



10-1975

Buckley v. Valeo

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>



Part of the [Civil Procedure Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), and the [Election Law Commons](#)

Recommended Citation

Buckley v. Valeo. Supreme Court Case Files Collection. Box 441/Folder 10-28;Box 442/Folder 1-8. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

fine memoBENCH MEMORANDUM

TO: Justice Powell

FROM: Chris Whitman

DATE: September 18, 1975

75-436 BUCKLEY v. VALEO

This memo contains my initial thoughts upon reading the CADC opinion, some of the literature, and the relevant case law. The briefs are not due in for some weeks. I will update and flesh out where necessary. I did read the briefs at the Court of Appeals, so I am not working completely in the dark.

At this point I will point out problems I see in the CADC opinion and suggest another approach to the case. This could turn into a small book if I discussed the statute and the history of the litigation in detail. That has been done well by the CADC opinion. The legal principles - of justiciability and strict scrutiny analysis - are familiar to you and fairly well settled. My primary concern here is with their application to the questions raised by this intricate case.

I. The Court of Appeals Opinion - Basic Problems.

The primary failing of the CADC opinion is that it does not analyze the justiciability and substantive issues raised in terms of each particular question raised. Justiciability is handled summarily - by a broad assertion that the challenged

provisions exert an "inhibitory effect;" presumably on all or some of the plaintiffs. Some questions - in particular, those dealing with unexercised powers of the Federal Election Commission (Commission) and vagueness challenges that might be avoided by advisory opinions from the Commission - were found to be unripe for resolution.

The analysis on the merits is also too broadly drawn. The court labels all the activities allegedly infringed upon by the Federal Election Campaign Act (FECA) as "speech plus" and then applies that the "compelling government interest" test applies. The government interest in the Act as a whole - the elimination of both the appearance and the reality of corruption in political campaigns - is identified and found to be sufficient to justify most of the Act. Those provisions that cannot be directly related to that end are upheld as loophole-closing and enforcement devices that only incidentally infringe on private rights. The Act is found to depart too far from legitimate service of that compelling interest only when the legislative history inescapably demonstrates that a provision (§ 437a) was designed to apply to organizations that primarily are concerned with discussion of public issues, rather than with campaigns.

yes ① There is little balancing of the government's interest in each provision against the specific private rights infringed by that section of the Act. ② Nor is there adequate consideration of less restrictive alternatives to each provision. The court

escapes this obligation by pointing to "a legislative conviction that the intermesh of reinforcing measures is needed to cope with the grave abuses." Slip op. at 1518.

Williams v. Rhodes, 393 U.S. 23 (1968), demonstrates the necessity of evaluating a scheme of election regulations as a whole. There "the totality of the [state] restrictive laws taken as a whole" was found to impose an impermissible burden on voting and associational rights. 393 U.S. at 34. But Williams did not relieve the courts of the obligation to evaluate whether any given provision (although part of a large plan) impermissibly infringes on rights protected by the Constitution. This litigation comes to us in an unwieldy clump. But that is no excuse for failing to give each challenge raised by plaintiffs the consideration it would be given if it were raised separately.

Justiciability

The judicial review provision of the Act, § 437h, is very broad. It gives the Commission, the national committee of any political party, and any individual eligible to vote in a Presidential election the right to institute actions to construe the constitutionality of any provision of the Act. But we must also ensure that the constitutional requirement that a case or controversy exist is met. CADC apparently assumes that plaintiffs who suffer an "inhibitory effect" from some provision of the Act have standing to challenge any other provision.

Perhaps they had in mind this Court's decision in Sierra Club v. Morton, 405 U.S. 727 (1972), which held that under certain statutes "once review is properly invoked [by one who can show a personal injury], that person may argue the public interest in support of his claim." 405 U.S. at 737. This holding, however, does not give every person who has standing the right to raise every possible challenge to the Act which contains the provision from which that does him injury. Instead, it allows a litigant who can establish that he has been injured by a given governmental action the right to raise the claims of third parties against that specific action if Congress has indicated by statute that it wishes to allow him to do so. Section 437h, then, allows a party injured by a provision of the Act to present the challenges that could be raised by others to that provision.

Note It does not allow a party who claims injury solely under, say, the disclosure provisions to raise a challenge to the public financing scheme. *Note*

Each challenge will be evaluated separately below. For the most part, however, there is at least one plaintiff who has standing to make each challenge raised here. This is typically because the challenged provision directly and unambiguously applies to activities in which one or more of the plaintiffs engage and seek to engage. Therefore, they are now in the position of having to choose between the risk of criminal prosecution and conformity to a statute which (they argue) would create a substantial deprivation (in the tangible

form of loss of funds and support, or in the form of forced abstinence from activities protected by the First Amendment). This choice is made more difficult for the candidate-plaintiffs, for they risk both criminal prosecution and the political costs that prosecution would entail in this Watergate-conscious era.

Standard of Review.

CADC labels the contribution and expenditure activities regulated by the Act as "speech plus."¹ This is not a helpful characterization. The concept of "speech plus" grew out of the picketing situation, where the action elements of picketing gave the conduct a tangible impact beyond that created by mere speech.

CADC does not explain its choice of this term, but it appears to conclude that the spending of money brings the regulated conduct out of the category of pure speech. The spending of money should be irrelevant; it was, for instance, an integral part of the speech in Times v. Sullivan. There is little effective communication activity that can be engaged in without some spending of money. We would not remove a citizen from the protection of the First Amendment because he purchased a soap-box.

Some of the spending regulated here is directed solely to promulgating the political ideas of the spender - e.g., expenditures by candidates or independent expenditures by voters for newspaper space or air time. Other expenditures are

1. The challenge to the public financing provisions raises a different question. The appropriate standard of review for that part of the Act will be discussed in context below.

not so directly related to the spender's speech - e.g., contributing funds to a candidate, hotel and transportation expenses - although they too promote political discussion. The closeness of the regulated activity to the speech of the regulated party is one factor to be considered in evaluating the extent to which a given provision infringes on protected rights.

I find it more useful to look at the purpose behind the regulation than to look at the regulated activity. If the Act purported to impose a direct restriction on speech because of its content, our only inquiry would be: Is this speech protected by the First Amendment? If Congress wished to advance independent interests and has in the process incidentally infringed upon First Amendment rights, a balancing analysis is appropriate, although the governmental interest must be very strong to justify the infringement.

There is no other way accurately to characterize some provisions of this Act   It is possible to characterize some aspects of the challenged legislation as imposing direct restrictions on political speech -- Congress clearly intended to prohibit expenditures above a certain amount precisely because the speech they bought was too effective. But I think that the balancing test is more appropriate. Congress' primary concern in enacting FECA was to deter corruption, or the appearance of corruption. Speech that was "too effective" was not prohibited because of its content but because of the corruption and cynicism that it breeds.

Where the attack made by plaintiffs is based on the Equal Protection clause, rather than directly on the First Amendment, the compelling-governmental-interest test is still applicable, for the alleged discrimination burdens the First Amendment rights to associate for political purposes and to vote effectively. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

My analysis leads me back by a different route to the compelling-governmental-interest test adopted by CADDC. I do think the different route is significant. If the infringed activities are dismissed as "speech plus," we may forget that the infringement may tread on important personal rights that must be given adequate weight.

* * *

A recurring difficulty in making the balances required by this case is that the legislation seeks to serve First Amendment values as well as to limit them. The campaign laws were designed to open access to the federal election process and to increase political opportunity by reducing the advantage of those who have deep financial reserves.)

(In Lubin v. Panish, 415 U.S. 709 (1974), the right to participate on an equal basis with other voters was said to "flow naturally from our recognition" of the "right to elect legislators in a free and unimpaired fashion." 415 U.S. at 714, citing Reynolds v. Sims, 377 U.S. 533, 562 (1964) (Warren, C.J.).

Congress concluded that a completely "free and unimpaired" electoral process, like a "free and unimpaired" economic system, can create monopolies and oligopolies.

The legislation under review is, in effect, an attempt to lower barriers to political competition in order to increase the range of voter choice. But the attempt to open access for the many necessarily involves limiting the power of the few to exercise rights of speech and association protected by the Constitution. This is complicated by the fact that we do not understand fully the relationship between spending and political opportunity. Neither Congress nor the courts can say on the basis of present information whether spending restrictions, on balance, serve or hinder free speech.

This makes it difficult to evaluate both the governmental interest and the precision with which the legislation serves that interest. Since campaign spending regulations may prove to be the most effective way to serve First Amendment values overall, an absolute constitutional prohibition should not be imposed against all experimentation. But it is also important that excessive infringement on constitutionally protected activity not be justified on the basis of an unverified conviction that the good of all will ultimately be served.

II. Disclosure Requirements.

Justiciability. (My discussions of justiciability draw

* Are the "many" really denied access now?
There has not been my experience in campaigns.

Perhaps
True

Well
put

on the findings of fact made by the district court on remand from CADC.)

The Libertarian Party, the American Conservative Union (ACU), and the Conservative Party of New York (CPNY) allege that they have received and expect to receive contributions over \$100, which will subject their contributors to the disclosure requirements. There is testimony by officers of ACU and CPNY that their members have been subject to harassment in the past. There is testimony that at least two persons would have contributed to the Libertarian Party but for their fear of disclosure. These groups fear that they will suffer financial harm (through loss of contributions) and that their contributing members will be injured (through being deterred from exercising their right to contribute or through harassment if they exercise that rights). It is not clear that any disclosure pursuant to FECA will be the "proximate cause" of any harassment that does result. But fear of harassment, and any consequent deterrence, are proximately related to disclosure. *Standing* These plaintiffs have "standing to present" both their own claims and those of their members, for there is a direct infringement on the associational rights of the organization and its contributors. The evidence of harassment is relatively sparse, but that goes to the weight of plaintiffs' interest in the balancing process described below.

The Merits. Several strong governmental interests are served by the disclosure requirements - providing information

*Strong case can be made for
disclosure requirements - perhaps
the least restrictive means.
Could rationally have different¹⁰
disclosure requirements for minor parties*

to the public to aid in the evaluation of candidates, gathering the data necessary to spot violations of campaign laws, and deterring corruption by exposing large contributions to the light of publicity. The extent to which these interests tip the balance depends on the extent of the burden placed on individual rights. The requirements do not directly limit speech protected by the First Amendment, but they do place a burden on the exercise of the right of speech. In most cases, however, disclosure of contributions to candidates and parties will neither deter contributions nor expose contributors to harassment because of their associational ties. In fact, disclosure appears to be the least restrictive means of achieving the government's interests. Plaintiffs' ^(EMDC) brief urges disclosure as a less restrictive alternative in its attacks on the contribution and expenditure limitations. The \$100-line for contributions that will be subject to the requirements is necessarily arbitrary, but it falls within the bounds of reasonableness. *I'm not sure*

There are two situations in which the balance tips to the other side: (1) disclosure of contributions to certain minor parties, and (2) disclosure of contributors to issue-oriented organizations.

(1) Minor Parties. (This is the primary challenge made by the appellants discussed above. What is said here is equally applicable to independents such as appellant McCarthy.

He has already received contributions over \$100 and has testified that individuals have hesitated to contribute to his current campaign for fear of disclosure.)

The governmental interest in disclosure is less when the contribution is made to a minor party with little chance of winning an election. Minor parties usually represent definite and publicized viewpoints, so there is less need to inform the voters of the interests that a candidate represents. For example, the label "Republican" tells a voter relatively little; the candidate may be supported by funds from Marriott or from Stewart Mott. *(not Mott!) He supported Rockefeller. Only in primaries.* It is less likely that a candidate of the Socialist Workers Party will represent interests that cannot be discerned from the party's published platform. The government's interest in deterring the buying of elections and officeholders is also less where contributions to a minor party or its candidate are concerned, for there is less chance that the candidate will be victorious. (The likelihood of success is one factor that can be weighed in measuring the strength of the governmental interest in a particular case.) *These* ~~There~~ is some chance that major party interests will finance minor party candidates to divert votes from their major party opponents, but this situation should be relatively rare.

On the other side of the balance, the damage done to the interests of the minor parties and their members by disclosure may be extensive. These parties are likely to have a less sound financial base and *(therefore)* are more vulnerable to fall-offs in

contributions. Fear of reprisal may deter contributions to the point where the party cannot remain viable. And those members who do contribute may suffer personal harassment as a result.

In this case, no appellant has offered evidence of harassment substantial enough to tip the balance. Judge Bazelon, dissenting in part from the CADC opinion, argues that proof of harassment is so difficult that all minor parties should be absolutely exempt from the disclosure requirement, as are issue-oriented groups under the majority opinion. Judge Bazelon admits that there is no clear line (like that dividing political from issue-oriented groups) that marks off those parties that should be exempt from disclosure requirements. The problem is that the balance of interests must turn on the facts of each case. Judge Bazelon is concerned that it will be impossible for a minor party to prove substantial harassment, for it will have to find witnesses who are too fearful to contribute but not too fearful to testify about their fear.

This is a legitimate concern, but it would be more appropriate to define the standard of proof so that the problem is minimized.

Substantial evidence of present or past harassment of members due to their associational ties - or even of harassment directed against the organization itself - should be sufficient. There is no substantial evidence of that sort here.

Issue-oriented groups and § 437a. This question is raised by the New York Civil Liberties Union (NYCLU), an issue-

oriented group that is barred by the national ACLU constitution from endorsing or opposing candidates. NYCLU criticizes officials as part of its discussion of controversial issues and thus could be required to disclose its contributors under § 437a. The organization receives approximately 500 contributions over \$100 per year and can point to incidents of threats and harassment against individuals because of their association with the group.

437a | The CADDC conclusion that § 437a is unconstitutional is sound. Congress may have sought to achieve the legitimate ends of preserving the purity of the election process, but the section is not drafted to achieve that end with sufficient precision. Instead, its sweep is deliberately broad, to catch any group that might remotely be said to have an impact on the election process, including those who are primarily informational or issue-oriented. The statute is limited to situations where some direct link can be established between a candidate and the organization - e.g., when the organization publishes material "setting forth the candidate's position on any public issue, his voting record, or other official acts." But this, in effect, requires any group that wishes to discuss without disclosure to refrain from mentioning the views or conduct of any candidate for office or any officeholder who is a candidate. This is an excessive and unwarranted burden on free public discussion.

III. Contribution Limitations. *(There are different from limitations on expenditures)*
Justiciability. Appellant Mott has standing to

present the First Amendment claims of contributors. He has spent over the limits in the past and has the means and the intent to do so in the future.

The candidate - appellants may also have standing to vindicate contributors' rights. They are threatened with specific personal harm in the form of decreased contributions. Ordinarily, prudential considerations would counsel against allowing an injured party to press the claims of others. But § 437h(a) provides a broad grant of standing to "[t]he Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." These appellants fall into the last category, although they suffer distinctive personal injury as candidates, rather than as voters. Any injury they suffer as voters is shared equally by all others who can vote in a Presidential election and would not be sufficient in itself to justify reaching the merits of their claims.

I do not have enough ^{information} ~~evidence~~ at this point to evaluate the standing of the committee-appellants to challenge the contribution limitations imposed on political committees.

The Merits. Limitations on the amount of contributions that a person or committee can make cannot be dismissed as

equivalent to a regulation of the "time, place, and manner" in which speech can take place. The limitation on amount is comparable to the time limit in Rosario v. Rockefeller, 410 U.S. 752 (1975). As you pointed out in your dissent, a limitation of this sort is an absolute prohibition of activity that does not fall within its bounds. The prohibition implicit in amount limitations is even more absolute, for there is no possibility of avoiding the bar as there was in Rosario (through timely registration).

Despite this, contribution limitations survive the compelling-government-interest test. The government's interest in reducing the dependence of candidates and officeholders on special interest groups ^{*} and in equalizing the influence of all citizens is substantial. Appellants have not shown that it can be served by less restrictive means - the efficacy of disclosure is too heavily dependent on the existence of a crusading press and a public that will be aroused by the often-tedious data derived from collating information about contributions. The \$1,000 and \$25,000 figures, like the \$100-line used for the imposition of disclosure requirements, are necessarily arbitrary but fall within reasonable bounds ^{**}. Appellants argue that a lower figure would impose a less onerous burden, but less-restrictive-means analysis is not appropriately applied to this kind of legislative line-drawing.

Most significant, the infringement on First Amendment

I'm not convinced yet, altho I lean this way.

* What about labor, cooper, the 3 TV net works & other media?

** The \$100 threshold is absurdly low - but this is for Congress to decide.

But if one buys an ad for
a \$1,000 to express his own
views ~~too~~ in favor of a candidate
hasn't he made a contribution? ^{16.} *no this*
rights is relatively small and indirect. A contribution to *is an*
a candidate is a means of expressing political preference, *expenditure*
but it does not directly contribute to political discourse.
It merely finances the speech of another. I do not think
that a politician can be considered a conduit for the
contributor's expression in the sense that a newspaper or a
broadcasting station would be a conduit for the views of a
person who buys advertising space or time. In fact, the
candidate may spend some of his speaking time and energy
discussing issues on which the contributor is apathetic or
even in disagreement with the candidate's views. And the
contributor has the alternative of expressing his views
directly. *yes, but this also is subject to Act.*

Minor parties and independents. I am not so sure
that the contribution limitations survive strict scrutiny
where they are applied to minor parties and independents who
do not receive the full public funding available to major
party candidates, for the harm suffered becomes substantial.
That will be discussed below in the context of public
financing.

Limitations on the Use of Personal and Family Funds.

The standing of any appellant to challenge this provision as
discriminatory is unclear. As far as I can tell, no candidate
has alleged that he could not raise the permitted amount from
his family, and no party or committee has alleged that it supports

*Probably,
but
not
necessarily
so.*

a candidate who lacks these resources. Even if such allegations were made, I think it unlikely that any appellant could establish that he will suffer significant harm, for it is unlikely that the relatively small amount permitted by the statute will make the difference between victory and defeat.

Apparently no candidate who attacks the limitations as too low has alleged that he could raise more. I imagine Senator Buckley could make such allegations, if they were required.

On the merits, the higher limitation for personal funds is permissible. The governmental interest in limiting the amount given to the candidate is relatively less where family money is involved, for attempts by family members to buy influence are unlikely (perhaps because they are unnecessary). When the funds come from the candidate's own pocket influence-buying is not a problem, and the spender's First Amendment interests in freedom of speech are directly implicated because the funds are used to promulgate his own views.

candidate's own money does it buy influence

As I pointed out above, the harm to the candidates who cannot raise the full amount is likely to be insubstantial. Some limit is necessary to keep the race relatively equal. What that limit should be can be left to the legislature so long as their choice is reasonable.

Incidental Expenditures by Volunteers. Appellants Buckley and McCarthy allege that they relied heavily on volunteers

Vastly imp. in state + local elections

in their previous campaigns. There were no allegations as to how many of those volunteers, if any, exceeded the \$500 limit on incidental expenses, or how the need to reimburse those who exceed the limits would affect the candidate's ability to wage an effective campaign. And it is difficult to extrapolate the significance of volunteers in future elections from past experience. It is doubtful that McCarthy, for example, will call forth the same volunteer effort that he did in 1968.

Incidental expenditures by volunteers can be equivalent to direct contributions, and the governmental interest in limiting them is equally strong. Moreover, the limitation imposes a relatively insignificant burden on free speech. The right to participate in the campaign is preserved even if incidental expenses above a certain amount must be paid by the candidate rather than the volunteer.

No! (see my notes)

The absence of restrictions on services per se does not draw an unconstitutional distinction between services and spending. As CADC points out, there is no indication that the contribution of volunteer labor has been a source of corruption or cynicism on the part of the voting public. Instead, the participation of volunteers has been regarded as a sign of health in the political process.

much more than as a result

Independent Expenditure Limitations. Appellant Mott spent over \$50,000 on behalf of Senator McGovern and similar

Chen - I suppose you are talking here only about "services" personally rendered. Not expenditure of money.

Limitation on personal "expenditures" - 608(e)

19.

amounts in support of Senator McCarthy. He has the means and the desire to continue this practice in future elections.

Section 608(e) closes what would otherwise be a large loophole in the contribution and expenditure limitations. But, unlike the contribution limitations themselves, it imposes a direct restriction on the personal expression of the views of the spender. In some cities, the limitation would bar a citizen from placing a full-page ad in support of his candidate in the town's leading newspaper.

The problem is compounded by the difficulty in drawing the line between political advocacy and discussion of issues. CADC attempts to resolve this problem by construing the statute to reach only expenditures for material that "taken as a whole amounts to a clear advocacy of the election or defeat of a clearly identified candidate." This effort to limit the reach of § 608(e) is admirable, but it leaves too vague a line between issue discussions protected by the First Amendment and conduct that is subject to civil and criminal sanctions.

Some protected activity will still be deterred. The only statutory construction that would avoid this ambiguity would limit the reach of the section to expenditures for material that expressly advocates the election or defeat of a candidate. Since this criterion could be avoided with relative ease, it is doubtful that the provision would effectively close the loophole foreseen by Congress.

There is clearly an infringement of 1st Amendment rights

Different in drawing line bet. supporting a candidate & discussing an issue. An issue is serious, but limitation on pure speech is more serious

Yes
I should say 20!

Serious vagueness issue

Yes

* Very difficult to prove

20.

* There is a less burdensome method that would prevent the most egregious circumvention of the expenditure and contribution limits without creating vagueness problems. Congress could count as contributions, or impose limitations on, independent expenditures that are made by prearrangement with the candidate. * A similar, if much more limited, criterion is used in § 608(b)(4)(A), which counts as contributions those sums given to a committee authorized by the candidate in writing to accept contributions on his behalf. For present purposes, any discussion with a candidate or a member of his staff as to how funds should be spent could be made sufficient to bring an expenditure under the limitation requirements.

Time Restriction on Qualifying as a Political Committee.

None of the appellant committees has alleged that it fails to meet the six-month, 50-person requirement for qualifying for the higher committee contribution limits. Nor has any appellant-candidate alleged that a committee that supports him fails to qualify.

On the merits, the provision should be upheld, but not for the reasons given by CADC.

Committees can spend up to \$5,000 for any candidate, with no over-all ceiling. Unless the committee is authorized in writing to receive contributions on behalf of a candidate or the contribution is earmarked or otherwise directed to a specific candidate, the amount donated to a committee is not counted against

the individual's contribution limit. (This seems like a major loophole to me. It will be relatively easy for a candidate to withhold his authorization - in fact, he has an incentive to do so.) yes

CADC says that the six-month limitation is necessary to prevent two or three persons from coming together to acquire the authority to contribute \$5,000 to a candidate. The fifth-person requirement is addressed to that problem. The time limitation is an attempt to discriminate between committees formed for bona fide purposes and those formed as last-minute efforts to avoid contribution limitations. Although a six-month existence is no guarantee of clean hands, the requirement weeds out the most egregious cases. There is no direct infringement on associational rights. Instead, a committee that has met the § 608(b)(2) requirements is relieved from restrictions that might otherwise be legitimately imposed.

All committees - other than national and state committees - are subject to the \$1,000 independent expenditure limits, but no separate attack, apart from the general challenge discussed above, has been raised to that provision.

IV. "Expenditure" Limitations.

Justiciability. I do not believe that any candidate-appellant has alleged that he has exceeded the expenditure limits in the past, or that he has the means and intention to do so in the future. Similar allegations are missing from the appellant-

committees. The Committee for A Constitutional Presidency - McCarthy '76 has alleged that it will need over \$24 million to wage an effective campaign, but it has not established that it is likely to be able to raise that amount.

yes *11* The Merits. The "expenditure limitations impose direct restrictions on the political speech of the candidates." Some expenditures - e.g., those for transportation, offices, parties - only indirectly support protected activities. Even these, however, are integral to the participation of the candidate in the election process. Other expenditures, e.g., those for advertising space and media time - are related directly to the exercise of the right to engage in political speech.

The limitations are imposed because of content If expenditure limitations were characterized as direct restrictions on a certain kind of speech because of its content, the only inquiry ^{would be} ~~is~~ whether that speech is protected. Such a characterization could be made - the expenditure limitations are directed solely at election-related (political speech), and speech over the limits is prohibited in part because it is thought to be too effective. If this approach is adopted, the expenditure limitation must be found to be unconstitutional because political speech is pre-eminently the sort of speech protected by the First Amendment.

True Within the category of election-related political speech, however, no further distinctions are made on the basis of content. No expression is prohibited because it contains an unpopular view.

The quantity restriction is not imposed to suppress certain opinions or ideas, but to deter corruption, a state goal independent of the political content of the regulated speech. Therefore, the compelling- government-interest test applies.

Expenditure limitations flunk that test. There is no significant interest, much less a compelling one, that both outweighs the significant intrusions of private rights described above and cannot be served by a less restrictive means.

Appellees argue that expenditure limitations are an essential part of the public financing program. That program is not designed to provide initial seed money which candidates can supplement with whatever sums they can raise. Instead, it is an attempt to equalize candidate spending power and to eliminate dependence on large contributors. Spending limitations ensure that the latter - not the former - goal is served. But it is not necessary to impose expenditure requirements as an absolute on all candidates, including those who receive no public funds. Candidates have an option to accept public financing. An agreement to abide by certain expenditure limits could be made a condition of the exercise of this option. The large amounts available - as well as the political mileage gained by cooperating with reform measures - should be sufficient to attract the participation of at least the major parties.

Appellees also argue that spending limitations reduce the dependence of candidates on large contributors. Contribution:

*A less
restrictive
means
suggestion*

Disclosure: a less
restrictive measure^{24.}

requirements should effectively destroy this dependence without excessively infringing First Amendment rights. CADC says that statutory limits on contributions have proved ineffective in the past. But expenditure requirements came earlier and were equally ineffective. The past experience with disclosure and contribution limitations was not a true test. No prosecutions *good point* were brought under those laws, and a large loophole permitted easy circumvention by the formation of multiple committees.

We have no evidence that a carefully drafted and strictly enforced system of disclosure requirements and contribution limits is ineffective to deter corruption.

CADC says that expenditure limits are essential to the enforcement of disclosure requirements and contribution ceilings. The majority argues that candidates will have a strong incentive to circumvent the other provisions if they can spend whatever money they can raise and that violations of expenditure limitations are the most difficult to conceal. This is unpersuasive. Even with spending limits, candidates have an incentive to violate contribution limits until they have reached the ceiling. Moreover, as CADC points out, unused contributions received by a candidate (including those in excess of his spending ceiling) can be used to defray his expenses of office or for "any other lawful purpose."

Is this
true?

yes

This removes any disincentive to violate contribution restrictions that might otherwise have been derived from the spending ceiling. Disclosure of expenditures would serve the government's enforcement

ends equally well without directly restricting political speech. Wide disparities between contributions disclosed and a candidate's spending would be a signal to investigate more closely.

Expenditure limits may be the only way - other than public financing - to free candidates from the exhausting round of fund raising brought about by the increases in campaign costs. However dreary and disheartening this may be to candidates, I do not think it rises to the level of a compelling interest sufficient to justify direct restrictions on protected activities.

Discrimination in Favor of Incumbents. Appellant

McCarthy has launched a campaign for the Presidency and should have standing to challenge discrimination in favor of White House incumbents. I doubt that he will be able to show that the advantages held by the incumbent are likely to make the difference between his election and defeat. If the advantages given to Congressional candidates are distinguished as a separate issue, no plaintiff appears to have standing to raise the claim of discrimination. Buckley is an incumbent. Rep. Steiger alleges only a "possibility" that he will run for the Senate in 1976. The Mississippi Republican Party and the Conservative Party of New York will probably run challengers to Congressional incumbents, but no specific candidates have been named.

On the merits, I agree with CADC that the evidence of harm is speculative. It is clear that incumbents have certain advantages - the franking privilege may be the most obvious. Tight regulations on the use of incumbents' privileges, or lower expenditure limitations for incumbents may be desirable if general expenditure limits are upheld. But it would be difficult to say on this record that either of these measures is required. At this point, the search for less restrictive alternatives borders too much on redrafting the statute, for we are working in an evidentiary vacuum.

Limits on Convention Expenditures. These limits apply to national convention expenditures of major and minor parties. None of the appellants allege that they or their parties have had or plan to have national conventions, or that, if such a convention were held, the party would be capable of exceeding the \$2 million limit if allowed to do so.

If expenditure limits in general are upheld, limits on convention spending are necessary to prevent the creation of a gaping loophole. The other end sought to be served by the convention limits - to make the public financing system effective - can be achieved, as I pointed out above, by tying an agreement to abide by spending limits to the receipt of public funds.

V. Public Financing. *Said to be discriminatory. See*

p. 31

(The challenges to these provisions were heard by a three-judge district court formed of Chief Judge Bazelon, Circuit Judge Robinson, and District Judge Corcoran. It sat with CADC en banc to hear argument in this case. This unusual arrangement was used because the special review provision of the Act (§ 437h) did not clearly apply to Subtitle H of the Internal Revenue Code, which contained the public financing provisions.)

Justiciability. McCarthy is an independent candidate for President who will not qualify for the full public funding that will be available to major party candidates if enough funds are earmarked by taxpayers.

Since the challenge to the public financing provisions is based on a claim of discrimination, rather than any effect on the exercise of First Amendment rights, the attack on the general election funding may not be ripe until funds are actually paid out to McCarthy's opponents. It is my understanding that the only funds that could be paid out at the present time are those to primary candidates and for convention expenses. (This should be clarified at argument if it is not explained in the briefs.) Since the funds are to be allocated to Presidential primary candidates, ^{and primary candidates,} nominating conventions, and general election candidates, in that order, there may not be any funds left for McCarthy's

applicants for funds are being certified. I am not sure whether they are receiving money.

yes by first of year.

It does seem likely that there will be sufficient funds since FEC is certifying primary candidates.
 opponents in the general election. McCarthy argues that the primary and convention funding gives aspirants associated with parties an advantage against him in the general election: those claims should be ripe since the expenditures under attack are currently being made. McCarthy challenges not only public funding per se, but also the impact that funding has on the burden imposed by the contribution limits. To this extent the claim is ripe for the contribution limits pose an immediate threat.

None of the minor party-appellants have alleged that they plan to run a candidate for President. Therefore, no appellant has standing to raise the question of discrimination against minor parties. Most of the questions will be resolved anyway if McCarthy has standing, for the minor parties' claim of discrimination is essentially the same as that raised by McCarthy as an independent.

Standard of Review. The public funding provisions are not attacked as direct restrictions on First Amendment rights. Appellants contend, instead, that the statute unconstitutionally discriminates against independents and candidates of minority parties. If this discrimination exists, it imposes a substantial burden on the right of those persons (and their supporters) to participate in the election process. Therefore, the compelling-governmental-interest test remains appropriate. The principle that restrictions on candidates who do not represent major parties will be evaluated under this

demanding standard was developed in Williams v. Rhodes, 393 U.S. 23 (1968); Storer v. Brown, 415 U.S. 724 (1974); and American Party of Texas v. White, 415 U.S. 767 (1974). Unlike the present litigation, these cases concerned direct restrictions on candidates who wished to qualify for places on the state ballots. When access to the ballot is closed off, candidates have only the remote possibility of winning election through a write-in campaign. Deprivation of public funds, in contrast, is not so total a barrier to election, for private funds can be raised. But equal political opportunity can be as effectively destroyed by a statutory scheme that gives some candidates a financial head-start, or even a free ride, while leaving others to raise their funds as best they can.

General election funding. All candidates from major parties (parties which received at least twenty-five per cent of the total popular vote in the preceding Presidential election) receive \$20 million, an amount equivalent to that permitted under the expenditure limits. Minor party candidates (from parties whose candidate received between five and twenty-five per cent of the vote) receive that proportion of \$2 million that their share of the vote bears to the average share of the major parties. Candidates of all other parties (classified as "new" parties) receive no pre-election funds. A "candidate" is defined as the nominee of a major party or an individual qualified to have his name on the ballot in ten or more states.

In Jenness v. Fortson, 403 U.S. 431 (1971), the Court upheld a Georgia law that limited ballot access to candidates who had won party primaries or who submitted a petition signed by five per cent of those eligible to vote in the last election. The Court acknowledged that "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, . . . and a new or small political organization . . ." 403 U.S. at 441. There was found to be "an important state interest in requiring some preliminary showing of a significant modicum of support before ^{putting} the name of a political organization's candidate on the ballot - the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." 403 U.S. at 442.

The governmental interest in this case is similar - avoiding the electoral confusion that would be created if every arguably serious candidate could receive \$2 million in government funds upon request. There is also an interest in conserving public funds, but this in itself would not be sufficient to justify substantial infringements upon the rights of serious candidates.

In Jenness the state system was upheld because the state interest was found to be important and the infringement on candidates' rights relatively insignificant. Georgia allowed those candidates who had not been able to establish that ^{they} were serious contenders by winning a primary to prove that they commanded

substantial support by collecting signatures on petitions. This "alternative route" could not be assumed to be inherently more burdensome. See also American Party of Texas v. White, 415 U.S. 767, 790 (1974).

In this case there is no alternative route to public funding under the Act's scheme. A candidate who is not a nominee of a major party can qualify for "candidate" status by qualifying for the ballot in ten states. But if he is associated with a "minor" party he still cannot receive his full share of funding. And if he is associated with a "new" party or is an independent he is completely barred from receiving pre-election federal funds. I see no basis for distinguishing among serious contenders in this way.

It is not impermissible to assume, on the basis of their parties' past successes, that major party nominees are serious candidates, but no candidate should be barred by his party's past failures from making his own show of current support. And once his strength has been shown, he should not be penalized (through lower funding) for his association with a party that was not a major winner in the last election or for his failure to associate with any party.

7. The discriminatory impact of the public funding scheme becomes even more pronounced when viewed in conjunction with the contribution limitations. Major party candidates may be totally relieved of the need to raise funds by the huge gifts from the

government. Their minor party and independent opponents are not only required to invest time, money and energy in fund-raising from private sources, but must do so under restrictions that prohibit them from receiving any contributions over \$1,000.

Post-election funding, based on the actual election results, may relieve the ultimate financial burden of minor party candidates, but it does nothing to alleviate the injury done to their right to participate on an equal basis in the election process. Independents do not qualify for public funds at any time.

There are less onerous means of designating recipients of public funds without opening the resources of the government to every frivolous candidate. Candidates who have not been nominated by major parties could be required to demonstrate their strength by qualifying for the ballot in a certain number of states (perhaps in all fifty), or by submitting petitions from a certain number of states. Or a system of matching funds similar to that used to fund primary candidates could be used to ensure that public funding is responsive to the strength of the candidate. A simple method would be to allow taxpayers to designate which candidate or party is to receive the dollar checked-off on their tax return; the difficulty with this is that the return is often filed long before all the players in the Presidential election have been identified.

If the general public funding provisions are upheld, contribution limitations should be graduated on the basis of the major-minor-new party distinctions. The governmental interest in imposing contribution limitations is reduced when the party appears to have a smaller chance of winning. New party candidates could be exempted from all limits, and the contribution limit applicable to gifts to minor party candidates could be set at a level higher than the \$1,000 applicable to major party nominees.

Convention Funding. Convention funding, like general election funding, turns on the major-minor-new party distinctions. CADC says that American Party, which found no constitutional infirmities in a state's decision to finance the primaries of only major parties, is controlling. But the decision to restrict financing to major party conventions in that case was justified on the grounds that the state required major parties - and only major parties - to hold primaries.

CADC also failed to consider the residual impact that the publicity generated by a convention might have on the subsequent general election campaign. Appellants argue that this gives an unfair advantage to candidates nominated at conventions. In this context, however, the major-minor-new party categorization does not seem so arbitrary. It may be a rough gauge of the number of participants in, and thus of the size of, a convention. While it is unfair to tie the fortunes of a candidate in a general

election to the past success of his party, conventions are party functions and can reasonably be evaluated in terms of party fortunes. There does not appear to be a workable alternative route by which a party can show that public financing is deserved, as there ^{is} ~~was~~ for candidates in the general election. Most significantly, any adverse impact on the chances of a nominee's opponents is difficult to predict. Where a clear nominee has emerged before the convention - say, when the party has a Presidential incumbent - the favorable publicity generated by the convention may be considerable. But the advantages of an incumbent President are considerable and inevitable; the additional publicity generated by a convention is likely to have a negligible incremental effect. Where the nomination is hotly contested, the inter-party rivalry displayed to the public watching the convention may actually do the nominee a great deal of harm (e.g., the 1968 Democratic Convention).

Primary Funding. Appellants challenge the eligibility requirements for primary funding: A candidate must have received \$5,000 in contributions in each of twenty states, counting only the first \$250 of each contribution. Since none of the candidate-appellants are running for a party Presidential nomination, and none of the committees allege that they intend to run such a candidate, this attack does not appear to present a case or controversy. On the merits, the requirements seem to be a fair way to single out the serious candidates. They

do not impose an invidious discrimination against any particular group.

The ~~P~~Primary funding is only available to candidates who seek the normination of a political party. Senator McCarthy has standing to raise the claim that this scheme discriminates against independents by giving party nominees a head start on publicity for the general election. As with convention spending, the existence and extent of any injury to the independent is difficult to assess. Candidates for party nomination bear an additional burden in that they must defeat opponents within their own party before they can pass on to the general election forum. This intraparty contest may have a debilitating effect.

VI. The Federal Election Commission.

Justiciability. According to newspaper accounts, the Commission is currently* issuing advisory opinions and determining which candidates will qualify for primary funding. Godd
faith reliance on an advisory opinion is presumed to be compliance with the Act. Under the circumstances, appellants are not free to forego compliance without risking civil and criminal sanctions, with the attendant political costs. They have standing to challenge the authority of the Commission to issue these decisions.

The Merits. Four members of the Federal Election Commission are appointed by the legislative branch of the government.

---

* At the time the suit was filed not all of the members of the Commission had been appointed; only ex-officio members were names as defendants.

Article II, section 2 of the Constitution provides that:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Congress also has the authority to appoint officers to fulfill legislative functions, such as the keeping of Congressional records or the gathering of information for a Congressional investigation.

Some of the powers that could be exercised by the Commission - most notably the power to initiate civil enforcement go far beyond the accepted range of legislative activity. But these powers may never be exercised. The power to issue advisory opinions is being exercised, and only the most strained arguments can be made in support of its characterization as a "legislative" power. CADC says that the Commission is merely "informing the public as to its interpretation of the statutory provision it must administer." But the administration of a statute, particularly when it entails the threat of civil enforcement and criminal prosecutions, is pre-eminently an executive function. The presumption of compliance that follows from reliance on an advisory opinion dramatically illustrates how close the link is in this case.

CADC's approval of the appointment method may have been

prompted by a fear that extensive control over the election process through appointment of Commission members should not be placed in the hands of the President, who is the national leader of one of the competing parties. The Constitution made the necessary compromise by requiring that Presidential appointments be made with the advise and consent of the Senate. Congress should not be permitted to extend its check beyond this measure. To the extent that it wishes to diversify "control" over appointees it can provide for staggered terms spread over the tenure of several Presidents and require that the appointees be drawn from several political parties.

* * * * *

but excellent

This is a most cursory [^]discussion of the problems raised by this case. I will develop any particular point that concerns you in more detail.

Chris



Office of the Solicitor General
Washington, D.C. 20530

September 25, 1975

RECEIVED

SEP 26 1975

OFFICE OF THE CLERK
SUPREME COURT, U.S.

DISCUSS

Chris

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Buckley, et al. v. Valeo, et al.
(Nos. 75-436 and 75-437)

Dear Mr. Rodak:

I have received the motion for leave to participate in oral argument in the above case filed by Senators Hugh Scott and Edward M. Kennedy.

I take no position with respect to whether the motion should be granted. I wish to comment, however, upon one statement in the application. The application states (p. 3): "Counsel are informed that the Solicitor General will not defend the congressional legislation according to the usual practice, but will attack a number of its provisions." Counsel are misinformed. The only provision of the legislation that we will challenge is the provision authorizing the Federal Election Commission to take certain law enforcement actions. We will contend that the issue is not ripe for review, but that, if the Court should reach the issue, the delegation of power to a legislative agency to perform an executive function violates the separation of powers. In all other respects we will defend the constitutionality of this legislation.

Would you please distribute copies of this letter to the Members of the Court.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General



cc: Honorable Archibald Cox
Harvard University Law School
Cambridge, Massachusetts 02138

Brice M. Clagett, Esq.
888 - 16th Street, N.W.
Washington, D.C. 20006

Ralph K. Winter, Jr., Esq.
127 Wall Street
New Haven, Conn. 06520

Melvin L. Wulf, Esq.
22 E. 40th Street
New York, New York 10016

John G. Murphy, Esq.
General Counsel
Federal Election Committee
1325 K Street
Washington, D.C. 20006

Lloyd N. Cutler, Esq.
1666 K Street, N.W.
Washington, D.C. 20006

Kenneth J. Guido, Jr., Esq.
2030 M Street, N.W.
Washington, D.C. 20036

Court .....
 Argued ....., 19...
 Submitted ....., 19...

Voted on....., 19...
 Assigned ....., 19...
 Announced ....., 19...

No. 75-437

BUCKLEY

vs.

VALEO

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

not voting

Court .....
 Argued ....., 19...
 Submitted ....., 19...

Voted on ....., 19...
 Assigned ....., 19...
 Announced ....., 19...

No. 75-436

BUCKLEY

vs.

VALEO

Grant
~~*State*~~

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

not voting

10/15/77
David S. Broder

Reforming Finance Reform

The Federal Election Campaign Act of 1974 comes up for review next month in the Supreme Court. What that worthy body will do with the challenge to the constitutionality of the big post-Watergate "reform" law is anyone's guess.

But if the learned justices take judicial notice of what was said last week in the U.S. Senate, when the authors of that legislation had their first occasion to look again at their handiwork, they might be taken aback.

Sen. John O. Pastore (D-R.I.), who has announced his retirement at the end of next year, is free to speak with notable candor. Pastore was a co-sponsor of the legislation and a member of the Senate-House conference committee which put it in its final form.

And what does he think of it now? "The law is absurd. We created a monster. It is our own fault. . . . We have a law now that even the people who wrote it do not understand."

How can such a thing happen? Here is Pastore's answer, on the Senate floor: "I remember I went to that conference and we were there for days and days and days and nobody understood what was in that bill. But at that time we were running like scared rats for some reason. I do not know why. We were running like scared rats. We thought the stronger we make it, the tougher we make it; the more the people would believe us. I do not think they believe us any more today than they did before we passed the law."

If that sounds like an epitaph for the spasm of post-Watergate morality that produced the campaign finance reform law, you are hearing it exactly right.

Indeed, the Senate floor fairly echoed with cries of regret over the unexamined and unintended consequences of the law which Congress passed at the height of the Watergate fever. The question immediately before the Senate was a narrow one — a review of a specific ruling of the Federal Election Commission, the agency created by the Congress to administer the new law.

The commission had ruled that any money spent from a congressional office fund in the final year of a House member's term and the final two years of a senator's term would be presumed to be a campaign expenditure, subject to the limitations on spending in the new law.

Many members of Congress maintain such funds to finance travel, communications with constituents, entertainment of office visitors and gifts to home-state groups, items which are not paid for from their government expense account. Some members of Congress put their own money into such funds, some raise them from contributors, and some do both.

The Senate debate showed no reluctance to disclose the sources and uses of the office account moneys. But there were anguished expressions of pain at the idea that if a senator up for re-election in 1976 presents an American flag to a grade school or sends a congratulatory telegram to the honoree at a "Woman of the Year" banquet in 1975, that most is deducted from the amount he can spend on his actual campaign next year.

The senators dealt with the immediate problem by vetoing the commission ruling, (as the law permits either house of Congress to do). But this incident brought them face-to-face for the first time with what is clearly emerging as the most serious mistake in the 1974 law — the imposition of rigid spending ceilings on every race for federal office.

As Sen. Edmund S. Muskie (D-Maine) said in a characteristically thoughtful comment on last week's controversy, "I wish to make it clear that since the passage of the act last year, I have had increasing reservations about the constitutionality and the wisdom of fixing limits on the amount of money which any candidate for federal office can expend on his campaign."

Muskie's view carries special weight because he had been the commission's strong supporter of the law and he had argued that the commission's ruling was a reasonable interpretation of its basic provisions.

The problem, as he now sees, is in the law itself — and, specifically, in the concept of spending limits. The sooner the Supreme Court deals with the issue, the better off everyone will be.

October 28, 1975

No. 75-436 Buckley v. ValeoMISCELLANEOUS NOTES IN PREPARATION FOR ORAL ARGUMENT1. Relationship of "money" to "speech".

The Act (FECA) limits contributions to \$1,000 per candidate, with an overall limitation of \$25,000 by any one contributor. The Act also establishes an overall ceiling on campaign spending as follows:

General Elections

President	\$20,000,000
Senator	150,000
Congressman	70,000

In addition, limits (usually lower) are placed on primary spending. A political committee also is limited to \$5,000 to a candidate.

Critically important provisions relate to limitations on expenditures by citizens who are not candidates but who may wish to support a candidate or express views on a campaign issue. CADC describes these limitations substantially as follows: (p. 1522)

"In addition to making political contributions of up to \$25,000 a year, a person may make unlimited outlays to voice his views on public issues and campaign issues, subject to the limitation that if he makes an expenditure 'relative to a clearly identified candidate' that 'advocates the election or defeat of such candidate', all expenditures relative to that

candidate may not exceed \$1,000. §608(e).

*See Chris Furr
memo. p 19*

"There is no provision analogous to the \$25,000 ceiling on contributions, so 'presumably a person may make expenditures of up to \$1,000 relative to an unlimited number of candidates for federal office.'"

(a) Appellees' position: Appellees' brief includes the following statements:

"Giving and spending money are not speech"
(p. 12)

"If unlimited money were available, some candidates would spend it all, just as the Pentagon 'would fortify the moon'. It is only in this sense that the regulation of campaign money has any effects on political expression. . . . Such effects are entirely incidental to the purpose of the statute. . . ."
(p. 8, 9).

(b) Appellants' position: Limiting the use of money for political purposes directly limits speech. Some of appellants' statements are as follows:

"Virtually every political communication involves the expenditure of money. . ."(p. 27).

"The FECA limits citizens in spending money, completely independently of political campaigns or campaign organizations, to advocate or oppose the election of a 'clearly identified candidate'".
(p. 30)

"It mocks the purpose of the First Amendment to argue that, while such communication (political speech) cannot be restricted, the underlying expenditures can. . . . Expenditures for political communication falls within what this Court has called 'pure speech'. Edwards v. South Carolina, 372 U.S. 229.*

*In arguing that virtually every political communication involves the expenditure of money, appellants cite obvious examples: use of the media, direct mailings, transportation, staff to research and write, newspaper ads, bullhorns, picket signs, printings presses, etc., etc.

(c) Attorney General amicus brief: This brief contains a helpful discussion of "the relationship of money to political speech". The AG says that it is necessary for us "to decide whether money in political campaigns is correctly characterized as a nonspeech element".*

The Attorney General then makes the following observation:

"Money often has a close relation to speech, as the Court recognized in Sullivan and reiterated last spring in Bigelow v. Virginia." AG's Br. p. 22 et seq.

". . . money is a proxy for speech. That is to say, the amount of money contributed and spent is regulated [by the Act] in order to limit the amount of speech." AG's Br. p. 27.

The AG thinks CADC mistakenly relied on O'Brien. This case differs significantly from O'Brien in that the Act here (FECA) imposes direct "limitations" on speech itself, whereas the selective service act did not. In O'Brien everyone of the selective service act's purposes could be achieved without regard to any effect upon communication.

As the AG noted, CADC also relies upon Red Lion. But the regulation in that case was limited to a medium which enjoyed a monopoly of government-owned airwaves. Query

*CADC relied on O'Brien, 391 U.S. 367, saying that in political campaigns there are both speech and nonspeech elements. According to CADC, the nonspeech element is money, which may be regulated under O'Brien as involving only "incidental limitations on First Amendment freedoms." J.S. at App. 15-16.

whether the interests served by FECA are weighty enough to impose arbitrary limitations on the exercise of speech by the public at large, by whatever medium, as well as upon candidates for office? The limitations on the exercise of speech are no less because the means adapted to the purpose are expressed in terms of expenditures of money.

2. Act severely restricts some, but exempts others.

FECA restricts money used for "political speech" by candidates, parties, groups and individuals who support them.

But it allows media to spend unlimited amounts for identical purposes.

It also excepts unions and corporations subject to regulation under § 610 of Corrupt Practice Act.

The opinion of CADC and Appellees briefs identify one of "evils" as the power of "the wealthy few" (undefined but obviously unworthy people) to influence elections unduly.

Since when are the media, unions and corporations not includable among "the wealthy few"?

A candidate for Congress running in a district where the entire press is against him is limited to \$70,000. The press - not to mention unions or corporations - may spend \$700,000 to beat him.

What "special interest" groups are more "specially interested" in election results than unions, corporations, TV networks, other media? (Few of these are neutral or

genuinely nonpartisan in elections)

3. Limitations on Purely Personal Speech.

The Act's limitations on contributions and requirements for reporting apply to individual speech, including the following:

- (i) Running ads in newspapers and magazines to express personal support of, or opposition to, a candidate.
- (ii) Soliciting support for a candidate by mail - e.g., a letter to all school teachers in the state in a Senate election.
- (iii) Buying radio or TV time for a personal speech or a political commercial.
- (iv) Renting billboards from outdoor advertising company to support candidate.
- (v) Personal financing of "handbilling", "bumper stickers", lapel buttons, street banners, etc., etc.

4. Limitations on Campaign Expenditures

See Chris' memo - 21, 22, 23

Impose direct limitations on speech of candidates. The can say less.

The limitation is imposed on content of speech - i.e. because of content - political speech (22).

Then speech is limited because it may be too effective. This is a new departure in 1st Amend. doctrine. (23)

5. Disclosure - a less restrictive means. (10, 24)

Buckley
File

OPINION AND COMMENTARY

Roscoe Drummond

Congress: its own 'Saturday night massacre'

Washington

Congress is tearing a dozen pages from the worst political crimes of Watergate and is putting them to work for itself!

It is a sly, crude, crass, and morally corrupt operation.

By a series of actions — one at a time so the public won't catch on too quickly — Congress is setting out to paralyze the Federal Election Commission to prevent it from effectively enforcing the new campaign-spending law.

The congressmen don't care how strictly the commission enforces its rules against presidential candidates as long as it can be kept from enforcing them against the incumbent congressmen.

They want to get out from under the law — and are showing that they have the gall to do so.

What this means is that the only solid, significant, meaningful post-Watergate political reform is being scuttled by the House and Senate. Perhaps they never wanted it in the first place. At least they knew how to draft it

so that, when the public heat for reform had waned, the law would self-destruct whenever Congress pushed the button.

Congress is now beginning to push the button. Here is how it works:

It imbedded into the law a sly provision which enabled either house to nullify any regulation which, for reasons of its own, it wanted neglected.

Congress has done this twice in the last few days.

The Federal Election Commission ruled unanimously that during the two years prior to an election each senator's so-called "office funds," which are contributed by constituents, not by the government, must be reported to the commission as campaign expenditures.

Remember the "Nixon fund," which nearly got Nixon thrown off the 1952 Republican ticket? And also the "Dodd fund" which got Connecticut Senator Thomas Dodd a vote of censure and brought about his defeat in the next election? Now nearly every senator has such a fund and is making sure that he can use

it as he wishes anytime he wishes by placing it beyond the oversight of the commission.

Thus the first time the Federal Election Commission acted to enforce the law, Congress stopped it in its tracks. It said, in effect, don't touch me!

Then, when the election commission directed, as prescribed in the law, that all congressional, presidential, and state candidates file their campaign finance reports with the commission, Congress opted itself out. By a vote of 257 to 146, the House canceled the commission ruling and decided that Congress would do no such thing. The House refused to come under the law and arranged to have its members file their campaign finance reports with its own clerk.

The congressmen want to be sure they have time to "correct" their reports and also to look over the data submitted by their campaign opponents.

What Congress has done is that, after creating in the glow of Watergate reform an independent agency to enforce a stiff cam-

paign financing law, it is now proceeding to make it impossible for the commission to enforce the law.

Surely this is another "Saturday night massacre." President Nixon fired Archibald Cox, the special prosecutor, because he did not want him to peer too closely in the dark corners of the Watergate offenses.

Now Congress is doing the same thing with the Federal Election Commission.

Watergate reform — gone with the wind! And with the active connivance of the Democratic leadership.

Will Congress get away with it? It may well, but it can be put down as a certainty that there will be an explosion at the Federal Election Commission.

Since commission chairman Thomas Curtis, himself a long-time member of Congress, is a man of fierce integrity, it is inconceivable that he would allow himself to be connected in any way with a return to such shabby, shoddy politics. His resignation would give the voters a shattering view of what Congress is up to.

To: Justice Powell
From: Chris Whitman

Date: Nov. 9, 1975

Nos. 75-436, 75-437 Buckley v. Valeo

Questions presented:

- *
1. Do appellants have standing? (I have marked with an asterick those questions with regard to which standing may be a problem. See my memo of 9/18/75 for details.)
  2. Are the disclosure requirements constitutional?
  3. ~~are~~ Are the contribution limits constitutional?
    - b. Are the limitations on independent expenditures by individuals (§ 608(e)) constitutional?
    - c. Are the limitations on the use of personal or family funds constitutional?*
    - d. Are the limitations on the incidental expenditures of volunteers (e.g., travel expenses) constitutional?
    - e. Are the requirements for becoming a political committee eligible for higher contribution limitations constitutional?*
  4. a. Are the expenditure limitations imposed on candidates constitutional?*
  5. Is the public financing scheme unconstitutional?
  6. a. Is the issue of the constitutionality of the Federal Election Commission ripe for review?
    - b. Is the Federal Election Commission constitutional?

* Appellees in oral argument challenge "standing" (renew, justifiably) only as to questions # 5 & 6 (Cutler & Spickard arguments)

necessary to serve any compelling state interest -- there are less onerous means.

The public financing scheme is challenged on the ground that it violates the general welfare clause, discriminates against nonmajor parties and independents,^{and}/leads to excessive governmental entanglement in political affairs. The attacks on the general election subsidies include the following: the prior-vote criterion should not be the only method of establishing qualification for subsidy; the post-election funding of nonmajor parties is inadequate; the requirement that candidates be on the ballot in ten or more states is discriminatory; and candidates receiving less than 5 per cent of the popular vote are never funded. (I think the first of these-- the prior-vote criterion -- is the most serious question raised.) The convention funding is said to discriminate against parties who have no conventions. The primary funding eligibility requirements* are attacked as unreasonable, and as discriminatory against candidates who do not seek the nomination of^a/political party.

The Federal Election Commission is challenged as an "executive" or "quasi-judicial" branch the members of which are not appointed in the manner required by Article II, section 2. This can be characterized as an attack on the method of appointment or an attack on the powers granted. There is a question as to whether the issue is ripe -- if the issuance of advisory opinions is considered to be something other than a "legislative" power, there is no ripeness problem. The legislation is also attacked as too vague and leaving too much discretion to the administrators.

Below I describe in more detail the various challenges made.

The disclosure requirements are attacked as an intrusion on and First Amendment rights of association, /as an undue burden on minor parties. Appellants also argue that the threshold limits are set too low.

The contribution limits, appellants argue, violate the First Amendment guarantees of freedom of speech, /and are overbroad. They are also challenged as discriminating in favor of incumbents and against minor parties and independents (especially when combined with the public funding of major party Presidential candidates). The limits on /Independent expenditures are said to be a direct infringement on First Amendment rights. (I agree)

The limitations on personal and family contributions are said to discriminate against candidates without personal wealth. (They are, of course, also challenged as part of the general First Amendment attack on all contribution limits.)

The limitations on the incidental expenses of volunteers are said to violate rights of speech and association.

The eligibility requirements for political committees are said to be irrational and violative of First Amendment rights of speech and association. They are also attacked as enhancing the power of /^{established} interest groups, contrary to the stated intention of the Congress in enacting FECA.

The expenditure limitations, say appellants, are direct restrictions on protected political speech. They discriminate in favor of incumbents. The provisions allowing higher ceilings for national and state party committees are said to discriminate against independents and candidates of parties without national committees. I think the most important point with regard to

November 10, 1975

No. 75-436 Buckley v. Valeo

Possible Questions

(at oral argument)

"Money" and "Speech"

Appellees' Brief (12): "Giving and spending money are not speech"

Ask: How can one effectively support or oppose a candidate for office without spending money? TV, radio, ads, letter writing, billboards, bumper-stickers, buttons, bull-horns, public address systems?

Spending money may not be speech, but without money in a political campaign the right to speak is an empty one.

Citizen Limitation 608(e) on "Expenditures"

A citizen is limited to spending \$1,000 in support of or in opposing a candidate.

Ask: If \$1,000 limitation is a valid restriction on political speech, what about \$500 or \$50?

Ask: The citizen ^{608(e)} limitation applies when the expenditure "advocates the election or defeat" of a "clearly identified candidate" § 608(e).

(i) who determines who is a "clearly identified candidate"?

(ii) Could you name today all such candidates for President in 1976? Does one have to be an announced candidate? Was Hughes a candidate in 1916? Stevenson in 1952/56?

Perennial issues

There are perennial issues in this country, not peculiar to a particular campaign: e.g., continued federal deficits, women's rights amendment, government's role in public and social welfare, expanded medicare, national defense, isolationism, foreign aid, etc.

In a campaign, candidates - by long platforms and otherwise - become clearly identified with many of these issues.

Ask: Is a citizen thereby limited to \$1,000 in expressing views on one or more of these issues? Such views, expressed without identifying a candidate, nevertheless may help or hurt one significantly.

Ask: Does a candidate who wishes to express his views on a perennial issue during a campaign do so at his peril? Criminal penalty?

The Element of "Intent"

Section 591(f) defines "expenditure". The definition is relevant to the \$1,000 limitation. Excepted from

"expenditures" is the following:

"Any communication by any person which is not made for the purpose of influencing the nomination for election, or election of any person to federal office." § 591(f)(F) [see pp. 1522 of CADC's opinion]

The intent of the party making the expenditure is controlling?

Ask: Intent is subjective. Who determines what one's intent is? Does one, having views on some of the perennial issues, run an ad or send out a letter to all registered voters in his district, do so at his peril?

Facial Vagueness

One who wishes to spend more than \$1,000 expressing his views on any public issue during a campaign is faced with a number of vague phrases:

(i) Who are the "clearly identified candidates".

(ii) Would expressing of views on the issue be deemed "advocating the election or defeat of such a candidate"?

To what extent is the citizen's subjective intent relevant?

(iii) Does the citizen have to obtain an advisory opinion in advance? Does he act at his peril.

In view of these, and similar questions, is a citizen fairly advised by the language of the Act as to what he may do?

November 10, 1975

No. 75-436 Buckley v. Valeo

Possible Questions

"Money" and "Speech"

Appellees' Brief (12): "Giving and spending money are not speech"

Ask: How can one effectively support or oppose a candidate for office without spending money? TV, radio, ads, letter writing, billboards, bumper-stickers, buttons, bull-horns, public address systems?

Spending money may not be speech, but without money in a political campaign the right to speak is an empty one.

Citizen Limitation

A citizen is limited to spending \$1,000 in support of or in opposing a candidate.

Ask: If \$1,000 limitation is a valid restriction on political speech, what about \$500 or \$50?

Ask: The citizen limitation applies when the expenditure "advocates the election or defeat" of a "clearly identified candidate" § 608(e).

(1) who determines who is a "clearly identified candidate"?

(ii) Could you name today all such candidates for President in 1976? Does one have to be an announced candidate? Was Hughes a candidate in 1916? Stevenson in 1952/56?

Perennial issues

There are perennial issues in this country, not peculiar to a particular campaign: e.g., continued federal deficits, women's rights amendment, government's role in public and social welfare, expanded medicare, national defense, isolationism, foreign aid, etc.

In a campaign, candidates - by long platforms and otherwise become clearly identified with many of these issues.

Ask: Is a citizen thereby limited to \$1,000 in expressing views on one or more of these issues? Such views, expressed without identifying a candidate, nevertheless may help or hurt one significantly.

Ask: Does a candidate who wishes to express his views on a perennial issue during a campaign do so at his peril? Criminal penalty?

The Element of "Intent"

Section 591(f) defines "expenditure". The definition is relevant to the \$1,000 limitation. Excepted from

"expenditures" is the following:

"Any communication by any person which is not made for the purpose of influencing the nomination for election, or election of any person to federal office." § 591(f)(F) [see pp. 1522 of CADC's opinion]

The intent of the party making the expenditure is controlling?

Ask: Intent is subjective. Who determines what one's intent is? Does one, having views on some of the perennial issues, run an ad or send out a letter to all registered voters in his district, do so at his peril?

Facial Vagueness

One who wishes to spend more than \$1,000 expressing his views on any public issue during a campaign is faced with a number of vague phrases:

(i) Who are the "clearly identified candidates".

(ii) Would expressing of views on the issue be deemed "advocating the election or defeat of such a candidate"?

To what extent is the citizen's subjective intent relevant?

(iii) Does the citizen have to obtain an advisory opinion in advance? Does he act at his peril.

In view of these, and similar questions, is a citizen fairly advised by the language of the Act as to what he may do?

November 10, 1975

No. 75-436 Buckley v. ValeoRelevancy of U.S. v. O'Brien, 391 U.S. 367

Appellees rely on O'Brien (as did CADC) to support their view that "money" is a non-speech element, that the Act regulates money and not speech.

O'Brien involved a violation of the Selective Service Act, specifically the proscription against destruction of a draft card. The Court, recognizing some incidental restrictions of symbolic speech, applied a four-part test:

"A governmental regulation is sufficiently justified if it is (i) within the constitutional powers of the government; (ii) if it furthers an important or substantial government interest; (iii) if the governmental interest is unrelated to the suppression of free expression; and (iv) if the incidental restriction [on free speech] is no greater than is essential to the furtherance of that interest."

Assuming that it is proper to characterize use of money in a political campaign as a "non-speech element", does this Act meet the O'Brien test No. 3? The government interest supporting this Act is hardly "unrelated to the suppression of free expression". The expressed purpose of the Act is to limit speech by some individuals and groups. In O'Brien, however, the interests of the Selective Service Act (the statute's goals) could all be achieved without regard to any limitation upon speech.

Indeed, O'Brien's conduct (burning draft card) has communicative value only because his action was illegal. The illegal act, he asserted, was "symbolic speech". The Selective Service Act itself had nothing to do with speech, symbolic or otherwise. It simply required registrants to preserve and carry their cards.

L.F.P., Jr.

SS

November 10, 1975

No. 75-436 Buckley v. ValeoRelevancy of U.S. v. O'Brien, 391 U.S. 367

Appellees rely on O'Brien (as did CADC) to support their view that "money" is a non-speech element, that the Act regulates money and not speech.

O'Brien involved a violation of the Selective Service Act, specifically the proscription against destruction of a draft card. The Court, recognizing some incidental restrictions of symbolic speech, applied a four-part test:

"A governmental regulation is sufficiently justified if it is (i) within the constitutional powers of the government; (ii) if it furthers an important or substantial government interest; (iii) if the governmental interest is unrelated to the suppression of free expression; and (iv) if the incidental restriction [on free speech] is no greater than is essential to the furtherance of that interest."

Assuming that it is proper to characterize use of money in a political campaign as a "non-speech element", does this Act meet the O'Brien test No. 3? The government interest supporting this Act is hardly "unrelated to the suppression of free expression". The expressed purpose of the Act is to limit speech by some individuals and groups. In O'Brien, however, the interests of the Selective Service Act (the statute's goals) could all be achieved without regard to any limitation upon speech.

Indeed, O'Brien's conduct (burning draft card) has communicative value only because his action was illegal. The illegal act, he asserted, was "symbolic speech". The Selective Service Act itself had nothing to do with speech, symbolic or otherwise. It simply required registrants to preserve and carry their cards.

L.F.P., Jr.

MONDAY, NOVEMBER 10, 1975

CASES FOR ARGUMENT TODAY

Powell
(Keep in
File)

Nos. 75-436 and 75-437. JAMES L. BUCKLEY ET AL., Appellants

v.
FRANCIS R. VALEO, SECRETARY OF THE
UNITED STATES SENATE, ET AL.

CONSOLIDATED--4 hours for argument.

The order, time and subject matters of the arguments will be as follows:

1. Statement of the Case, Contribution and Expenditure Limits, and Disclosure

RALPH K. WINTER, JR.
New Haven, Conn.
(50 minutes for appellants
pro hac vice)

(Will save 10 minutes of his
time for rebuttal)

JOEL M. GORA
New York City
(15 minutes for appellants)

DANIEL M. FRIEDMAN
Off. of the Sol. Gen.
Dept. of Justice
Washington, D. C.
(30 minutes for appellees)

ARCHIBALD COX
Cambridge, Mass.
(30 minutes for appellees)

} *Contribution*
+ Expenditure

2. Public Financing

BRICE M. CLAGETT
Washington, D. C.
(25 minutes for appellants)

(Will save 5 minutes of his
time for rebuttal)

LLOYD N. CUTLER
Washington, D. C.
(30 minutes for appellees)

3. Federal Election Commission

BRICE M. CLAGETT
Washington, D. C.
(30 minutes for appellants)

(Will save 5 minutes of his
time for rebuttal)

RALPH S. SPRITZER
Philadelphia, Pa.
(30 minutes for appellees)

No. 75-436 BUCKLEY v. VALEO

Writer (for appellants)

1, Discriminates in favor of incumbents. An incumbent Congressman can accept \$40,000 for sending out materials - none of which counts as a contribution or an expenditure. This is violation of 1st & 5th Amend ~~of~~ ^{invidious} - ~~invidious~~ discrimination.

This suppresses speech against challengers.

More money is sent out under "frank" than Act allows and challengers to Congressmen to spend.

If we agree with appellants on this issue, ~~the~~ the provision for both contributions & expenditures are invalid.

2. Facially discriminates vs. non-candidate

Chris
verify
this.

Winter (cont)

Act helps wealthy candidates
who finance their own campaign

Corps & unions not limited.

Burden of Act falls on those
who challenge incumbents. The
Act favors the status quo.

It is argued we should give
the Act a chance to see how
it works. Winter argues that
if Act is sustained, we ~~do~~
will have insufficient data
(statistics) to ~~determine~~ determine
whether Act disadvantages various
categories of interests (candidates)

Act is contrary to ~~the~~ 1st Amend cases
of this Court.

Gora (for appellants)

Addresser disclosure provisions.

Committee required to keep ~~names~~ names of all persons ~~who~~ who contribute or expend ~~\$100~~ ^{\$10 (ten)} or more.

Anyone who contributes \$100 or more must report it. Penalty is up to one year in jail.

(Stewart asked how one draws line as to reporting — \$10, \$100 or \$10,000.)

Sec 454 ^{is} ~~has~~ a severability provision. We don't have to invalidate all of disclosure provisions.

~~There~~ There have been disclosure provisions since 1910 — but none with teeth prior to 1972 (?).

Most states have disclosure provisions. White asked whether there there also are involved

no rational public interest in knowing who gives \$10 or \$100 — interest is obvious at \$10,000. Is there a principled basis for drawing a line (Const. basis)

Friedman (SG - appellee)

Act represents judgment of Congress
after yrs. of study.

Cox (- appellee)

Most imp. leg. in several
decades.

44 states have disclosure provisions
37 " have campaign expenditure
limitations.

Congress ~~is~~ regulated conduct
only - not speech.

There is not a "direct" regulation
of speech.

Relies on ~~Brasfield~~ Brasfield,
O'Brien

see
591e

608(e) is essential to close
loop - hole in Act

Winter (Rebuttal)

Cites Morley for authority that favorable treatment of corpor & unions is invidious discrimination.

Claggett (Public Financing) Ch 95

Major Parties are furnished \$26 million from public financing. Thus, they do not have to spend money to raise money.

("Primary" financing is a different subject - different Ch. of Act.)

Ch 95 does not provide for New Parties (minority Parties) to qualify by petition. This is most egregious discrimination of Ch 95 - according to Claggett. A Party that comes into existence after 1976 Election can receive no public funds for 1980 election.

Cloggett (cont)

Post election funding may be used only to repay loans.

New parties are left far "worse off" than they are now.

Stewart's Point: [Rep. party would never have become a major party in 1860 (It was not a party in 1856

Ch. 96 - ~~Repeal~~

Then ^{impose} a "wealth" test similar to tests we have invalidated in our cases. A single contributor can meet the requirement. But no provision is made for petitions.

Sec of Treasurer will decide how much funding Ford & ~~Reagan~~ Reagan receive in the N. H. Primary.

Claggett (cont)

I don't understand

{ A check-off scheme in tax returns would be an appropriate way to legislate on this subject. Refer us to his Reply Brief.

Cutler (for Appellees - addressed "public financing" issue).

Standing? Challenger right of Appellants to challenge these provisions or not being properly before us. McCarthy won't accept public funding. No other party in this case represents a Third Party that is running a presidential candidate. (What about Wallace?)

Arguer that Act reflects "great care" not to favor or disfavor small or new parties. Relied on guide-line in Wm v Rhodes + Jenners v Fortson.

Arguer that 5% provision, as a condition to public financing, is sustainable ~~to~~ under Storer v Brown

Cutler (cont)

~~The argument against this~~

There is some discrimination - but
it is justified. Forner

~~the~~

Clayton (Rebuttal)

~~The~~ Under both 1st Amend
violation by the Pub. Financing
provision and a 5th Amend. violation.

Check-off is just as if
Gov't received the tax proceeds
& appropriated them to
candidates on a discriminatory
basis.

No system of public
financing is valid - whether
discriminatory or not. (Read
what Clayton says on this)

Clayett (argument in chief on
Fed. Election Commission)

As to "Ripeness"

Commission is appointed
& giving opinions frequently.

Appellants (candidates,
parties, etc) have right to seek
advisory opinions. Some of
these ops. have injured appellants
— e.g. Op. as to lawyers' & accountants'
fees (copy filed with us).

(Rebucant asks why Clayett
doesn't attack this Ch. as facially
invalid) ~~as~~

Appellants are ~~now~~ now subject
to juris. of Commission on day to
day basis.

As to merits

This is a Legislative Commission
& can have no ~~to~~ greater power
than Congress. Membership of
~~Commission~~ ^{Congress} is controlled by Congress
& each House has a veto power
over Commission

Clegett (cont.)

Congressional power over elections is very broad. But this is not to say that Congress may assume Executive power.

Spritzer (for ~~appellee~~ appellee - on validity of Commission's powers) Made a good argument
Urge ~~the~~ absence of standing.

The thrust of Appellants argument (according to Spritzer) is that Congress has usurped Presidential appointive power. Pres. is not in this case, (See Stewart's rebuttal of this point)

Argue that enforcement powers of Commission are limited - not plenary & not exclusive of A.G.

Congress has initiated no proceedings up to this time.

Each House of Congress is judge of election & qualification of its members.

Relies on Powell

Clagett (Rebuttal as to Powers of
Commission.)

Asserts that Spritzer did
not address bases issue. Refers
us to pp 98, 99 of Clagett's Reply
Brief - which he says Spritzer
did not answer.

See note 82 in Powell v McCormack

November 11, 1975

No. 75-436 Buckley v. Valeo

My tentative thoughts, pre-Conference, on what seem to be the major issues:

1. Standing.

Appellees, as I understand it, now raise standing issues only as to the following:

(a) Public financing. Despite McCarthy's testimony that he will not accept public financing, I am inclined to think there is standing. McCarthy may be injured by the public financing.

(b) Election Commission. CADC, some months ago, concluded that it was premature to consider the validity of the Commission; that there was an absence of "ripeness". In view, however, of the fact that the Commission is imposing regulations and opinions on candidates I would think there is standing and ripeness.

(c) Other issues. At least arguably, absence of standing can be urged with respect to other issues - e.g., expenditure limitations on candidates. But in view of the posture of the case, and the mandate from the Congress to decide these issues, I think we should take as liberal a view of standing as possible.

2. Disclosure requirements.

Constitutional. Although these are attacked as violative of rights of association, as burdening minor parties, and as prescribing threshold limits that are far too low, I do not think any of these grounds reaches constitutional dimension. Judge Bazelon was concerned as to the impact on minor parties. This is highly speculative, and absent far more specific proof than that in this case, I would hold reasonable disclosure requirements valid across the board. I must say that the threshold limits seem far too low; they will undoubtedly impose serious burdens, and frighten a good many citizens away from contributions and expenditures; the red tape and possible litigation also will not be insubstantial.

Although I personally think the law is badly drawn, and reaches too far, I am not convinced that it is invalid. I will, however, await discussion on this aspect of the disclosure requirements.

3. Contribution limits.

Await Conference discussion. The Act limits contributions to \$1,000 per candidate, with an overall limitation of \$25,000 by any one contributor. A political committee is limited to \$5,000 to a candidate. Appellants argue a direct First Amendment infringement, and facially overbroad. It is urged that the limits discriminate in favor of incumbents, and against minor parties and independents. (especially when

combined with the public funding of a major party candidate).

These are not frivolous arguments. Any limitation on a contribution to a political candidate or committee undoubtedly restricts the exercise of political speech. But this restriction, where one's money is turned over to someone else, is not as severe or as direct as the 608(e) limitation on expenditures by individuals. Although I am convinced that the central thrust of the Act is to favor incumbents and seriously disadvantage challengers (both individuals and minor parties), I agree that the federal government has a compelling interest in doing what it can to promote "purity" of elections - however illusory a goal this may be in fact. Therefore, unless we are to invalidate the entire Act, I am inclined to think that limitations on contributions are an essential element - and perhaps the key element - in legislation of this kind.

4. Independent Expenditure Limits (§ 608(e))

Plainly unconstitutional. The Act attempts to draw a distinction ^{between} the voicing by an individual of his views on public issues, and making an expenditure "relative to a clearly identified candidate" advocating "the election or defeat of such candidate". All such expenditures relative to a candidate may not exceed \$1,000.

Appellees' position that "giving and spending money are not speech" is nonsense. In a political campaign, speech

is rendered most effective through the expenditure of money. Indeed, there would be no need for this Act, if this were not true.

Section 608(e) is therefore a direct restriction on the exercise of First Amendment rights. The restriction also is upon the most sensitive of such rights - political speech.

Moreover, the provision is facially vague and overbroad. Even if one can be sure who is a "clearly identified candidate", it will often be impossible to know in advance when an expenditure will be deemed to advocate "the election or defeat" of such a candidate. One does not have to identify a candidate by name to influence votes for or against him.

There are perennial issues that are likely to be involved in almost any campaign for federal office: continued federal deficits, the federal bureaucracy, the government's role in public and social welfare (e.g., expanded medicare), national defense, isolationism, foreign aid. Candidates become identified - sometimes clearly and at other times arguably - with such issues. If a citizen spends money to promote his views on any of them in a particular context, he may well be deemed to be supporting or opposing a candidate. He thereby runs the risk of criminal prosecution.

5. Limits on Personal and Family Funds.

Probably valid. If the basic evil is to prevent "buying" undue influence, there is no reason to limit expenditures by the candidate or his family. There is, of course, the

argument that the higher limitations on personal and family contributions discriminate against candidates who lack personal wealth. But this sort of discrimination has not yet attained constitutional levels. In any event, with proper disclosure requirements - duly enforced - extravagant expenditures by a candidate would be revealed and could backlash against him.

6. Limitations on Total Expenditures by Candidates.

Await discussion. There are persuasive policy and public interest arguments on both sides of this question. In terms of First Amendment analysis, as well perhaps as equal protection analysis, the burden is on appellees to justify a compelling state interest supporting these limitations.

It cannot rationally be denied that limiting the amount a candidate may spend on political speech is a serious infringement of core First Amendment rights. Moreover, any limitation (particularly as applied to congressional candidates) gives the incumbent a significant advantage over his challenger.

On the other hand, however, it is certainly true that candidates will spend whatever money they can raise, and - as argued by appellees - the level of political "noise" tends to escalate. This is not necessarily "bad" in a social or political sense, however improvident it may be economically. If a candidate makes too much "noise", he may well alienate his constituents: there is a saturation point. Moreover,

if everything else were equal, there is much to be said for preventing one candidate substantially outspending the other simply because one is able to raise more money than the other. The difficulty is that "all things" are rarely equal. This is illustrated by the not unlikely hypothetical as follows:

A well-known congressman, running for reelection after years of publicized service, is supported vigorously by the owner of the only newspaper, radio and television outlets in the district. In addition, the incumbent is supported all-out by organized labor, and even has - as is true of most incumbents - substantial support from business interests whom the incumbent has "looked out for". In addition, the incumbent may spend \$70,000. On the other side of the scales, the challenger is limited to the \$70,000. The result is likely to be foreordained.

If one applies a strict First Amendment analysis, it is difficult to avoid concluding that the expenditure limitations are invalid. Yet, the state interest in favor of a limitation (if one assumes an equitable limitation is possible) is strong indeed.

7. Public Financing.

Constitutional. Although there may well be serious inequities in this particular legislation, and I may identify some that should not be approved, I have no doubt that the

Congress may provide for public financing of federal elections.

8. Federal Election Commission.

Await discussion. If this legislation (or a major portion of it) survives constitutional attack, a federal commission or regulatory agency of some kind is necessary. The asserted constitutional infirmities of this commission are that (i) it is wholly a creation of the Congress, (ii) Congress reserves the right to veto any action of the commission; and (iii) Congress, through the commission, exercises executive rather than legislative functions.

The mere fact that Congress controls the commission, and even has the power to veto its actions, may not invalidate it. After all, Congress is the judge of the qualifications and election of its own members. Nevertheless, by retaining control of the commission the incumbent members of Congress have enlarged the advantages they already enjoy over challengers, an enlargement that is supportive of the other provisions of the Act which disadvantage challengers.

Even if the commission is otherwise found to be validly created and empowered, its right to initiate prosecutions (if I understand it correctly) does appear to impinge upon executive powers.

9. Exemption of Corporations and Unions.

The Attorney General, in his amicus brief, states flatly that the exemption enables corporations and unions to make

unlimited contributions to candidates of their choice. This is challenged by appellees who say that these most "vested" of all "vested interests" remain subject to the limitations on "committees". I derive little comfort from this qualification even if appellees are correct. As conceded in oral argument, there is no effective way to limit the number of committees that are created by unions and corporations. There are tens of thousands of corporations in this country, and probably thousands of local unions or subunits of unions (the unit at a particular plant) that could - if deemed desirable - qualify a committee.

If we sustain other major provisions of the Act, I will vote to invalidate the exemption of unions and corporations. The exemption accorded to them gives a rather hollow ring to the impassioned rhetoric of appellees about "the wealthy few", the "corrosive effect" of large aggregations of wealth, the undue influence of special interests, etc., etc. Anyone familiar with politics knows that historically the large corporate interests were the most dominant influence in American politics until the Wagner Act. Since 1935, unions have moved ahead of corporations in the effective exercise of political influence and power. But both types of economic organizations exercise enormous influence, and under this legislation the political power of corporations and unions will be enhanced enormously.

10. The Media.

Although I certainly do not suggest any invalidity in the blanket exemption given the media, I do note that this exemption tends to exacerbate the disadvantages this Act imposes upon challengers and unpopular figures. This is not irrelevant in light of the vast concentration of media power in this country since the advent of electronics. The three TV networks reach some 80 million people with their "news" programs everyday. There has never been in the history of our country a comparable ability to influence elections vested in so few private individuals. In addition, radio is a powerful medium which is likewise controlled by the "few". As the capacity of TV and radio to influence public opinion has increased, that of the conventional "press" undoubtedly has decreased. Hundreds of newspapers have been forced out of business and - with a few exceptions - circulations have tended downward.

Moreover, the advent of national columnists has reduced the influence of editorial comment by the local press to its lowest state in our history. A Jack Anderson, for example, appears in some 500 papers. He reaches millions of readers. Not even the editors of the Times and the Post have a comparable audience.

In sum, and viewed realistically, this Act will alter profoundly the "politics" of this country. It is clearly designed to benefit incumbents. Perhaps, more significantly,

the Act's drastic curtailment of First Amendment rights of individual citizens and candidates will augment the political power (influence) of the media, unions and corporations.

It is a "chilling" piece of legislation!

L.F.P., Jr.

ss

Buckley-75-436
75-437

11/12/75

Keep in

Discussed at Conference 11/12/75: File

Agreed that all expressions are tentative

I. Contribution limits { \$1000 per candidate
by individual; 25,000 ^{overall}
5000 per committee

C.J. - Doubts validity.

WTB - Affirm

Purpose is in furtherance of 13th A Rts.
Self-govt is arguably furthered. Agreed with
CADC.

Has reservation, however, as to 608(e)
w/d. to expenditure.

Also has reservations as to impact
on minor parties

P.S. - not at rest. (probably affirm.)

Pre-disposed to affirm in toto. But more
give read & studied, serious doubts have arisen.

B.W. Affirm

Giving
 money is an "act" or conduct -
 agree with Cox. No doubt as to validity
 of this. ~~Heritator~~ Heritator to differ with
 Congress.

Purpose is legitimate.

T.M. Affirm

Agree with Brennan + White.

HAB. Reverse on both contributions + expenditure

This is a 1st Amend case. If we
 affirm entire Act, we will have to
 "cut-back" on ~~the~~ prior cases.

In complete sympathy with
 purpose of Act.

Act is a severe 1st Amend
 infringement.

Can't separate "contributions"
 + "expenditures" - both include severely
 on 1st Amend values.

B.W. Affirm

^{giving}
 \ money is an "act" or conduct -
 agree with Cox. No doubt as to validity
 of this. ~~Heritable~~ Heritable to differ with
 Congress.

Purpose is legitimate.

T.M. Affirm

Agree with Brennan + White.

HAB. Reverse on both contributions + expenditure

This is a 1st Amend case. If we
 affirm entire Act, we will have to
 "cut-back" on ~~the~~ prior cases.

In complete sympathy with
 purpose of Act.

Act is a severe 1st Amend
 infringement.

Can't separate "contributions"
 + "expenditures" - both include severely
 on 1st amend values.

L.F.P. - Not at rest on contributions

(See my memo)

Inclined to affirm.

Rehnquist - Affirm

The 1st Amend is addressed to the Congress. Act hits core of 1st amend.

Those who say this Act furthers 1st A. values, argue an absurdity.

But as to "contributions" limits, ^{willing} ~~will~~ to ~~now~~ approve them despite misgivings as to overall effect of Act.

II. Individual Expenditures [608(c)]

C.J. - ~~Not at Rest~~ Not at Rest

Would preclude a citizen writing a book - but ~~not~~ no limits on writings by media. Not could citizens write pamphlets, buy ads, etc. This is

W.J.B. - Appeal

This is really ~~as~~ nothing more than a "contribution". Thus, Bell has no 1st Amend. problem.

But may be void for vagueness - but still inclined to appeal (why??) There is a criminal penalty.

P.S. - Reverend

Clearly unconvincing.

Can't think of a more gross infringement of 1st Amend rights.
~~It is certainly~~

B.W. - Appeal

II. Individual Expenditures [60862]

C.J. - ~~Not at Rest~~ Not at Rest

Would preclude a citizen writing a book - but ~~not~~ no limits on writings by media. Not could citizens write pamphlets, buy ads, etc. This is

W.J.B. - Appar

This is really ~~as~~ nothing more than a "contribution". Thus, Bell has no 1st Amend. problem.

But may be void for vagueness - but still inclined to appear (why??) There is a criminal penalty.

P.S. - Reverse

Clearly unconvincing.

Can't think of a move gross infringement of 1st Amend rights.

~~It - certainly~~

B.W. - Appar

More troubling than contribution issue but ok.

T.M. - Cyfun

OK

H.B. Reverse

Formely invalid.

L.F.P. Reverse

Rehugmit Reverse

608(c)

III. Limitations on Candidates + Families [608(c)]C.T. - Pass

Doubtful - but inclined to think OK

W.T.B. - AffirmP.S. - Reverse

In so far as there are law limits
a candidate, ~~and his family~~ it is
invalid.

As to ~~the~~ limits on contributions
by family members, OK. No def.
in principle bet. contributions
generally & these.

B.W. - AffirmT.M. - Reverse

Violates 1st Amend to limit
what a candidate may spend of own
money.

OK as to family

Blackburn - Revenue

Agreed with Stewart

LFP - Revenue (tentative)

Limitation on candidates
own money is direct enforcement
of 1st A. R. H.

Family provisions OK.

IX. Presidential Expenditures

Rebiquart - Revenue

IV

Candidate Expenditure for House
 (\$1,000,000 - Senate)
 70,000 - House
 Senate
 (Not for President)

C.I. - Pass

W.G.B. - Pass

This is most troublesome. Hard to see issues bet. this over-all limitation and the limitations on contributions & expenditures.

If limitations on contributions & expenditures are valid, the over-all limitation is difficult to justify.

Severe E/P issue. Challenger is certainly disadvantaged.

If limitations on individual contributions is valid, the problem is not serious.

P.S. - Reverse

Not now addressing primary, matching or public financing (or limitations thereon)

limitation on what candidate may spend is plainly violative of 1st Amend rights.

~~IV~~

IV Candidate Expenditure for House
 +
Senate
 (\$100,000 - Senate)
 70,000 - House
 (Not for President)

C. 9. - Pass

W. 9. B. - Pass

This is most troublesome. Hard to see repeal bet. This over-all limitation and the limitations on contributions & expenditures.

If limitations on contributions & expenditures are valid, the over-all limitation is difficult to justify.

Second E/P issue. Challenger is certainly disadvantaged.

If limitations on individual contributions is valid, the problem is not serious.

P. 5 - Reverse

Not now addressing primary matching or public financing (or limitations thereon)

Limitation on ~~what~~ what candidate may spend is plainly violative of 1st Amend rights.

(Our op. should not discuss how the Act would work. Confine op. to Const. issues.)

B.W. - Affirm

Limits on total expenditures
are ok.

T.M. - Affirm

Nothing new about this type
of limit

HAW - Reverse

L.F.P. - Reverse

Agree with Stewart + Blackburn

Rehnquist - Reverse

?? "tail following dog"

There is some E/P

B.W. - Affirm

Limits on total expenditures
are ok.

T.M. - Affirm

Nothing new about this type
of limit

HAW - Reverse

L.F.P. - Reverse

Agree with Stewart + Blackburn

Rehnquist - Reverse

7.7. Not necessarily a case of
"tail following dog"

There is some E/P
issue as well as 1st A issue.

Affirm

I "Contribution" limits - Affirm
6-1-2

\$1000 per candidate
5000 " " "

(By Committee)

- Brennan
- Stewart
- White
- Marshall
- Powell
- Pohugnot

Individual Expenditures - Reverse
5-3

Limitations on Candidate - Reverse
or to
Candidate
5-3

* Family spending

affirm
or to
family
limits

Volunteer Incidental Expense - Affirm?

II Candidate Expenditures for House & Senate

Revere 5-3
(4 of votes
this way)

III Public Funding of Presidential Campaigns.

1. As to "general power" - Affirm
7-1

2. As to minor parties - Affirm(?)

3. As to expenditure - Affirm
limit

vote
not
clear

IV Disclosure - Affirm 8-0

V Commission

V Public funding of Election

C.J. - Revere (^{"leaving"} ~~leaving~~)

Troubled by ~~no~~ effect on new & minor parties

W.B. - Affirm

no 1st Amend problems

not concerned by effect on new & minor parties

P.S. - Affirm

Clearly Congress has power to fund election. No 1st Amend ~~to~~ issue.

But there are E/P issues, but ~~E~~ tentatively P.S. thinks there are not substantial.

B.W. - Affirm

Clearly valid

~~once we know~~

T.M. - Affirm

will - Affirm (tentative)

V Public funding of Elections

C.J. - Revenue (^{"learning"}~~tentative~~)
 Troubled by ~~us~~ effect on new & minor parties

W&B. - Affirm
 no 1st Amendment problems
 not concerned by effect on new & minor parties

P.S. - Affirm

Clearly Congress has power to fund elections. No 1st Amendment ~~to~~ issue.
 But there are E/P issues, but ~~E~~ tentatively P.S. thinks there are not substantial.

B.W. - Affirm

Clearly valid
~~once we know~~

T.M. - Affirm

Harry - Affirm

LFP - Affirm

Power is clear.
 I'm still in doubt on E/P issues as to new & minor parties

Rehnquist - Affirm (~~tentative~~)

VI Volunteer Incidental Expenses (not to exceed \$500)

GF - Inclined to Reverse

Certainly a restriction on individual speech. Limitation applies w/ regard to whether ~~to~~ a candidate

P.S. - Affirm (also not sure how it operates)

~~Valid to limit contributions~~

To extent this limitation impinges on 608(e) (if it does), would be invalid. But if this does not so impinge, it is OK

If one goes over the \$500, the expenditure could be either a contribution or a 608(e)

B.W. Affirm

T.M. Affirm

HAW - Reverse (?)

LFP - Affirm (If I understood it

VI Volunteer Incidental Expenses (not to exceed \$500)

GF - Inclined to Revenue

Certainly a restriction on individual speech. Limitation applies w/regard to whether ~~to~~ a candidate

P.S. - Affirm (altno not sure how it operates)

~~Valid to limit contributions~~

To extent that limitation impinges on 608(a) (if it does), would be invalid. But if this does not so impinge, it is OK

If one goes over the \$500, the expenditure could be either a contribution or a 608(a)

B.W. Affirm

T.M. Affirm

HAW - Revenue (?)

L.F.D. - Affirm (If I understood it correctly)

Relinquist - Affirm

VII - 6 mos. Requirement as to
existence of Committees

C.I. Affirm

W.E.B. "

R.S. "

a Definitive matter

B.W. Affirm

T.M. "

B.H.B. "

L.E.P. "

(I agree with Poller)

W.B.W.R. "

Affirm

8-0

VIII Disclosure (Affirm 8-0^{TM} with some reservations)

C.I. Affirm

Heart of the Act. The possibility of "chilling" in any real sense is remote. The limits as to amounts are low, but is a legal matter.

W.B. Affirm in part + Reverse in part

As applied to ~~some~~ independent ~~part~~ candidates + parties, probably invalid

P.S. - Affirm

Cut off amounts are unworkable, but low
then is for Congress.
There may be problems as applied

B.W. - Affirm

T.M. - Reverse ~~to~~ (could affirm as to some)
the 10th 10 -

H.B. - Generally Affirm

VIII Disclosure (Affirm 8-0^{TM?}
with some
reservations)

C.I. Affirm

Heart of the Act. The possibility
of "chilling" in any real sense is remote.
The limits as to amounts are
low, but is leg. matter.

W.B. Affirm in part + Reverse in part

As applied to ~~some~~ independent
~~part~~ candidates + parties, probably
invalid

P.S. - Affirm

Cut off amounts are unweildy, ^{low} but
this is for Congress.

There may be problems as applied

B.W. - Affirm

T.M. - Reverse ~~to~~ (could affirm as to ^{some}
as to 10 -

H.B. - Generally Affirm

L.F.P. Affirm

Imp. provisions.
- Key to this Act.

W.R. Affirm

(D. Whether in a particular
fact situation
the NAACP v Ala
principle might apply
- but we can deal
with that in
another suit.

IX Commission

C.J. As to composition: Reverse

If Congress itself can perform all acts delegated to Commission, it is OK.

But as composed ~~and~~ in light of its powers, Congress has gone too far.

~~Strike~~ "Strike from ballot" is invalid & is before us.

Brennan. Affirm

The Power to strike a candidate off a ballot is "obviously invalid," & is before us.

The Commission could give an advisory op that might conflict with a prosecution by Justice Dept. But this case is not before us.

But on record before us, we don't have these cases.

Does not read Act as allowing Commission to initiate a prosecution w/out approval of Justice Dept: Would read "shall" to mean only that Comm. may request J/D to prosecute

IX Commission

C.J. As to composition: Reverse

If Congress itself can perform all acts delegated to Commission, it is OK.

But as composed ~~and~~ in light of its powers, Congress has gone too far.

~~"Strike from ballot"~~ is invalid & is before us.

Brennan. Affirm

The Power to strike a candidate off a ballot is "obviously invalid," & is before us.

The Commission could give an advisory op that might conflict with a prosecution by Justice Dept. But this case is not before us.

But on record before us, we don't have these cases.

Does not read Act on allowing Commission to initiate a prosecution w/out approval of Justice Dept: Would read "shall" to mean only that Comm. may request J/D to prosecute

PS. Pass

There involves no 1st amend. issue.
There is a separation of powers
issue. ~~35 yrs ago~~

At first, PS thought Comm. was
OK. Now is quite uncertain.

Power to strike from ballot is invalid but
is not ripe.

B.W. Affirm in major part; not at
rest on some
powers.

Close issue. Would not strike down
appointment provision. Comm.
clearly has power properly to issue
regulations. Thus Comm. has
powers that are valid.

~~Agrees with Brennan that Comm.~~

Comm. seems to be authorized
to initiate ^{civil} proceedings. If so, this
is an executive ~~power~~ power & would
be invalid. But no one has
standing in this case to raise this.

Also concerned by power of
Comm. to cut-off (allocate) public
funds. Very doubtful.

Would not invalidate entire

PS. Pass

This involves no 12th amend. issue.
This is a reparation of powers issue. ~~35 yrs ago~~

At first, PS thought Comm. was OK. Now is quite uncertain.

Power to strike from ballot is invalid but is not ripe.

B.W. Affirm in major part; not at rest on some powers.

Close issue. Would not strike down appointment provision. Comm. clearly has power properly to issue regulations. Thus Comm. has powers that are valid.

~~Agree with Brennan that Comm.~~

Comm. seems to be authorized to initiate ^{civil} proceedings. If so, this is an executive ~~power~~ power & would be invalid. But no one has standing in this case to raise this.

Also concerned by power of Comm. to cut-off (allocate) public funds. Very doubtful.

Would not invalidate entire provision.

Congress could say, if this is valid, that ~~the~~ the Regs & act of all Commissions are subject to Congressional veto.

Power to strike from ballot void but not ripe

Marshall - Affirm all

Blackmun - Reverse

~~Congress has power~~

The Composition of Court.
should rest with President.

Concerned about its powers.

L.F.P. - Affirm in part; ^{probably Reverse} in part, it is ^{issued} ^{are before us}
Doubtful as to authority to

~~not~~ institute civil & criminal cases, and
not at all certain Congress ~~can~~ ^{can} validly
can retain control ~~thereover~~ ^{thereover} Regs. through
veto of ~~Regs.~~ ^{Regs.} & decisions thereunder.

Rehnquist - Reverse

Some of functions of Court. are
ok. e.g. Admin. & record keeping.

Issuing regs. ~~may~~ is not proper.
This differs from legislation as
Pres. ~~can~~ has no authority to veto —
thus this goes beyond the leg. functions
There is no case law on this: a new
issue.

This would be a major
step towards denigrating ~~the~~ Executive power

I agree with Brennan
as to power to "strike"
and take from budget - if we reach it.

This point (veto power
of Pres.) is persuasive.

Marshall - Affirm all

Blackmun - Reverse

~~Congress has power~~

The Composition of Court.
should rest with President.

Concerned about its powers.

LFP - Affirm in part; ^{probably Reverse} in part, if ^{is} ^{any before us} ^{is} ^{any before us}
Doubtful as to authority to

not at all certain Congress ~~can~~ ^{can} validly
can retain control ~~through~~ ^{through} Regs. through
veto of Regs. & decisions thereunder.

Rehnquist - Reverse

Some of functions of Court. are
ok. e.g. Admin. & record keeping.

Issuing regs. ~~may~~ is not proper.

This differs from legislation as
Pres. ~~can~~ has no authority to veto —
thus this goes beyond the leg. functions
There is no case law on this: a new
issue.

This would be a major
step towards demigrating ~~the~~ Executive power.
This is a technique ~~to~~ ^{for} retention
by Congress over admin. of a law
after it has been passed. Congress
increasingly is being done. ~~by~~

I agree with Brennan
as to power to "strike"
candidate from ballot - if we reach it.

This point (veto power
of Pres.) is persuasive.

Re-run of this vote { Public Funding - Pro + V/P
(We reconsidered & took new tentative vote - 11/17/75)

C. J. Revere

As to gen. power, ~~to~~ invalid.

Brennan - Affirm across board

Gen. power is clear - OK.

As to minor parties -

Power of Congress to allocate ^{funds} - OK

~~Stewart~~
Stewart - Affirm

Congress has ^{general} power (gen. welfare power, & power over elections).

As to Primary funding & minor parties - OK.

The ballot "position" cases are relevant (Fortson, etc).

Primary + ... +

Re-run of this vote { Public Funding - Pres + V/P
(We reconsidered & took new tentative votes - 11/17/75)

C. J. Revere

As to gen. power, ~~to~~ invalid.

Brennan - Affirm across board

Gen. power is clear - OK.

As to minor parties -

Power of Comm to allocate ^{funds} - OK

~~Stewart~~
Stewart - Affirm

Congress has ^{general} power (gen. welfare power, & power over elections).

As to Primary funding & minor parties - OK.

The ballot "portion" cases are relevant (Fortson, etc).

The expenditure limitation on ^{candidates who accept} public grants is OK. ~~and~~ If a candidate does not accept the grant, there ~~can~~ can be no valid limitation.

White - Affirm

Marshall - "

Blackmun - "

L.F.P.

~~He~~ Generally Affirm

Affirm as to gen. power
of Congress & as to amounts.

~~He~~ I have some doubt
as to impact on minor parties,
but absent more specific showing
~~of~~ I'm inclined to affirm.

~~He~~ I also am in doubt as
to over-all expenditure limit on
candidates. But ~~is~~ I'm impressed by argument
that a candidate who accepts public funding,
may validly be required to accept the limitation.

Rehnquist - Affirm except as to ^{Minor} Parties.

Doubtful as to minor parties
- are discriminated against.

Otherwise, OK.

Library
Supreme Court of the United States
Washington, D. C. 20543

November 13, 1975

Memorandum to: Mr. Justice Powell

From: The Librarian

Dear Mr. Justice Powell:

With the exception of the figures for the total number of corporations with securities dealt Over the Counter, the information which you asked for in your letter dated November 11, 1975, is included in the documents which are being sent to you with this letter.

The figure for the total number of corporations with securities listed in the New York and the American Stock Exchanges appears in the S. E. C. Annual Report for 1974 at page 166 (Table 19). I hope to have the Over the Counter figure within a day or so.

The figure for the number of corporations for profit that exist in the United States is reflected in the 1972 Preliminary Statistics for Income Tax Returns. See Table A on page 2 and the Table on page 5.

The figure for the labor union locals is given in the 1973 Directory of National Unions and Employee Associations, together with figure in the February, 1975, Supplement. See pages 5 and 67 of the former, and page 5 of the latter.

The documents sent to you with this letter are the latest of each that are available.

If this material does not satisfy your request please let me know and I shall dig further.


Edward G. Hudon.

Library
Supreme Court of the United States
Washington, D. C. 20543

November 14, 1975

Buckley ^{case}
File

Memorandum to: Mr. Justice Powell

From: The Librarian

Dear Mr. Justice Powell:

Apparently an accurate figure for the number of corporations with securities that are dealt with Over-The-Counter is hard to come by. The attached letter addressed to me points out the problems involved and why an accurate figure cannot be reached. I do not know whether this letter addressed to me satisfies your inquiry. If it does not, please let me know and I shall search further.

Ed. G. Hudon

Edward G. Hudon.

NASD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

1735 K STREET NORTHWEST • WASHINGTON D.C. 20006

November 13, 1975

Mr. Edward G. Hudon
Librarian
United States Supreme Court
Washington, D.C. 20543

Dear Mr. Hudon:

In response to your request for the "number of companies whose securities are listed on the over-the-counter exchanges", I hope the following will provide the information you are seeking.

The term "over-the-counter exchange" is self-contradictory, since over-the-counter means not limited on an exchange. However, over-the-counter transaction encompass activity between individuals in addition to trading within the brokerage community. Corporations are able to issue securities without registration of those shares with any agency, federal or state. It is only when the shares are offered to the public (definitions of public offerings vary among states and the federal government) that registration is required. The shares issued pursuant to private transactions however, may, subject to some restrictions, eventually be traded freely in the marketplace.

Thus, with certain areas of the marketplace not subject to regulation it is difficult to establish precise estimates of the securities trading in the over-the-counter market. The Report of the Subcommittee on Securities, Committee on Banking, Housing and Urban Affairs, U.S. Senate, 93rd Congress cites an estimate of 20,000 securities trading in the over-the-counter market. Other estimates have indicated that there are 30,000 to 40,000 common stocks of public corporations (see NASDAQ & the OTC, enclosed). It is also estimated that only about 10,000 to 12,000 trade with any regularity and only 5,000 could be considered actively traded. Currently, the National Quotations Bureau lists approximately 8,000 issues in its "pink sheets", which are the broadest listing of quotations available in the over-the-counter market. Further, there are presently just over 2,600

Page Two.
Edward G. Hudon
November 13, 1975

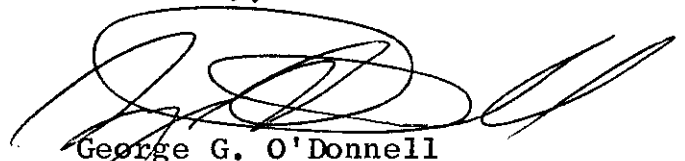
---

issues included on the National Association of Securities
Dealers Automated Quotation (NASDAQ) System.

Of all of the above, approximately 8,500 are covered
by periodic reporting requirements of the Securities and
Exchange Commission.

I hope the above discussion gives you the information
you are seeking. If not, or if I can be of any further assistance,
please do not hesitate to contact me at (202) 833-7216.

Sincerely,

A handwritten signature in dark ink, appearing to read "G. O'Donnell", with a large, stylized flourish extending to the right.

George G. O'Donnell
Manager
NASDAQ Securities Qualifications

GGO/jbs

Enclosure:

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 17, 1975

Re: 75-436) Buckley v. Valeo
75-437) Buckley v. Valeo

Dear Potter and Lewis:

I will be engaged until about 4:00 p.m. today, but I will hold myself ready if both of you are available at that time to try to agree on the division of this case into five or six topics for possible separate assignment, as the Court of Appeals seems to have done. Otherwise, tomorrow will do.

Regards,

s/ WEB

Mr. Justice Stewart

Mr. Justice Powell ✓

Supreme Court of the United States
Washington, D. C. 20543

File

CHAMBERS OF
THE CHIEF JUSTICE

November 18, 1975

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

Dear Lewis:

Since the Assignment form does not lend itself to dealing with an unusual case like this, or to our mode of handling it, please take this as an assignment of what we have designated as Part II in the attached "Drafting Outline."

Our modus operandi will be for the "drafting team" to develop its full draft before general circulation so that all Justices will see the entire package at once, rather than piecemeal. This will avoid having questions raised as to one part which are to be answered in another part. It will be essential to maintain flexibility within the drafting team as we go along, so as to leave no gaps, but also to avoid repetition.

Regards,

WB B

Mr. Justice Powell

November 18, 1975

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

DRAFTING OUTLINE

- I. Statement of case, facts, issues and contentions *C. J.*
- II. Disclosure provisions *LFR*
- III. Public funding of primary and general election campaigns for President and Vice President *Brennan*
  - a. General power of Congress
  - b. Validity as to minor parties and independent candidates
  - c. Limitation on total expenditure
- IV. Contribution and expenditure limitations *Stewart*
  - a. Individual and committee contributions
  - b. Individual expenditures
  - c. Candidate and family expenditures
  - d. Volunteer incidental expenses
  - e. Limitations on expenditures by candidates for House and Senate
- V. Election Commission *Rehnquist*
  - a. Selection and composition
  - b. Regulations and advisory opinions
  - c. Veto power of Congress
  - d. Power to institute civil and criminal lawsuits
  - e. Power to strike from ballot

Supreme Court of the United States
Washington, D. C. 20543

file

CHAMBERS OF
THE CHIEF JUSTICE

November 18, 1975

Re: (75-436 - Buckley v. Valeo)
(75-437 - Buckley v. Valeo)

MEMORANDUM TO THE CONFERENCE:

Our discussions at Conference brought unanimous agreement that the disposition of these appeals should have high priority and that, time being crucial, no one Justice should undertake this task. Justices Stewart, Powell and I agreed on a five-part outline and I have assigned the parts to a "drafting team" of Justices Brennan, Stewart, Powell, Rehnquist and myself. I have also invited Byron to write on Part V, which Bill Rehnquist will address initially. Naturally the part assigned was geared to the expressions of each Justice at Conference so that (with the variation as to Part V) each is writing in an area to which five or more Justices appear to be in agreement.

When the parts are "glued" into a tentatively acceptable whole, the draft will be circulated to all.

Regards,

WSB

 November 18, 1975

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo)

DRAFTING OUTLINE

Assigned to:

CJ	I.	Statement of case, facts, issues and contentions
LFP	II.	Disclosure provisions
WJB	III.	Public funding of primary and general election campaigns for President and Vice President
	a.	General power of Congress
	b.	Validity as to minor parties and independent candidates
	c.	Limitation on total expenditure
PS	IV.	Contribution and expenditure limitations
	a.	Individual and committee contributions
	b.	Individual expenditures
	c.	Candidate and family expenditures
	d.	Volunteer incidental expenses
	e.	Limitations on expenditures by candidates for House and Senate
WHR BRW	V.	Election Commission
	a.	Selection and composition
	b.	Regulations and advisory opinions
	c.	Veto power of Congress
	d.	Power to institute civil and criminal lawsuits
	e.	Power to strike from ballot

Law Impedes Corporations' Drive for Political Power

By WARREN WEAVER Jr.

Special to The New York Times

WASHINGTON, Nov. 27 —

Corporations, seeking to revive the conservative political power formerly enjoyed by the wealthy, are encountering serious legal problems in their efforts to build muscle for the 1976 elections.

Big business has won permission from the Federal Election Commission to finance political action committees with corporate funds. These committees will collect voluntary contributions from employees and stockholders and distribute the money among candidates favored by the management.

Despite this important weapon, available for the first time on any scale in 1976, corporations appear to be operating under some other legal handicaps in their effort to counterbalance the formidable political power of organized labor.

Both corporations and unions have long been prohibited from making direct contributions to candidates or parties from their treasuries under the Corrupt Practices Act, but important exceptions were created by Congress in the 1971 and 1974 campaign laws.

Exemption for Unions

A union, for example, can spend unlimited amounts of its own money, outside any campaign ceiling, on "communications to its members and their families on any subject," such as political leaflets pre-election, phone calls and, probably, house-to-house solicitation.

But, under most authoritative interpretations of the campaign law, a corporation cannot spend its money for this kind of political communication unless it has no Government contracts, a condition that eliminates most of the large and powerful corporations from this kind of activity.

A single union can and often

does operate a chain of separate political action committees at the national, state and local level; each of which is entitled to make the maximum \$5,000 committee contribution to a given candidate as long as all its money is raised and allocated independently.

As a result, labor can multiply many times over the contributions it is able to make to Presidential and Congressional candidates, it favors within the framework of the campaign law. Those candidates, however, remain subject to the same spending limits as their opponents, who might or might not be beneficiaries of legal corporate support.

No one knows as yet whether corporations may enjoy the same freedom to proliferate their political action committees and multiply their influence accordingly. The statute is unclear, and the Federal Election Commission has not been asked to rule on the question.

Importance in 1976

These questions have immense importance for the first time in the 1976 election. In the past, labor's political activism has been largely balanced by the fact that wealthy conservatives and their organizations could make unlimited donations to candidates they favored.

Under the 1974 campaign law, individuals, some of whom formerly gave hundreds of thousands of dollars, are limited to \$1,000 a candidate and committees, to \$5,000. (Accordingly, the power of labor to proliferate its political action committees and to spend for communication outside the ceilings has become much more significant.)

In addition, public attention has been focused on illegal campaign contributions that corporations, notably the Gulf Oil Corporation, made in the past, with an increasing likelihood that business will try in 1976 to apply political pressure through channels that will not involve it in criminal penalties and bad publicity.

A small segment of the electorate got a startling look at

the potential impact of labor's power to "communicate" with union members in last September's special Senate election in New Hampshire.

Union activists set up phone banks and called members as many as two or three times to solicit their votes for John A. Durkin, the Democratic candidate. They also distributed Durkin literature and engaged in "foot-pulling," walking through labor districts house to house on Election Day to insure high voter participation.

Spending Ceilings Avoided

(Under the "communications" provision in the election law, the entire cost of this operation passed outside the campaign spending ceilings imposed on Mr. Durkin and his Republican opponent, Louis C. Wyman.)

Without significant labor support, Mr. Wyman was forced to rely on volunteers and use a share of his permissible campaign spending to finance telephone contact and get-out-the-vote activity. Mr. Durkin won the rematch of their deadlocked 1974 contest by 27,000 votes.

In 1971, the House adopted an amendment to the pending campaign reform legislation sponsored by a conservative Republican, Representative Orval Hansen of Idaho, that provided apparently parallel new rights for corporations and unions. As the law finally read, both groups could do the following:

Use their financial resources to communicate with shareholders, in the case of corporations, or members, in the case of unions, on any subject.

Conduct "nonpartisan registration and get-out-the-vote campaigns" among their stockholders and members, at corporate and union expense.

Establish and operate with their own money "a separate segregated fund to be used for political purposes," consisting of voluntary contributions.

In 1971, all labor unions were authorized to engage in this activity, but only corporations that did not have Federal Government contracts were given comparable authority. (In 1974, Congress approved a change that permitted corpora-

tions with Government contracts to establish the separate funds — now called political action committees — but did not give them access to the other two kinds of political activity available to unions.)

Of the 1.8 million corporations in the country, about 275,000 have Federal Government contracts, but these are believed to include most of the major companies.

Subdivision of Committees

On the question of whether corporate political committees can subdivide and thus increase their influence, the election commission has issued two related but not controlling decisions.

The commission refused to permit a national dairy industry pressure group to create state units, each with a separate political contribution limit, when they were all to be financed by the national committee and given little or no individual control over the candidates they supported.

But the commission has also given a county committee of a political party the right to collect funds and donate them to candidates of its choice up to the \$5,000 committee ceiling, as long as both its fund raising and candidate selection were independent of the state and national committees of the same party.

On the basis of these precedents, state or local corporate political action committees may be able to qualify for separate contribution limits of their own if they demonstrate independence. Thus, the General Electric Company might have separate committees in Connecticut, New York and all other states in which the corporation has substantial numbers of employees and stockholders.

Currently, in the absence of any clear legal ruling, the Dow

Chemical Company has set up five regional political action committees, each of which apparently expects to operate with separate contribution limits.

In the long run, the commission will almost certainly have to issue ground rules for union political committees, defining what degree of independence is required to permit them to operate as separate entities each entitled to its own contribution ceiling.

Some Democrats who follow election commission rulings are concerned by the fact that corporate political committees were authorized to solicit contributions from employees, particularly executives and middle management, as well as shareholders.

Business statistics indicate, however, that many of the big corporations have more shareholders than employees — only three of the 12 largest in the

country have more employees — and many employees, particularly at the management level, are also stockholders who would be reachable in any event.

But the important question may be whether such corporation officials would be subject to more pressure to contribute to a management-controlled fund when solicited as employees by their superiors than if they received a mailed solicitation as shareholders.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 1, 1975

Re: Nos. 75-436 and 75-437 — Buckley v. Valeo

Dear Chief:

I have now come to the conclusion that the election commissioners are officers of the United States within the meaning of Article II, Section 2, that their mode of appointment violated that provision and that the Commission is therefore illegally constituted. My tentative view that the statutory provisions respecting the Commission could be salvaged by accepting the assurance that civil enforcement powers would not be exercised and by considering the rule-making and advisory authority of the Commission as legislative functions not trenching on the domain of the executive would not write out to my satisfaction. That Congress, consistently with the separation of powers principle, may create a commission or agency to administer a statute free from day-to-day control by the President is not responsive to the constitutional requirement that except for those whose selection is otherwise provided for, all officers of the United States, whatever their function, are to be appointed by the President with the approval of the Senate unless in the case of inferior officers Congress vests the power to select in the President alone, the judiciary or a department head. It is the President, not Congress, who nominates judges although they are to have judicial, not executive, duties. And it is the President who must nominate the members of the independent agencies even though they perform what this Court has said are wholly legislative and judicial, rather than executive, functions. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Perhaps the rule-making function of the Commission is legislative in nature and does not invade the President's veto power. The commissioners are nevertheless officers of the United States and their mode of appointment is controlled by the Appointment Clause of Article II.

I am, therefore, closer than I was to the views Bill Rehnquist expressed at Conference, and if my assignment was to write in defense of the Commission, that task should be undertaken by someone else.

I should add, however, that if the commissioners had been appointed in accordance with Article II, it is likely that I would not find constitutionally suspect the limited congressional veto of commission regulations which the statute provides. I am not wholly at rest on that question.

Sincerely,

A handwritten signature in dark ink, appearing to be "Burger", written in a cursive style.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 1, 1975

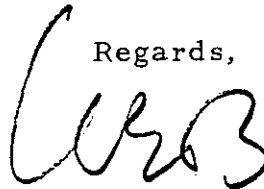
Re: 75-436 - Buckley v. Valeo
75-437 - Buckley v. Valeo

Dear Byron:

Thank you for your memo of December 1 in the
above case.

In light of this we will proceed along the lines agreed
upon and in due course the "writing team" will present
something on all points for consideration by the full Court.

Regards,

A handwritten signature in dark ink, appearing to be 'W. E. B.', written in a cursive, flowing style.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 8, 1975

MEMORANDUM TO: The Chief Justice
                  Mr. Justice Stewart
                  ✓ Mr. Justice Powell
                  Mr. Justice Rehnquist

RE: No. 75-436 - Buckley v. Valeo, et al.
      75-437 - Buckley v. Valeo, et al.

Attached is my initial submission of Part III.
As agreed this morning, circulation at this time is
limited to the members of the "drafting team."

W.J.B.Jr.

750
75
—
725

Sen. to Cong 10/17/75

- FYI - Conference, 2 p.m.,
12/18/75

Supreme Court of the United States
Washington, D. C. 20543

December 17, 1975

MEMORANDUM FOR THE CHIEF JUSTICE

Subject: Buckley, et al. v. Valeo, et al., A-550
(Application for Injunction)
Federal/civil

Appellants Buckley, et al. seek an injunction to prevent the "imminent" payment of \$250,000 to the Republican National Committee and of \$461,000 to the Democratic National Committee pursuant to 26 U.S.C. 9008. They also seek an injunction to prevent the payment of unspecified amounts to at least three presidential-nomination candidates pursuant to Chapter 96 of the IRC.

Facts: The Federal Election Commission (FEC) has advised counsel for appellants that on Tuesday, December 23, it will certify to the Secretary of the Treasury pursuant to 26 U.S.C. §§9036 and 9008(9) payments to three individuals who are seeking a political party's presidential nomination for their campaign expenses and to the two major parties for portions of their convention expenses. Payment to the parties must be made "promptly" and, according to a representative of the Secretary as set forth in counsel's affidavit, normally would be made by check within two or three days after receipt of the certification, but might be made within as short a time as two hours. Payments to the candidates will not be made prior to January 1 pursuant to 26 U.S.C. §§9032(6) and 9037(b), but that promptly after the certifications are received procedures would be instituted to make an account designation pursuant to 26 U.S.C. 9037(a) and that no more than a week, or two weeks at the outside, should be necessary to complete the designation process. Once a designation is made, payments will be made to the candidates immediately. The Secretary does not intend, as a condition of making payments under either type of certification, to require that the recipients agree to repay such funds or give security for repayment in the event that the statutory provisions for such payments should be held unconstitutional.

Contentions: On the merits, appellants would rely on their arguments made on appeal.

On the equities, appellants first argue that an injunction is necessarily directed to the certification of parties and candidates by FEC since in making payment the Secretary is performing a mere ministerial act, is not a party to this case and, consequently, is beyond the Court's jurisdiction.

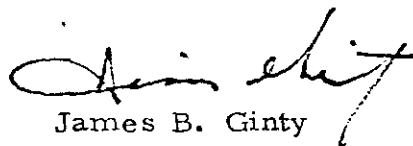
Appellants assert that they will be irreparably injured by the payment of funds to their political opponents and that a subsequent decision favorable to appellants will be ineffectual as to those monies. They argue for maintenance of the status quo. They contend that the FEC, the parties and the candidates will not be injured by an injunction since the nominating conventions are not until the summer and the first primary is not scheduled until February 24. Appellants point out that whatever expenses that need be incurred now can be met by private funds or by loans against which, they note, public funds could eventually be applied. Appellants also assert that in any event injury to the national parties and to the candidates is irrelevant since they are not parties to this case and have not chosen to intervene.

Appellants make extensive argument for not requiring a bond.

Discussion: It would seem that when a case is sub judice, absent compelling reasons for not doing so, the status quo should be maintained. Such compelling reasons are not obvious here.

I do not doubt too seriously that the Court has the power to enjoin the Secretary from making payments. However, enjoining the FEC from certifying probably is more appropriate in any event.

There are no responses as of now. I understand, however, that at least one of the appellees intends to oppose the application.


James B. Ginty

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 16, 1975

MEMORANDUM TO THE "WRITING TEAM" IN No. 75-436 and No. 75-437 -
Buckley v. Valeo

My circulation of last Friday did not deal with Certified Question 8(f) in the case, regarding the authority of the Federal Election Commission under § 9008 of the Internal Revenue Code to authorize expenditures of the national committee of a party in excess of enumerated limits. The reason I did not address this point in my memorandum was that my recollection was we had not discussed the point at all in Conference. I think it is apparent that the logical implication of what I have written is that the Commission, appointed as it is, could not constitutionally exercise the authority granted it under § 9008 of the Internal Revenue Code of 1954 any more than it could exercise the other grants of authority which my memo concludes are invalid.

Sincerely,

WHR

Copy to: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 17, 1975

Re: 75-436 - Buckley v. Valeo
75-437 - Buckley v. Valeo

MEMORANDUM TO:

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell
Mr. Justice Rehnquist

Enclosed is a "working" draft of the "preamble" to
our proposed per curiam.

Obviously each part must be edited to fit the others.

This can be expanded or contracted as needed when
we reach the editing stage.

Regards,

WES + B

December 17, 1975

No. 75-436/437 Buckley v. Valeo

Dear Chief:

As my trip plans require that I leave the Court at 1:00 p.m. on Thursday, I will not be able to attend the Conference on the application for a stay - rescheduled for 2:00 p.m. on Thursday.

I have reviewed the application, and am inclined to think that the equities are with the Appellants. To be sure, any action we take will be viewed as a "signal" of how the Court will decide the merits. If a stay (or "injunction") is granted, possibly it would be well to accompany it with a brief statement to the effect that in view of the complexity of the matter and the equities involved, we wish to preserve the status quo until the Court is able to reach a decision.

In short, and without the benefit of Conference discussion, I would be inclined to grant a stay.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 17, 1975

Re: 75-436 - Buckley v. Valeo
75-437 - Buckley v. Valeo

Dear Chief:

Unfortunately, I cannot attend tomorrow's conference on this case because I have a long standing engagement which requires me to be out of town all day Thursday and Friday.

I have gone over all of the papers now on file and my vote is to grant the injunction.

If a question comes up concerning requesting a response or other matter, I leave my vote with you on any other matter concerning the application as it now stands.

Sincerely,

J.M.

T.M.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 17, 1975

MEMORANDUM TO THE CONFERENCE:

On reviewing the papers I am satisfied
we need not meet today. ①

I suggest we have Conference at 2 pm
Thursday.

Regards,

WLB

Supreme Court of the United States
Washington, D. C. 20543

December 18, 1975

CHAMBERS OF
THE CHIEF JUSTICE

SUPPLEMENTAL MEMORANDUM FOR THE CHIEF JUSTICE

Subject: Buckley, et al. v. Valeo, A-550

1. Response to Application for Injunction.
2. Motion of Congressman Udall to Intervene.
3. Motion of Democratic National Committee for leave to file amicus curiae brief.

1. Response to Application: The SG, on behalf of the AG, and the FEC have filed a joint memorandum in opposition to the application for an injunction. They are joined by the other appellees.

Appellees argue that appellants have not demonstrated that they will suffer irreparable injury if an injunction is not granted. They contend that the payments sought to be enjoined will have no direct impact upon appellants. Eugene McCarthy, the only appellant seeking nomination or election, and appellant Libertarian Party, appellees note, have stated that they would not accept public financing.

Appellees argue that claims of injury to the political process is not enough and that the traditional rule is that individual litigants are entitled to a stay only if they show that its denial would inflict irreparable injury upon them personally.

Appellees answer appellants' argument that an injunction is necessary to preserve the Court's jurisdiction by noting that the certification at issue is but the first in a series which will be made under the Act.

Appellees urge that the public interest requires that the payments be made since most of the candidates for nomination have predicated their campaigns upon the assumption that the public financing provided for under the Act will be made. Absent the funds, serious and irreparable injury to the candidates and

to the public interest could occur by forcing one or more of the candidates out of the race, thereby denying the electorate the opportunity to make the fullest possible choice.

Discussion: Although I believe some question was raised in the CA and during oral argument, I am unaware of any serious standing issue that has been raised with respect to the public financing issue. Congress specifically gave the right of judicial review to "the national committee of any political party, or any individual eligible to vote. . . ." It would seem that the same "interest" sufficient to give this "standing" is sufficient enough interest to suffer irreparable injury if payments are made and, presumably, used in the election processes. Once disbursed, the funds will be applied to the various campaigns and the injury immediately and irreparably done. Even if the monies are subsequently recovered, the dramatic change in our political process and the momentary political advantage gained at the expense of public funds is the injury with which appellants are concerned. Moreover, the fact that Mr. McCarthy and the Libertarian Party have renounced public funds is not dispositive of any potential irreparable injury to them. At the least, their opponents would have the benefit of these funds, to the obvious political detriment of appellants.

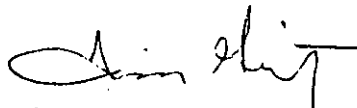
The equities argument is advanced in all or nothing terms. What is at issue here is a relatively short postponement of funding, pending decision on the merits. (This would appear especially true with respect to the candidates. If appellants' estimates are accurate, it would be at least the first or second week of January before payments are made in any event.) Appellees do not make a compelling argument that they cannot get by for such a period. Any argument that the Parties or candidates have relied on the use of these funds must be considered in light of their sure knowledge of this case.

The constitutionality of the statute being sub judice, it would seem that compelling reasons for not maintaining the status quo must be shown. Appellees have not made a convincing showing.

2. Motion to Intervene: Congressman Udall has been advised by the FEC that he is qualified to receive federal matching funds. He expects to receive approximately \$600,000. He claims irreparable injury if an injunction is granted in that he has relied on having the use of these funds for such political ventures as the Iowa presidential caucus scheduled for January 19 and the N. H. primary on February 24.

He claims that the application for injunction is a separate action concerning matters and parties not before the Court on the appeal. He argues that there has been no showing that the requested relief cannot be obtained below and that, as is regularly the case with injunctive actions, the USDC is the more appropriate forum for the evidentiary and fact-finding hearings that should be held. Congressman Udall's motion is opposed by appellants. They note that there is no authority to support such an intervention and that the Congressman's reference to the Fed. R. Civ. Proc. is inappropriate. They urge that allowing intervention would open the door to the approximately dozen or so other candidates. They note also that the Congressman has had ample notice of this action since its inception, having been notified by letter of one of the appellants on March 4, 1974. The letter specifically mentioned the possibility of a preliminary injunction.

3. Motion of Democratic National Committee, et al. to file an amici curiae brief in opposition to an injunction: In an essentially one page memorandum the DNC gets on the record in support of the position taken by the SG and the FEC. It states that it has entered into contracts and financial arrangements in reliance upon the availability of public funds and, in order to qualify for such funds, has neither solicited nor accepted private contributions to its Convention Committee. The various campaign committees for those seeking nomination have taken similar action. Amici urge that the effect of an injunction at this time will not be a preservation but a disruption of the political status quo.


James B. Ginty

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1975

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

Dear Chief:

I agree with the proposed order contained in your
circulation of December 18th.

Sincerely,

The Chief Justice

Copies to the Conference

December 18, 1975

Nos. 75-436 and 75-437 Buckley v. Valeo

Dear Chief:

Supplementing my note to you of yesterday, and following Thurgood's example, I give you a general proxy for the Conference this afternoon.

I have tried to keep abreast of the various papers filed. There are indeed important interests and equities on both sides, and one can understand the concern of the presidential candidates in particular. I still incline to the view, however, that the balance of the equities favors a stay.

I assume, in this connection, that a majority of us think that the major conclusions in Bill Rehnquist's draft probably are correct. In any event, I do not wish to be noted - however the vote goes.

The papers filed this week (after we did not bring the case down on Tuesday) reemphasize the importance of our reaching a prompt decision. I will circulate a draft of my "chapter" early next week. If all of the drafts are in, perhaps the drafting team should meet early in the new year.

I will be in Richmond for only three days (Tuesday-Thursday) of Christmas week. I plan to return to the Court on Friday, December 26, and will be available thereafter.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1975

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

Dear Chief:

I agree with the proposed order contained in your
circulation of December 18th.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1975

MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

In consideration of some of the papers filed in connection with the application for an injunction in this case yesterday, I had occasion to go over once again my treatment of jurisdiction, standing, and ripeness found at pages 6 through 10 of my memorandum. I now propose to insert a new paragraph on page 9, after the sentence in the fifth line concluding with the words "Article III". That paragraph would read as follows:

"We also note that while § 437h permits litigation of the constitutional issues in the case by the Commission and by the national committee of any political party, none of the actual plaintiffs appear to come within that description. But Congress in this section also authorized litigation of the constitutional issues by any voter, and several of the parties plaintiff qualify under that heading. We find it unnecessary to decide whether Congress might, consistently with Article III, confer standing upon voters to litigate the issues which we ultimately decide in this opinion, since we conclude that several of the parties plaintiff who are both voters and candidates do have the necessary standing.*/"

---

*/ Plaintiffs also asserted jurisdiction in the District Court based on 28 U.S.C. § 1331.

Sincerely,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 18, 1975

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

After receiving Potter's memorandum and draft I put my mind to the problem, and I think I would be willing to adopt the suggestion that I act on the application as Circuit Justice. If there are "five" who agree, I would add as the operative paragraph the following:

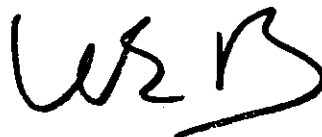
After consultation with such of the Justices as were available, constituting a quorum of the Court, and considering the factors to be balanced and it appearing there exists substantial doubt as to the constitutional power of the Federal Election Commission to make the certifications referred to above (see U.S. Const., Art. II, § 2, cl. 2);

IT IS ORDERED that the injunction for which application has been made be and it hereby is granted.

Washington, D.C.
December _____, 1975

Chief Justice as
Circuit Justice for the District
of Columbia Circuit

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 18, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 75-436, Buckley v. Valeo
No. 75-437, Buckley v. Valeo

Enclosed is a rough draft reflecting the
view I expressed at the Conference this afternoon.

P.S.

P. S.

PS draft

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1975

Nos. 75-436 and 75-437

JAMES L. BUCKLEY, ET AL.,

Appellants,

v.

FRANCIS R. VALEO, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT AND THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

The Appellants have made an application to the Chief
Justice, as Circuit Justice for the District of Columbia Circuit,
"pursuant to Rules 50 and 51 of this Court, for an injunction
against appellees Federal Election Commission, Francis R.

Valeo, and Edmund L. Henshaw, Jr., restraining them, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from making certification under 26 U. S. C. § 9036(a) for payments to finance the campaign activities of certain candidates for nomination for election to be President of the United States and from making certification under 26 U. S. C. § 9008(g) for payments to finance certain presidential nominating conventions, pending entry of final judgment in this action. "

The Chief Justice has referred the application to the Court.

It appearing that there exists substantial doubt as to the constitutional power of the Federal Election Commission to

- 3 -

make the certifications referred to above (see U. S. Const.,
Art. II, § 2, cl. 2), it is ordered that the injunction for which
application has been made be and it hereby is granted.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 19, 1975

Re: Nos. 75-436 & 75-437 - Buckley v. Valeo

Dear Chief:

I have indicated that I would not issue an injunction in this case at this time. Briefly, the reasons for this are as follows:

Any statute of Congress is presumptively valid, and it goes without saying that courts do not routinely issue a restraining order or preliminary injunction when complaints are filed seeking to enjoin the operation of a federal statute on constitutional grounds. Here, the Court of Appeals has refused to strike down the statute; and we have voted to sustain the statute in major respects, including the provision for public financing of primary and general election campaigns. If we anticipated sustaining the Act in all respects, clearly we would not now issue an injunction. Nor should we do so at this juncture simply because we expect to hold the Federal Election Commission to have been illegally constituted and incompetent to enforce the Act, including the public financing provisions at which the application for injunction is aimed.

When we ultimately announce our judgment that the public financing law is valid but may not be enforced by the Commission as it is now constituted, I would vote [to hold the prior acts of the Commission to be de facto valid and would, if necessary, stay our judgment to give Congress a chance to provide a valid enforcement mechanism.] Except for the method by which the officers enforcing it have been appointed, the law contemplating public financing is constitutionally valid. If the Commission were to be reconstituted or other valid procedures provided, the flaw would have been cured without interrupting the enforcement of those provisions which we shall sustain. The reapportionment cases, as well as the others, are ample precedent for not invalidating

past actions of an official body which we have held to have been elected under an invalid plan and to give legislative authorities at least a brief opportunity to put their house in order. Injury to the public interest in that way is avoided.

It is therefore difficult for me to join an injunction order whether or not it contains an explanatory word. It may be, of course, that Congress would scrap the financing scheme rather than to reconstitute the Commission or invent some other enforcement scheme. It is true that there is some nexus between the expenditure limits, which will be invalidated, and the public financing provisions; but the latter are in the main separate and apart from the rest of the statute and are financed by funds Congress already has in hand by way of taxpayer contributions. I could be wrong, but the odds heavily favor Congress saying at least this part of the new law. The chance that they will not does not warrant taking the serious step of suspending public funding simply because the Commission has been improperly appointed. Since we have the tools to avoid this, the injunction seems a gratuitous interference with federal legislation and with the progress of an election campaign in accordance with the congressional plan.

Sincerely,



The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 19, 1975

Re: Nos. 75-436 & 75-437 - Buckley v. Valeo

Dear Potter:

If the draft you circulated on December 18 in this case becomes an order of the Court, please note at the foot thereof that Mr. Justice White would deny the application for injunction.

Sincerely,



Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 19, 1975

Re: Nos. 75-436 & 75-437 - Buckley v. Valeo

Dear Chief:

If as Circuit Justice you enter the order you have suggested in your December 18 note, and if the order continues to refer to consultations with other Justices, I request that at the foot of your order you note that Mr. Justice White would deny the application for injunction.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 19, 1975

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

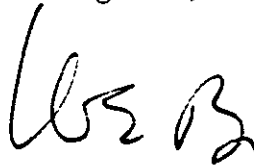
I have Byron's request that his view be noted on any order which I would enter as Circuit Justice. He requests that my order carry a notation of his view.

I know of no basis or precedent for the order of an individual Circuit Justice to reflect a "dissenting" view. However, I can understand his posture in light of the "consultation" reference. If there is any precedent for Byron's suggestion, it is one I am unwilling to follow because the two concepts are mutually exclusive.

The matter will therefore remain as "pending" before the Conference unless four join me for Conference action today.

Justices Blackmun and Rehnquist have agreed with my December 18 memorandum.

Regards,

A handwritten signature in dark ink, appearing to be "WRB", written in a cursive, stylized script.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 19, 1975

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

Dear Chief:

I would agree with what is suggested in your memorandum of December 18.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 19, 1975

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

Since all hands will be available Monday,
December 22, I suggest a Conference on the above
at 10:00 a.m.

Regards,

A handwritten signature in dark ink, appearing to be "WB", written in a cursive, stylized manner.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

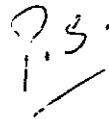
December 22, 1975

Re: Buckley case, A-550.

Dear Chief;

I agree generally as to form
with the proposed order you have circu-
lated. Your draft is herewith returned
with a minor suggestion noted in pencil.

Sincerely yours,

A handwritten signature in dark ink, appearing to be the initials "P.S." with a stylized flourish underneath.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 22, 1975

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

Each of you now has the "work drafts" thus far submitted.

The two remaining sections will be in your hands soon.

I suggest that, addressing substance, not form, you indicate whether you are in general agreement or dissent.

This will enable a draft to be put together.

Obviously each of the parts must be reworked to fit the whole when we are ready to work on form.

Regards,

WLB

MONDAY, DECEMBER 22, 1975

ORDER IN PENDING CASE

75-436) BUCKLEY V. VALEO
)
75-437) BUCKLEY V. VALEO

An application to enjoin appellees from making certification pursuant to 26 U.S.C. 9036(a) for payments to finance campaign activities of certain candidates for nomination for election to be President of the United States and from making certification pursuant to 26 U.S. C. 9008(g) for payments to finance certain presidential nominating conventions, pending final disposition of the appeals in this Court, was received by the Chief Justice December 17, 1975, and after calling for a response he presented the said application to the Court.

Upon consideration of the said application for an injunction, and of the opposition thereto filed by the Solicitor General of the United States, December 17, 1975, it is ordered that there being no majority to grant the injunction, the said application is denied.

The Chief Justice, Mr. Justice Stewart, Mr. Justice Blackmun, and Mr. Justice Rehnquist would grant the injunction.

Mr. Justice Stevens took no part in the consideration or disposition of this application.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 22, 1975



RE: No A-550 - Buckley case

Dear Chief:

I agree.*

Sincerely,

Bice
GB

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE POTTER STEWART

December 22, 1975

Re: Buckley case, A-550.

Dear Chief,

I agree generally as to form
with the proposed order you have circu-
lated. Your draft is herewith returned
with a minor suggestion noted in pencil.

Sincerely yours,

The Chief Justice

Copies to the Conference

December 22, 1975

No. 75-436 Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

I circulate herewith a first draft of the "disclosure" section of our opinion.

You will observe that my draft is written on the assumption that it follows Potter's section dealing with contributions and expenditures.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 22, 1975

Re: No. A-550 - Buckley case

Dear Chief:

I agree with the proposed order.

Sincerely,

T.M.
T.M.

The Chief Justice

cc: The Conference

Date: Dec. 23, 1975

Nos. 75-436, 75-437 Buckley v. Valeo

Brennan's draft Unless you are inclined to change the way
you voted at conference, you should concur in this. I would
prefer a less conclusory analysis, but that's not the sort
of thing you can insist on. In fact, I doubt that this section
can be written any other way. If the court does not want to hold
the provisions unconstitutional because of their discriminatory
impact on minor parties, there is no point in looking more
closely. As my earlier memo indicated, I am troubled by the impact
of this legislation on minor parties -- especially in combination
with the contribution limits. That may influence my reaction to
the draft. I am bothered, for example, by the repeated references
to the fact that minor parties are not subject to the expenditure
limits -- as if Congress had carefully balanced the interests and
insured that everyone got a quid pro quo, when in fact the
inapplicability of the limits is a mere accident of our decision.
On page 20, the opinion says that there has been no showing that
public financing reduces minor party strength below the
strength they attained without public financing. But, of course, the

argument is that it ~~will~~ will reduce their relative strength by increasing that of major parties. The same flaw is present in the argument on page 10, that there is no ~~abridgement~~ abridgement on First Amendment rights. The point is that appellants argue that the speech impact of minor parties is diluted by the increase in the exercise of speech on the part of the major parties.

⑤ I also find the analysis distinguishing the ballot-access cases (p. 21) a little off-base. The argument ~~goes:~~ In the ballot access cases, candidates had two alternative means for ~~xxxx~~ a single objective (getting on the ballot). Brennan characterizes appellants' position as arguing that ~~xxxxxxx~~ / FECA provides only one method for ~~xxxxxxx~~ attaining an objective ~~xxx(Brennanxxxxxxx)xxxxxxx~~ (getting pre-election funds). Brennan says that the ballot-access cases are not controlling because the the real objective here is to carry on a campaign and there are two ~~xxxx~~ routes (public and private financing) to that end. I would make a different analysis: The goal, in ballot-access ~~xxxx~~ cases and here, is election. Getting on the ballot and getting adequate financing are both critical to that end, because their denial to some and granting to others gives the latter group a great advantage. The ballot-access cases required at least two means to ballot-access; similarly, two means should be required for public financing. (See my earlier a lengthier memo for ~~xxxxxxx~~ discussion).

Justice Rhenquist's draft. The result is sound and I would concur. I understand Justice Rhenquist's clerk will be polishing, etc., over Christmas. Justice White's opinion is, unfortunately, ~~xxx~~ much more clear and persuasive than Rhenquist's. An ideal section on the Commission would have Rhenquist's discussion of the constitutional

convention, which is very thorough and ~~xxx~~ scholarly (White's is cursory and conclusory), and Justice White's analysis of the (The result of the two opinions is essentially the same.) problem and definition of the holding. / I would urge you ~~to~~ also ^{to} concur in Justice White's opinion, ~~except~~ ^{were it not} for the legislative veto discussion. I think ^{the} / discussion of the "legislative veto" is too simplistic. It turns on the argument that the President has the power to veto the bill that provides for the legislative veto and that power is sufficient to protect the interests of the Executive. ~~What if~~ But what happens if the President vetoes the bill and Congress passes it over his veto? ~~xxxxxx~~ Is White devising a new test for constitutionality dependent on whether the bill was approved by the President or passed over his objection? If not, could Congress approve a bill over a Presidential veto that, say, set up a commission to regulate interstate commerce by regulations and rules subject to a legislative veto? This would take all power over that particular ~~xxx~~ field out of the hands of the Executive permanently. yes

The Chief's draft. I don't know if you are to "concur" in this or not, since it has no holding. I really think it's a poor introduction to such an important case. Especially troublesome ^(a) is the lengthy discussion of the Court of Appeals opinion. ~~xx~~

yes That is all repeated -- inevitably -- in each substantive section, as well as in the synopsis of the appellees' arguments in the introduction itself. I also think it important to add some

^(b) summary of the Court's holding. If I were redoing the introduction ^(c)

I would include: a longer discussion of the importance of the case,

^(d) a discussion of standing and other points of justiciability, a more

^(e) extensive discussion of the statutory scheme as a whole, a history

of the litigation with a mere notation of the holding below, the contentions of the parties (this would be optional), and a summary of the holding. ~~IxHx~~ I don't see that you can do anything about this, but it might be appropriate to suggest that a summary be added -- and that the discussion of the decision be reduced to avoid repetition.

Justice Stewart's draft. This has not yet circulated. I have read Ron's version before the Justice worked on it. Ron has reported that it is greatly reduced in length but not changed in substance. I am sure that I will have no objections to it, and suggest that you concur. I will try to get a draft to take with me if I cannot get one before I leave and will call you if I see any problems.

→ I failed,
It's still
being
typed.

Chris

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 24, 1975

MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

Herewith are my tentative reactions to the drafts thus far circulated:

C.J.: I think this is probably the hardest to organize, because decisions will have to be made as to how much of the facts, issues of standing and ripeness, and the like, should be treated here, and how much in the portions dealing with the substantive issues. I am content to leave the matter in your hands, Chief.

WJB: I agree with the basic thrust of your opinion, Bill, insofar as it holds up payment out of the public treasury for the expenses of a federal election campaign is permissible under the congressional spending authority. I disagree only with that part of your opinion which treats that the issues raised by the minor parties -- issues which you describe as based on the Fifth Amendment but with First Amendment overtones. Because I believe that the First Amendment should be applied more stringently to Congress than to the states, in view of its language, and because the states in actually conducting the elections seem to me to be faced with a sort of necessity of decision with respect to minor party ballot access which Congress is not

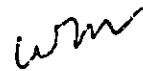
faced with in its optional determination to finance campaigns, I disagree with your resolution of some of these issues. I will write a very short and sketchy dissent, which I am confident will persuade no one who is not already persuaded.

LFP: I am in substantial agreement with your treatment of the issues of disclosure, Lewis.

BRW -- WHR: I think Byron and I are in substantial agreement on the validity of the Federal Election Commission. The reason that I would not decide the question of one House veto, which Byron would decide, is that it is not necessary to decide it in view of the resolution of the appointment issue, and I think it is a sufficiently doubtful and multi-faceted question that we should not express a view upon it before we are required to do so.

Merry Christmas and Happy New Year.

Sincerely,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 29, 1975

MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

Over the week-end I read through the draft segments that have been circulated in the presumed order of their appearance in the final opinion, *i. e.*, drafts of CJ, PS, LFP, WJB, WHR and BRW. Let me say at the outset that I agree with the results reached in each of the drafts, and basically with their substantive expositions.

My more specific tentative views are these:

CJ: The introduction was drafted without benefit of seeing most of the draft segments. Considering that you were "flying blind," so to speak, I think it is an admirable job. In view of the drafts that have now been circulated, I suggest the desirability of considering amending the draft to set out in some detail the statute itself, to discuss the facts and identify the parties, and to discuss the related questions of standing and why this is a case or controversy rather than a request for a supervisory opinion. (This would include material now appearing in footnote A of the LFP draft and on pages 6-10 of the WHR draft.) I would suggest that the detailed discussion of the Court of Appeals opinion, now appearing on pages 5-10, be eliminated or at least sharply reduced.

PS: I have already made some stylistic revisions and shall welcome suggestions and criticisms.

LFP: I think the primary problem is to dovetail this draft with those of WJB and PS. Although I found remarkably little repetitiousness, there is some, and I suggest that a good deal can be done at the cooperative law clerk level, to eliminate repetition, apparent inconsistencies, and differences in emphasis.

WJB: Here again, I think the primary problem is one of dovetailing, and I suggest the same approach as with the LFP draft. I have some problems of language and emphasis that I shall be glad to communicate directly to WJB or through our respective law clerks.

WHR-BRW: I would be very hopeful that these two authors can get together to produce a consolidated segment, because, while agreeing with each excellent draft, I think they have complementary strengths. In view of the inevitable length of the overall opinion, I suggest that much of the very interesting historical material now appearing on pages 19-29 of the WHR draft be eliminated, or at least relegated to footnotes. I should suppose that if these drafts are consolidated, the consolidated version would simply not deal with the one House veto question, and that Byron would set out his views on that issue in a separate opinion, which any of the rest of us would, of course, be free to join.

Happy New Year

PS,
✓

Supreme Court of the United States
Washington, D. C. 20543

FILE COPY

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 29, 1975

PLEASE RETURN
TO FILE

No. 75-436 Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

Potter's memorandum to the Conference of December 29, reached me just as I was preparing to write one myself. In general, my views are in accord with his. Subject to what is said below, I am generally in accord with the drafts that have been circulated.

C.J.: In revising your fine "flying blind" draft in light of the substantive drafts now available, Potter has identified the obvious changes. I agree that the detailed discussion of the Court of Appeals opinion can be eliminated or greatly reduced, as much of this is repeated in the substantive sections.

WJB: I am generally in accord with the result. I may have some language suggestions that I will convey to Bill. My only substantive concern relates (as I indicated at Conference) to the allegations of invidious discrimination against new and minor parties. I would prefer saying that, on the record before us at this time, we cannot say that the Act is facially violative of equal protection, and leave the door open to the possibility of such a factual showing in a subsequent case.

PS: I am in substantive agreement, although I may have some language suggestions. Also, I will suggest the addition of a paragraph or two pointing out that although Congress attempted to justify § 608(e) as necessary to close loopholes, it left corporations and labor unions - at least in major part - free from the principal restrictions of the Act. I view this as a vastly larger loophole than any Congress undertook to close. The techniques identified and approved

by the Court in Pipefitters enable these aggregations of large resources to exert an immeasurably greater influence on government than individuals who seek to purchase ambassadorships or other political plums.

I also have the conviction that the overall effect of the Act, if not indeed a stimulus to its passage, is to benefit incumbent members of the Congress. Our invalidating of § 608(e) and the ceiling on overall campaign expenditures substantially ameliorates the Act's original disadvantaging of challengers. Perhaps we need say nothing more, although I would welcome at least a footnote in Potter's section recognizing the possible merit of appellant's argument in this respect and noting that our decision substantially blunts the force of appellant's argument.

WHR-BRW: I agree with Potter that a consolidation of the White/Rehnquist drafts would be desirable. They do indeed have complementary strengths. I personally like Bill Rehnquist's discussion of the constitutional convention which is thorough and scholarly even if a bit long. I am also impressed by Byron's analysis of the problem and definition of the holding, although I consider the result of the two memoranda to be essentially the same and I could join either one. Indeed, I think both are excellent drafts.

My one reservation (at the moment I think it is my only one of substance) relates to the "legislative veto" issue. I would prefer Potter's suggestion that we save this for another day. If we must address the issue, I am not yet persuaded by Byron's view.

Future Procedure: The greatest need for "dovetailing" the drafts is with those of WJB, PS and LFP. I agree that our three Chambers should go to work promptly with the view to harmonizing these drafts, and recirculating them to the Conference.

L.F.P. Jr.
L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 29, 1975

PERSONAL AND CONFIDENTIAL

Re: 75-436 - Buckley v. Valeo
75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

I have Potter's memorandum of December 29, 1975, with his first draft of Part IV, and Lewis Powell's draft of Part II. These two sections will require more "dovetailing" than any other two parts, as I see it. There is a good case for Potter and Lewis to try to come up with new drafts that make Part II fit with Part IV. Byron and Bill have, as Potter noted, some chance of producing a larger segment acceptable to both.

I see less "dovetailing" between Bill Brennan's Part III and others, but anyone having comments can send them to Bill.

To be specific, I suggest we now proceed as follows:

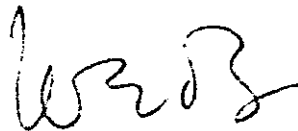
1. That Potter and Lewis try another "run at their respective parts working together.
2. That Byron and Bill Rehnquist see if they can find additional common ground and give us another draft.
3. That anyone having thoughts on Part III feel free to give comments to Bill Brennan; I doubt his Part III can be dovetailed with other drafts in their present stage.
4. I will defer circulating any major revision of what we now call Part I until I see how much detail of the Act is in each final part. As I see it, each part must treat the sections of the statute it deals with.

- 2 -

When we have our next "round" I would think we would want to consider a new sequence not necessarily conforming to Parts I - V as presently designated. What is now Part I for present purposes may need no numbering at all.

May I suggest that for clarity each part keep its present numeral and use lettering (A, B, etc.) for major sub-parts and (1), (2), (3) for subdivision where needed. Others will be able to address specific comments more easily in this way.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB' or similar, written in a cursive style.

Buckley Falls

My sketchy outline
of my section of Opinions
12/30/75

Buckley

75-436

I (p6 §-13)

Discussion of applicable law
(NAACP v Ala, etc; O'Brien)

Identification of govt. interests - p 11

p 6?

II (p14-

~~A~~ A

Disclosure Requirements said to
be overbroad as to minor parties
& ~~independent~~ independent candidates.

Appellants rely on Alabama

~~We hold Ala. not applicable~~

B

Recognize arguments of Appellants
but no ev. presented in their
case comparable to Ala.

C.

Discusses "less restrictive"
alternatives

D

Evidence of injury - courts
should be flexible in protecting
~~minor~~ minor parties

Buckley

III (pp 23-33)

§ 434(e) requires disclosure of contributions & expenditures above \$100 "other than by contribution to a pol. com. or candidate" by filing a statement with the Commission.

This does not require the contribution list of any "political association" (defined term?)

A.

appellants ~~rely~~ rely on Tally - saying this is intrusion on privacy.

We note that the "expenditure" provisions of 608(e) have been invalidated. Thus if sole function of 434(e) were ^{to aid in enforcing 608(e)} ~~related to expenditures~~, this would end discussion.

But we think 434(e) was intended to stand independently of ~~§ 608(e)~~ 434(e) serves the disclosure purposes of the Act of '71 & '74.

III (continued)

B, (p 25 ~~F~~ - 28

But language ^{of 434(e)} raises vagueness problems.

It applies to "every person
---- who makes contributions or
expenditures." "Contributions"
and "expenditures" are defined
in ~~these~~ terms of the use of
money "for purpose of influencing"
nomination or election "for office."

Discuss "slipperiness" of
distinction between advocating
election or defeat of a candidate
& The discussion of issues (27

C (28

no leg. hist. as to meaning
of 434(e)

We conclude that "contributions"
in 434(e) ~~is~~ has same meaning
as in ~~645(e)~~ 591(e)

But def. of "expenditures"
presents difficult line drawing (30)

Expenditures by "political committees"
as defined - OK (30,31).

But when an "individual" or a
group (other than pol. com), we must construe
expenditure narrowly.

III Cont

Construct "expenditure" (by individual or group) to apply only to express advocacy of election or defeat of an identifiable candidate - 32

Summary on p 32

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 30, 1975

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo)

MEMORANDUM TO THE CONFERENCE:

Tentative reactions to first work drafts circulated:

PART I: Statement of Facts and Contentions, Etc.

As my cover memo indicated, I will not circulate a revised version until after all "parts" are more or less final.

As to the submissions on Parts II, III, IV and V, the authors have done an exceptional job under great pressure and we now have the raw material at hand.

My observations, unfortunately, will be largely questions and only a small amount of solid conclusion.

As to the Part II work draft submitted by Lewis, I have the following comments, all tentative except when otherwise indicated.

(1) I am in complete agreement that the disclosure to the public is the soundest means of protecting the values and correcting the evils of large contributions and large expenditures -- the "buying" of public office and the undue influence of contributors. Nothing could be more wholesome and consistent with our tradition as an open society.

(2) I agree that line drawing is the business of legislatures, not judges. But this is not without limit. Were it not for Burroughs I would have great trouble going along with requiring contributors of \$11 to disclose their names. The impact of this on "working persons" who desire to help a candidate who is unpopular with management (ranging from Wallace to McGovern), is bound to be "chilling" (much as I dislike that vague, all-embracing word). Or take a

member of the Teamsters' Union who wants to contribute \$200 to Senator Kennedy or some candidates not loved by the Teamsters' Union leadership. I am troubled by how to "square" this with what we have said in the context of NAACP membership lists, for one example. Disclosure of a \$100 contribution probably falls nearer to the power of legislators to do the line drawing, but I cannot put away a conviction that it will operate to stop some junior executives from contributing to Carter, McCarthy or McGovern if the "Boss" is on the Wallace, Reagan or Jackson finance committee. Certainly, not too many truckdrivers will contribute to someone out of favor with Jimmy Hoffa's successors.

Lewis recognizes this (at p. 10), recalling his own statement that "financial transactions can reveal much about a person's activities, associations and beliefs." (416 U.S., at 78). I accept fully Brandeis' proposition on "publicity . . . as a remedy," but that statement was not directed at de minimis items such as \$10 or even \$100 contributions. Given our new attitudes toward breaching what was once thought protected privacy (see Rose draft opinion), can we be so sure that the Teamsters' Union or General Motors will not be able to secure the \$10 contribution lists under FOIA? In short, it will be too late to do a truck driver any good if he is left in doubt -- as I am -- that the \$11 contribution will not come to the notice of Jimmy Hoffa's successors in office. I am not at rest here. *on*

PART II (p. 13): Contributions to Minor Parties

I am concerned that we have not as yet, in this first draft, fully met the contentions as to the "depressant" impact on minor parties.

PART II (p. 23): § 434(e) Filing Statements of \$100 Contributions, or More

My problem with the treatment is that I wonder if, to save the section, we do not "redraft" the statute. If the Court could not accept and find the narrow construction urged by the city in Talley v. California, I find it difficult to justify the result reached here. ?

PART II (p. 36): § 434(d) Exemption of Special Services to Incumbents

This is one of the examples of the preferred position the Act gives incumbents. However, I regard it as peripheral if not de minimis and could accept it as valid.

We invited them to prove their claim

PART III: Public Financing

Here I seem to have little company in my doubts. That the scheme is a manifestation of the idea of recent years that we should let-the-government-do-it, is no doubt open to the answer that this is a policy argument. Public funding is a convenient way to finance election campaigns, and I think I could readily accept it on a constitutional basis if the dollar was added to the tax bill. Under the Act, the taxpayer simply tells IRS to give public money for political parties from the aggregate revenues received. I wonder if this is compatible with our political process as an enterprise of private volition? I agree that the scope of Congressional powers under the welfare clause is perhaps wider than anywhere except perhaps "war powers." I cannot escape the feeling that it is not the business of government to let private citizens "assign" tax revenues to finance political campaigns for anyone. If the government added \$1 to each tax bill and act as a conduit to transfer the donor's money, it might be quite different.

The general welfare clause does not seem to me to embrace financing political activity from tax revenues as distinguished from providing public services to all people (i.e., maintenance of the actual electoral process). It might be within the purview of the general welfare clause to provide transportation to voting places for that is neutral if it is universal, but here the very conduct of the political contest is being financed by revenue belonging to all people, i.e., the government. Of course, the Act allows only some people to allocate funds from the public treasury. Since a long-time welfare recipient pays no tax, he is not allowed to "assign" government funds to political parties. Does it deny equal protection to let a taxpayer "get in this act" and deny the same right to the "permanent poor"? I cannot escape a feeling that it does. I doubt that I can join in the Part III result. !

PART IV: Contribution and Expenditure Limitations.

B(1) Expenditure Limit: I agree generally with the treatment and conclusion that the expenditure limit violates constitutional guarantees...

B(2) Contribution Limit: I have some questions that need to be resolved as to the constitutionality of the contribution limit. Tenatively, it seems to me that most of the statements supporting a

holding of unconstitutionality of expenditure seem to apply with almost equal force to contributions. (I agree fully that the public disclosure provisions comport with the Court's First Amendment pronouncements of the past.) The draft analogizes (p. 15) contribution limits as one that "primarily effects the contributor's freedom to associate rather than his freedom of speech" and "entails only a marginal restriction upon free communication." But if we will not allow limits on spending, why can Congress curtail what we say is a "freedom to associate"? Is it an answer to say "But we do not totally curtail this 'right to associate,' we simply let Congress limit it"? Could Congress say that a "John Wayne" can lawfully attend only ten meetings of a McCarthy committee? As I see it, a "John Wayne" sitting on a candidate's platform in the TV frame or introducing the candidate would be worth a large amount with certain constituencies. Substitute Averell Harriman for John Wayne and Senator Jackson for McCarthy; or substitute Senator Kennedy for John Wayne. In short, if we analogize money contributions with "freedom to associate," which we say can be limited, how is it that other forms of "associations," as in the above hypotheticals, cannot be limited. ?

If I were George Wallace or Senator Jackson, I would rather have Senator Kennedy introduce me for a half-hour network TV speech than have his \$100,000. Yet Stewart Mott, who would be a zero asset on TV, cannot lawfully pay the \$100,000 tab for the same network speech. Somewhere in here there may lurk an equal protection issue as between "clods" with millions and notables like Averell Harriman and Senator Kennedy, (who have both millions and large political followings.) Each of these notables would do more for a candidate by sitting alongside him on one TV show than by contributing \$100,000 to pay for the TV time.

The draft states "The Act's contribution ceilings affect only one means of associating with a candidate . . . , " but that may be the only effective "means of associating" for a verbally inarticulate or unknown fellow who has \$100,000 to give to finance the network speech, or pay for a full page ad in every metropolitan daily. I question that Congress can make it unlawful for Stewart Mott to contribute \$100,000 while a Harriman or Kennedy can "fertilize" the campaign of his candidate in other and better ways without money passing.

I have difficulty avoiding both First Amendment and Equal Protection problems to curtail the non-affluent candidate's money-raising, yet allow Rockefellers, Kennedys, Harrimans, et al. to spend

their own money freely. This is hardly "evenhanded." Is it less "free speech" to spend money received from others than to spend your own? I wonder if we are being entirely consistent? The enormous built-in advantages of incumbents is further enhanced when the challenger is restricted on both contributions and spending. This has some undertones of equal protection, the more so if the opponent is both incumbent and affluent. I get some "rich vs. poor" vibrations out of what we have had to say, in other contexts, but not totally irrelevant.

Much the same considerations work to the disadvantage of "new" parties. To single out Senator Buckley to illustrate the contrary is to use the rare exception to establish the validity of what seems to me to be a questionable generalization. Buckley was not a typical new or minor party man. He had a then powerful incumbent President helping him by battering Mr. Goodell, the nominal Republican, to say nothing of "Republican financing."

B(3) The \$5,000 Committee Limit: There are only 16 lines devoted to this point and I am not sure it makes the case in this first draft. Here I have not come to rest.

I recapitulate as to specific provisions:

B(4) (p. 32) \$500 Limit on Volunteer's Expenses: An "Averell Harriman's" right to tour the country lecturing and speaking for "Governor Reagan" seems to me to have some First Amendment problems we have not really overcome. I am not fully at rest.

B(5) (p. 34): This \$25,000 "calendar year" limit may well be a "quite modest restraint" but to sustain it will require some distinguishing, if not overruling, of some of our prior rhetoric, if not law.

C(1) (p. 35) Expense Limit § 608(e)(1): On this part, I agree that § 608(e)(1) is unconstitutional but I have difficulty reconciling it with sustaining other restraints which seem equally to trespass constitutional limits.

C(2) (p. 37) \$1,000 Limit Spent For "A Clearly Identified Candidate" § 608(e)(1): I agree generally (pp. 37-51), but again have difficulty reconciling it with other conclusions sustaining parts of the Act.

C(3) (p. 51) Expenditure Limit on Candidate From Personal or Family Resources § 608(a)(1): I agree with the conclusion but have difficulty with the idea that Stewart Mott or Senator Kennedy can spend

millions of personal money unrestricted by the Act, but Senator Jackson, who presumably has no such resources of his own, is restricted.

(Equal protection via the First Amendment?) If Brandeis is correct (p. 52), that "public discussion is a political duty," a rich man has a better First Amendment going for him than those who must pay for their exercise of the First with other peoples' contributions. Why isn't the "dollar evil" sufficiently protected by public disclosure that Stewart Mott picks up the \$100,000 tab for Eugene McCarthy's national network TV speech?

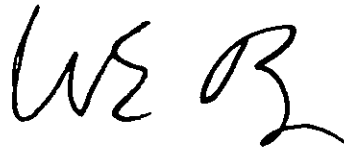
C(4) (p. 54) Limits on Campaign Expenditures § 608(c):

I agree that § 608(c) is unconstitutional but, again, have difficulty reconciling the result with provisions of the Act sustained as valid. The "skyrocketing costs of election campaigns" is used here in a way that seems inconsistent with precisely arguments on the same subject supporting restraints of the Act; it seems also in conflict with Bill Brennan's Part III.

PART V:

I am in general agreement with Bill Rehnquist's approach, and I am hopeful a larger area of agreement will be reached by Byron and Bill.

Regards,

A handwritten signature in dark ink, appearing to be 'W. E. B. DuBois' or a similar name, written in a cursive style.

Buckley File

1975?

~~LIBRARY~~

SUPREME COURT, U. S.

HIGHLIGHTS

FEDERAL ELECTIONS-

FEDERAL ELECTION COMMISSION

PUBLISHES AN ADVISORY OPINION

ESTABLISHMENT OF POLITICAL ACTION COMMITTEE AND
-EMPLOYEE POLITICAL GIVING PROGRAM BY CORPORATION

FEDERAL ELECTION COMMISSION

[Notice 1975-83]

ADVISORY OPINION

The Federal Election Commission announces the publication today of Advisory Opinion 1975-23. The Commission's opinion is in response to questions raised by individuals holding Federal office, candidates for Federal office and political committees, with respect to whether any specific transaction or activity by such individual, candidate, or political committee would constitute a violation of the Federal Election Campaign Act of 1971, as amended, of Chapter 95 or 96 of Title 26 United States Code, or of Sections 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 United States Code.

The Commission points out that this advisory opinion should be regarded as an interim ruling which is subject to modification by future Commission regulations of general applicability. In the event that a holding in the opinion is altered by the Commission's regulations, the person to whom the opinion is issued will be notified.

ADVISORY OPINION 1975-23

Establishment of Political Action Committee and Employee Political Giving Program by Corporation

In this advisory opinion, rendered pursuant to 2 U.S.C. §437f, the Commission responds to a request for an advisory opinion submitted by the Sun Oil Company and published as AOR 1975-23 in the Federal Register on July 29, 1975 (40 FR 31879). Interested persons were invited to submit written comments with respect to this request. A number of such comments were received and considered by the Commission before this opinion was issued.

A. Introduction

Sun Oil proposed to sponsor a bifurcated responsible citizenship program for political activities. One part of this program will involve the expenditure of general corporate treasury funds to establish, administer, and solicit voluntary contributions to a political action committee. This committee (hereinafter SUN PAC) will be maintained as a separate segregated fund and used by Sun Oil for political purposes under the provisions of 18 U.S.C. §610. The other part of this program will involve the expenditure of treasury funds to establish and administer a "trustee" plan. Under this plan (hereinafter SUN EPA) Sun Oil will open separate bank accounts for participating employees in order to channel

their contributions to candidates for political office. The activities of SUN EPA will be separate and apart from those of SUN PAC.

The Commission has been asked to evaluate SUN PAC and SUN EPA with respect to the requirements of the Federal Election Campaign Act of 1971, as amended (hereinafter the "FECA" or the "Act") and the proscriptions of 18 U.S.C. §610. In the following opinion, the Commission will discuss various legal aspects of corporate segregated funds and trustee plans.

B. Applicable Law

Section 610 of Title 18 of the United States Code provides, in pertinent part, as follows:

Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or [officials] to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any . . . political committee . . . to accept or receive any contribution prohibited by this section.

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization in connection with any election to any of the offices referred to in this section; but shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization . . . .
Provided, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

The history of section 610, prior to its amendment by section 205 of the Federal Election Campaign Act of 1971, was set forth in United States v. UAW, 352 U.S. 567 at 570-90 (1957). Moreover, the history of the 1971 amendment, which permits corporations to establish, administer and solicit contributions to separate segregated funds, was discussed in some detail in Pipefitters Local 562 v. United States, 407 U.S. 385 at 409-13, 421-27, 429-32 (1972). See also, United States v. CIO, 335 U.S. 106 (1948). There is no need, therefore, to trace that history here in any detail. However, some general conclusions can be made in light of legislative history about the application of section 610 to the corporate political activities proposed by Sun Oil.

C. Conclusions.

(1) First, it is lawful for Sun Oil to expend general treasury funds to defray expenses incurred in establishing, administering, and soliciting contributions to SUN PAC so long as it is maintained as a separate segregated fund. The language of section 610 and the supporting legislative history of the 1971 Amendment to the statute plainly permits such expenditures. See, Pipefitters, supra, at 429-33. SUN PAC must register and file reports just as any other political committee is required to do under the FECA.

(2) Secondly, it is lawful for Sun Oil to make any political contributions and expenditures it sees fit in connection with any Federal election so long as the monies used for such purposes are expended from SUN PAC and the fund consists of voluntary contributions.

In situations where SUN PAC makes contributions or expenditures in connection with Federal and non-Federal elections, it may establish and maintain a separate account for use in Federal elections. Thereafter, monies to be expended in non-Federal elections should not be commingled with monies to be expended in Federal elections. SUN PAC should designate the bank in which it maintains any such account for Federal elections as the campaign depository of the fund. 2 U.S.C. §437b. All contributions received or expenditures made in connection with Federal elections

should be deposited in or drawn from this account. If SUN PAC so decides to maintain a separate account for use in Federal elections, it may file reports pertaining only to the separate Federal account. However, if SUN PAC fails to segregate the accounts and monies to be used in connection with both Federal and non-Federal elections, then SUN PAC will be required to report all contributions and expenditures regardless of whether they are made for non-Federal purposes.

Any political contributions or expenditures made by SUN PAC are subject to the applicable reporting requirements of the FECA and the limitations of 18 U.S.C. §608. Moreover, since individual contributions made to SUN PAC are also contributions within the meaning of 18 U.S.C. §591(e), such contributions are also subject to the limitations of 18 U.S.C. §608.

(3) Thirdly, it is lawful for Sun Oil to control and direct the disbursement of contributions and expenditures from SUN PAC. When the issue of the control of segregated funds was presented to the Supreme Court in the Pipefitters case, (which involved a section 610 criminal prosecution against a labor union) the Court held that "such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments." Id. at 414. After an exhaustive review of legislative history, the Court concluded that (Id. at 415-417):

Nowhere, however, has Congress required that the political organization [i.e., the fund] be formally or functionally independent of union control or that union officials be . . . precluded from determining how the monies raised will be spent. * * * Senator Taft adamantly maintained that labor organizations were not prohibited from expending those monies [from the fund] in connection with Federal elections. * * * Neither the absence of even a formally separate organization, . . . , nor the method for choosing the candidate to be supported was mentioned as being material. Similarly, the only requirements for permissible political organizations were that they be funded through separate contributions [which were voluntary]. (Emphasis added.)

The Court also concluded from the legislative history that
(Id. at 426):

[T]he term 'separate' . . . is synonymous with 'segregated.' Nothing in the legislative history indicates that the word is to be understood in any other way. * * * It is difficult to conceive how a valid political fund can be meaningfully 'separate' from the sponsoring union in any way other than 'segregated.'

Since corporations and labor unions are subject to the same restrictions under section 610, it is clear that under the language of the Pipefitters case, Sun Oil can exercise control over the operations and activities of SUN PAC.

There is much concern in the business community about the proper class of persons who may be solicited by a corporation with its treasury money for contributions to a political fund. Sun Oil advised in its request for an opinion that "[t]o achieve its purpose, SUN PAC will solicit and accept contributions from

individuals and from other political committees." Sun Oil now advises, through counsel, that its solicitation efforts will not be as broad as the language of its request suggested. The Commission is now advised that Sun Oil "will not solicit contributions from members of the general public who are neither Sun employees nor shareholders" but that "Sun does intend to use corporate funds to solicit contributions to SUN PAC from its employees."

(4) It is the opinion of the Commission that Sun Oil may spend general treasury funds for the solicitation of contributions to SUN PAC from stockholders and employees of the corporation. The Federal Election Campaign Act of 1971 amended section 610 by defining contribution and expenditure and setting forth exemptions to that definition. The first two exceptions permit the use of corporate treasury funds for activities aimed only at stockholders and their families. The third exception places no limitation on the categories of persons who may be solicited for voluntary contributions to a separate segregated fund. However, the legislative history of the 1971 Act clearly states that general treasury money may not be used to solicit the general public. 117 Cong. Rec. 43380-81. The absence of a limitation in the third exception similar to that contained in the first two exceptions, indicates that it was

Congress' intent not to limit the use of corporate funds for solicitation of contributions to separate segregated funds only to stockholders. Furthermore, corporations have traditionally solicited their employees for both political and non-political purposes. Absent any express language in the statute or the legislative history prohibiting such solicitations, it would be illogical to conclude that corporations could solicit only their stockholders and not their employees. Finally, section 610 provides that contributions to a separate segregated fund may not be secured by "job discrimination" or "financial reprisals", actions which an employer may take against an employee.

The Commission recognizes, however, that there is in the best-intentioned plans a potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or on behalf of an employer. Section 610 forbids coercion or reprisal of any kind in the solicitation of contributions to separate segregated funds. To minimize the appearance or perception of coercion, the Commission recommends the following guidelines on solicitation of political contributions by employees to such funds. First, no superior should solicit a subordinate. Second, the solicitor should inform the solicited employee of the political purpose

of the fund for which the contribution is solicited. Third, the solicitor should inform the employee of the employee's right to refuse to contribute without reprisal of any kind.

(5) An issue related to that of soliciting contributions is that of SUN PAC accepting contributions from any donor willing to make them. It is the opinion of the Commission that SUN PAC generally can accept any contribution from any donor, whether or not it is lawful for Sun Oil to solicit a contribution from that donor. However, section 610 would prohibit SUN PAC from accepting any political contribution which would be an unlawful contribution by the donor under that statute.

Although Sun Oil cannot spend treasury funds to solicit contributions from political committees, SUN PAC could solicit such contributions with expenditures from its fund of voluntary contributions. Accordingly, SUN PAC may accept contributions from political committees which it solicited and contributions which were not so solicited but freely donated by political committees.

(6) Finally, Sun Oil has proposed a detailed organizational plan for SUN PAC. Essentially, SUN PAC will be a voluntary, non-profit, unincorporated, political membership association open to certain employees of Sun Oil and its subsidiaries. Several employees will be appointed by Sun Oil to create SUN PAC. In addition, Sun Oil will appoint the administrative officers of SUN PAC

A contribution committee will manage the overall financial operations of SUN PAC and will designate the donees of contributions. The committee may delegate all of its powers to the Chairman of SUN PAC who is a Sun Oil appointee.

Section 610 does not mandate any formal organizational structure for corporate political committees. However, under 2 U.S.C. §432, SUN PAC, just as any other political committee, would be required to have a chairman and treasurer in order to accept or make any political contributions. Beyond these requirements, there are no other formal organizational requirements applicable to SUN PAC under Federal law.

Sun Oil also proposed to spend general treasury funds to establish a political giving program for its employees called SUN EPA. SUN EPA is what is commonly called a "trustee" plan. This plan was described in some detail in Sun Oil's request for an advisory opinion and briefly in the introductory paragraphs to this opinion. One commentator has described the concept of SUN EPA as follows:

* * * SUN EPA conceptually serves a purpose not unlike a Christmas Club -- i.e., systematic 'saving' toward a set goal (in this case, in order to provide a source for individual contributions at campaign time, rather than a fund for Christmas gifts).

Sun Oil conceded that SUN EPA would not be a segregated fund under the only applicable exception of section 610, and that it would not be a political committee subject to the registration and reporting requirements of the Act. Sun Oil stressed the fact that it will not exercise any control over the affairs of SUN EPA and that employees who participate in the plan will exercise complete control and discretion over the disbursement of their political contributions.

(7) It is the opinion of the Commission that the expenditure of general treasury funds by Sun Oil for the ordinary and necessary administrative costs of implementing SUN EPA is not prohibited by section 610. The assumption of these costs would not represent any direct or indirect payment by Sun Oil to any candidate, campaign committee, or political party or organization, within the meaning of section 610, so long as Sun Oil will exercise no control over the program nor will attempt to influence employee contributions.

The legislative history of the 1974 Amendments to the Federal Election Campaign Act clearly states that if a person exercises any direction and control over the making of a contribution then that contribution shall count as a contribution with respect to that person. Thus, in order to avoid making a

contribution under section 610, Sun Oil and its management may not make any effort, either orally or in writing, to direct contributions by participants in SUN EPA to any candidate, group of candidates, political party or other person. Participants in SUN EPA must exercise independent judgment when making contributions.

The Commission notes that the Justice Department, which has criminal prosecution powers with respect to section 610, would not regard the use of corporate funds to administer such plans as being within the prohibitions of section 610:

provided that the corporation in no manner suggests to the contributing employee the identity of certain candidates or committees which should be the beneficiaries of such personal contributions, provided that absolutely no pressure of any kind is applied to induce participation in the program, and provided corporate funds are not indirectly contributed to the ultimate recipients through such means as artificially inflating employees' salaries . . . . (Letter to John G. Murphy, General Counsel, Federal Election Commission, November 3, 1975.)

Sun Oil states that:

the bank, on a quarterly basis, will inform SUN of the total amounts of contributions under SUN EPA for the quarter to specific candidates, committees, or political parties receiving them, so it may be published for those participating in the plan.

The receipt and publication of any report on the source or recipient of any contribution(s) or donation(s) into or out of any SUN EPA account(s) may constitute the exercise of direction and control over future contributions. The Commission would not object to Sun Oil's receiving reports setting forth the total number of employees in the plan, the total amount of funds in all the accounts and the total amount of contributions made to all candidates and committees.

The Commission further notes that the possibility of exercising direction and control may be inherently present when an employee trustee plan and a political action committee are administered simultaneously by the same corporation. This, of course, will be a factual determination. However, under section 610, a violation need not be willful.

This advisory opinion is issued on an interim basis only, pending the promulgation by the Commission of rules and regulations or policy statements of general applicability.

NOTE: The foregoing opinion was adopted by the Commission by a 4 to 2 vote with Commissioners Harris and Tiernan voting against adoption. The dissenting opinion of Commissioners Harris and Tiernan is published as follows.

Date:

Nov. 24, 1975

Thomas B. Curtis

Thomas B. Curtis
Chairman for the
Federal Election Commission

COMMISSIONER HARRIS AND
COMMISSIONER TIERNAN, DISSENTING

A. SUN-PAC: Solicitation of Contributions.

We do not think that the statute permits Sun Oil to use its general funds to solicit donations to its political fund from persons other than Sun Oil's stockholders. This conclusion is based on the language and overall objective of §610, the legislative history of the Hansen Amendment, and the Supreme Court's opinion in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972). [Also, the effect of the Commission's decision appears to be to give corporations greater leeway than unions as respects solicitation for their political funds -- a result surely astounding to both supporters and opponents of the Hansen Amendment.]

1. The language added to §610 in 1972 by the Hansen Amendment creates three exceptions to the section's general ban on the expenditure of corporate or union funds in connection with any election to federal office. They are (a) "communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject;" (b) "non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families;" and (c) "solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization."

The first of these exceptions, i.e., as to communications, is paralleled in the definition of "expenditure" [2 U.S.C. §431 (f) (4) (c) and 18 U.S.C. §591(f) (4) (c)], which excludes from "expenditure" "any communication by any membership organization or corporation to its members or stockholders . . . ." (Emphasis added).

The first two Hansen Amendment exceptions are restricted in terms to stockholders in the case of a corporation and members in the case of a union, while the third exception has no restriction. Thus, read literally, the third exception would permit a corporation or union to solicit not only stockholders or members, but the general public, that is, anybody and everybody. Such a construction of the third exception would however go far to destroy the general ban of §610 on the expenditure of corporate or union funds in connection with a federal election; and it would likewise undercut the provision in the first exception that corporations may communicate with stockholders and union with members and the parallel provision in the statutory definition of "expenditure". This is so because the "solicitation" of contributions to a political fund necessarily includes representations as to what sort of causes and candidates the fund will support, and as to why those solicited should contribute to it. If corporations and unions are free to use their general funds to solicit the public at large, they may legally carry on extensive political campaigns in support of particular candidates or types of candidates as a part of their solicitation efforts.

A more rational construction of the statute is that the first and third Hansen Amendment exceptions are to be read together. Individuals cannot be solicited to make a voluntary contribution except by communicating with them. As §610 states and as its legislative history makes emphatic, Congress intended to assure that corporate communications on political subjects financed by treasury money would be directed only at stockholders and their families and that such union communications would be to members and their families. It creates an inexplicable exception to that intent to read the permission to solicit contributions as separate from the permission to communicate with stockholders and members rather than reading these two clauses of the same sentence together. And, since there is in fact no dividing line between communication and solicitation, if such an exception were to be made there would soon be little if anything left of the rule. A corporation could then legally take out a full-page advertisement in the New York Times soliciting for contributions by stating who those contributions would be used to support and why. Except for the top and bottom line, such an advertisement would be no different than one communicating the corporation's views on those candidates to the general public through the expenditure of treasury money. That, of course, is precisely what §610 prohibits.

Since a construction which permitted corporations and unions to solicit the general public would go far to undercut §610, no one has urged it. Sun Oil has, subsequent to its initial presentation, disclaimed any purpose to solicit the

general public. However, as far as a simple reading of the statute goes, there is no basis for drawing any distinction between the use of corporate funds to solicit the general public and their use to solicit employees of the corporation.

2. Since the statute is thus ambiguous and not to be read literally, it is of course appropriate to examine the legislative history of the Hansen Amendment. Pipefitters Local 552 v. United States, supra. That history confirms that the first and third exceptions are to be read together, and that the Hansen Amendment was intended to sanction the use of corporate or union funds only to communicate with and/or solicit stockholders or members.

In explaining his Amendment to the House, Representative Hansen stated:

Next, the amendment, in further defining the phrase "contribution or expenditure", draws a distinction between activities directed at the general public, which are prohibited, and communications by a corporation to its stockholders and their families and by a labor organization to its members and their families, on any subject, which the courts have held is permitted.

The amendment sets forth the limited circumstances where such communications are permitted in connection with an election. These include:

(1) non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families.

(2) the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization.
(Emphasis added). (117 Cong. Rec. 43379)

Representative Hansen reiterated this distinction, between corporate political activity directed at stockholders (and union political activity directed at members) and political activity financed by treasury money directed at the general public, in three separate passages in his explanatory floor statement:

Section 610 strikes a balance between organizational rights and the rights of those who wish to retain their shareholding interest or membership status but who disagree with the majority's political views. The balance presently obtaining provides, in my judgment, an optimum solution to the complex problem of accommodating these conflicting interests. This solution is sound in theory as I shall show, has proved workable in practice, and has generated a broad bi-partisan consensus in favor of continuation of the present rules. For this reason my amendment, with one exception, follows the present law.

Thus, Section 610 as it stands, and under my proposal, represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking. It totally subordinates organizational interest to individual interests. (Emphasis added) (117 Cong. Rec. 43380)

* * *

Recognizing that group interests must be given some play and that the interest of the minority is weakest when corporations and unions confine their activities to their own stockholders and members, the beneficial owners of these organizations, the second subdivision of the amendment sets out three precisely defined and limited permissions for corporate and union activity related to the political process.

The courts, as well as other independent students of section 610 and its legislative history, have concluded that the 1947 Congress did not intend to prohibit corporations or unions from communicating freely with their members and stockholders -- see U.S. v. CIO, 335 U.S. 106 -- from conducting non-partisan registration and get-out-the-vote campaigns,

or from securing voluntary contributions made directly to the support of a labor or management political organization -- 93 Congressional Record 6440, remarks of Senator Taft." (Emphasis added). (117 Cong. Rec. 43380).

* * *

At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions, and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language. (Emphasis added). (117 Cong. Rec. 43381).

* * *

Representative Hansen further emphasized this distinction by quoting Senator Taft's explanation of §610 as it was enacted in 1947:

The dividing line established by 610 is between political activity directed at the general public in connection with Federal elections which must be financed out of political donations and activities directed at members or stockholders which may be financed by general funds . . .

Finally, there can be no doubt that union members or stockholders should have the right to set up special political action funds supported by voluntary donations from which political "contributions and expenditures" can lawfully be made. As Senator Taft stated in his floor explanation of section 610:

If [union members or stockholders] are asked to contribute directly . . . to the support of a labor [or management] political organization, they know what their money is to be used for and presumably approve it. From such contribution the organization

can spend all the money it wants to with respect to such matters. But the prohibition is against labor unions using their members' dues for political purposes, which is exactly the same as the prohibition against a corporation using its stockholders' money for political purposes, and perhaps in violation of the wishes of many of its stockholders. 93 Cong. Rec. 6440 (Emphasis added). (117 Cong. Rec. 43381).

Earlier in the debate the following colloquy occurred among Rep. Hansen and Reps. Dellenback and Hayes:

May I ask as a general question, Mr. Hansen, is it your intent by the way you have drafted the amendment to propose that corporations and unions be treated absolutely equally?

Mr. Hansen of Idaho. That is correct.

Mr. Dellenback. And, further, if a situation is proper for a corporation, it is also proper for a union and if it is proper for a union, then it is also proper for a corporation.

I think it is extremely important that what you have here proposed is an amendment that seeks to bring about equity. I think it is important that a union be able to communicate with its members and do what the law already permits it to do, and likewise I feel it is important that a corporation be able to do that same thing with its stockholders.

Mr. Hayes. I join in support of this particular amendment. It seems to me that it does work equity in what has been a very troublesome situation in the past. (Emphasis added). (117 Cong. Rec. 43380).

This statement of Congressional intent, involving as it does the author of the amendment (Rep. Hansen) and the Chairman of the House Committee (Rep. Hayes) is entitled to special weight.

3. In line with this legislative history, the Supreme Court stated in the Pipefitters case that the first and third exceptions of the Hansen Amendment are integrally related and similarly limited to stockholders and members:

With the exemption for communications to stockholders or union members and their families apparently in mind, Hansen stated, for example, 117 Cong. Rec. H11478:

"[E]very organization should be allowed to take the steps necessary for its growth and survival. There is, of course, no need to belabor the point that Government policies profoundly affect both business and labor . . . If an organization, whether it be the NAM, the AMA or the AFL-CIO, believes that certain candidates pose a threat to its well-being or the well-being of its members or stockholders, it should be able to get its views to those members or stockholders. As fiduciaries for their members and stockholders the officers of these institutions have a duty to share their informed insights on all issues affecting their institution with their constituents. Both union members and stockholders have the right to expect this expert guidance.

This reasoning, of course, applies as well to solicitations for contributions to voluntary political funds." (Emphasis added). (Pipefitters, supra at 431 no. 42).

4. The interpretation given §610 by the majority of the Commission seems to be to be slanted in favor of corporate political fund solicitations, as compared with union. Congress meant to hold the balance even.

In introducing his Amendment, Rep. Hansen stated:

The net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 of title 18 United States Code, and to codify the case law. It spells out more clearly the rules governing election activities that apply equally to labor unions and corporations. While prohibiting abuses that involve activities directed at the general public, the amendment recognizes that the constitutional guarantee of free speech protects the right of labor organizations and corporations to communicate with their own members or stockholders. (Emphasis added). (117 Cong. Rec. 43379).

The Commission's ruling destroys that balance. Unions are presumably limited to communicating with and soliciting their members, while corporations may solicit not only their stock-

holders, but all employees, whether union members or not.

This is a curious result to flow from the union-supported and corporation opposed Hansen Amendment.

The imbalance resulting from the majority's ruling can readily be discerned by reference to statistical data. The Sun Oil Co., ^{1/} which had gross earnings in excess of 3.7 billion dollars at the end of 1974, has almost five times as many stockholders as it does employees. As of December 31, 1974, the company had 126,555 stockholders holding 57,301,668 shares of preferred and common stock in the company. At the end of the same period, the company had only 27,707 employees. Under the majority's ruling, Sun Oil is now permitted to solicit partisan political contributions from well over 127,000 individuals including employees who are not also stockholders. On the other hand, the labor union affiliated with Sun Oil is restricted in its solicitation to the small percentage of the 27,000 employee workforce which holds membership in the union. The union presumably cannot even solicit employees who must go through its hiring halls for employment with Sun Oil if those employees are not also union members. On a national scale, the majority ruling grants corporations as a group an unfair advantage over labor unions in the solicitation of political contributions. It is estimated that over 30,900,000 individuals own shares of stock in American corporations. 1975 World Almanac 94. But, out of the nation's total workforce of 84,000,000

1/

The statistics on the Sun Oil Co. may be found in Moody's Industrial Manual, 2351-57 (Vol. 2, 1975).

workers, only 18,000,000 of them (or about 21%) are members of labor unions including AFL-CIO, independent, CNTU, and CLC unions. 1975 World Almanac 108. Had corporations been restricted to soliciting only their stockholders, they could have solicited almost twice as many individuals as labor unions. Under the majority's ruling, however, corporations now have the potential of soliciting almost the entire workforce of the nation. Congress certainly did not intend to create such a gross disparity in the solicitation power of corporations and unions, by enacting the segregated fund exception to §610, as the majority of the Commission now permits in its interpretation of the statute.

5. Finally, the majority ruling is inconsistent with scholarly writings dealing specifically with the solicitation question. These writings demonstrate in clear terms that a reasonable interpretation of §610 would restrict corporations to soliciting only their stockholders.

For instance, corporations have been advised in the Business Lawyer, a regular journal of the American Bar Association's Section of Corporation, Banking and Business Law, to direct solicitations of partisan political money to their stockholders. R. Garrett, "Corporate Contributions for Political Purposes," 14 Bus. Law. 365 (1959). Mr. Garrett closely examined §610 and cases construing the statute including United States v. CIO, 335 U.S. 106 (1948) and United States v. UAW, 352 U.S. 567 (1957). On the basis of these and other

Federal court decisions and labor union practices, particularly in operating COPE, Mr. Garrett reached the following conclusions:

Since Section 610 in terms applies equally to labor organizations and to corporations, certain conclusions relative to corporations under that section may be derived from the labor cases and the known practices of the unions:

* * *

(3) Corporations may use corporate facilities for soliciting voluntary contributions from stockholders to a fund to be donated or used for political purposes. (Emphasis added). Garrett, supra, at 375-76.

Mr. Garrett explained further that:

Corporate management eager to do something, but unwilling to put its neck in the noose for the purpose of making some law at the risk of heroic sacrifice, might well be advised to use the corporate facilities to arouse stockholders to voluntary contributions and political awareness. The New York Stock Exchange has estimated that there are over 8 1/2 million holders of stock in American corporations. They constitute a group who might be aroused to contribute and work for political purposes with possibly great effect. 2/ Where corporate soliciting of contributions from stockholders is bipartisan, as, for example, where stockholders are invited to contribute a very small percentage of a dividend to the party which they designate individually, there would seem to be little real danger of prosecution. (Emphasis added). Id. at 377.

Another writer, the General Counsel of the United States Chamber of Commerce, reached similar conclusions. Speaking in the American Bar Association Journal, the General Counsel said, after a thorough and careful analysis of Section 610 and Federal court decisions, that:

2/ This was the 1959 estimate. As previously noted, the current estimate of stockholders in American corporations exceeds 30 million.

As for the Federal Corrupt Practices Act, the corporation can play safe in its partisan political activity only if it limits its appeals, whether written or oral, so as to avoid the general public and communicate rather to its stockholders. On principle it seems a corporation should be allowed to appeal also to its employees, along with its stockholders, although there is no decision which settles this point. (Emphasis added). W. Barton, "Corporation in Politics: How Far Can They Go Under the Law," 50 ABA Journal 228, 231 (1964).

There have been no court decisions which have held that under §610 corporations are authorized to solicit contributions from employees.

We see no warrant for the construction of §610 adopted by the majority.

B. The Establishment of SUN-EPA.

We also dissent from the majority's ruling that §610 permits Sun Oil to spend treasury monies to establish a "trustee" plan contribution program for its employees.

1. As previously noted, the intent of the Hansen Amendment was to set forth in "clear and unequivocal statutory language" the "limited circumstances" under which corporations could spend treasury money in connection with federal elections. Those "limited circumstances" included the establishment of segregated funds. They did not include any other types of political contributions or expenditures from general corporate funds. The majority ruling, permitting corporations to subsidize "trustee" plans with treasury funds, simply does violence to the plain language of §610 which authorizes only three types of activities which are supportable with corporate or union treasury money.

2. The meanings of the terms "expenditure" and "in connection with a federal election," as used in §610, are broad enough to embrace the "trustee" plan proposed by Sun Oil. Certainly, the expenditure of treasury funds for SUN-EPA is intended to be "in connection with a federal election" inasmuch as Sun Oil has admitted that as a result of these expenditures, its employees will have a facility through which they can make contributions to candidates for federal office. The Justice Department made a similar observation in its comments when it said that "the general objective of the program is certainly 'political' in that it encourages employees to participate voluntarily in politics through personal contributions."

This conclusion is consistent with judicial interpretations of the terms "expenditure" and "in connection with." As noted by the D.C. Circuit United States Court of Appeals in Buckley v. Valeo, 519 F.2d 821, 852-53 (D.C. Cir. Aug. 29, 1975):

An expenditure may obviously inure to the benefit of a candidate even though the expenditure was not directed by the candidate and the candidate was not in control of the expenditures or of the goods or services purchased.

Similarly, Mr. Justice Rutledge, concurring in United States v. CIO, supra, characterized the broad reach of the terms "expenditure" and "in connection with" as used in section 610. (Id. at 133):

The crucial words are "expenditure" and "in connection with." Literally they cover any expenditure whatever relating at any rate

to a pending election, and possibly to prospective elections or elections already held. The broad dictionary meaning of "expenditure" takes added color from its context with "contribution." The legislative history is clear that it was added by the 1947 amendment expressly to cover situations not previously included within the legislative interpretation of "contribution." The coloration added is therefore not restrictive, it is expansive. * * * (Emphasis added).

Mr. Justice Frankfurter applied these same principles, regarding the breadth of the term "expenditures," in upholding an indictment prosecuted under section 610. See, United States v. UAW, supra, at 585.

It matters not that Sun Oil will exercise no control over the operations of SUN-EPA or the activities of employees participating in the program. The law prohibits expenditures in connection with Federal elections -- it does not go behind those expenditures to determine whether they will be made with a benevolent or patriotic intent. By facilitating employee contributions, through its subsidization of SUN-EPA, Sun Oil is necessarily using treasury funds in connection with Federal elections.

3. The majority concluded that expenditures for SUN-EPA were not prohibited by §610 because they would not represent "any direct or indirect payment by Sun Oil to any candidate, campaign committee, or political party or organization." (Emphasis added). This conclusion apparently relies on the definition of the terms "contribution" and "expenditure" added to §610 by the 1971 Amendment. But, that definition says that these terms "shall include" certain transactions. Since this

is not language of limitation, it is clear that the majority's interpretation of these terms is too narrow. Mr. Justice Rutledge's broad interpretation of these terms in the CIO case has still survived the 1971 Amendment and is controlling. Accordingly, the majority should have restricted its focus to the broader concept of an expenditure "in connection with a federal election" which would have made expenditures for SUN-EPA unlawful. The Justice Department recently prosecuted a §610 case against a labor union official where it expressed its views on the meaning of "contribution" and "expenditure" prior to the 1971 Amendment. In United States v. Boyle, 482 F.2d 755 (D.C. Cir.), cert. denied _____ U.S. _____, 94 S. Ct. 593 (1973), the Justice Department advised the trial court that:

It is important to note that Section 610 itself does not speak in terms of contributions to candidates for office but rather in terms of "in connection with any election." (Emphasis added).

Trial Brief for Department of Justice at 11, United States v. Boyle, No. 1741-71 (D. D.C.)

The trial court sustained this view of the law in rejecting the defendant's motion to dismiss the indictment on the grounds that Section 610 was unconstitutional or vague. United States v. Boyle, 338 F. Supp. 1028, 1031-32 (D. D.C., 1972). This case shows that what makes an expenditure of treasury funds unlawful is simply the fact that it is "in connection with" an election.

4. The majority's narrow interpretation of §610, to permit expenditures for SUN-EPA, has the effect of overruling by implication practically all of the advisory opinions which have dealt with indirect contributions or expenditures. Three opinions which immediately come to mind are (1) AO 1975-4, 40 Fed. Reg. 29793 (July 15, 1975), in which the Commission held that the guarantee of a loan made to the Democratic National Committee, to the extent that the loan was not repaid, was a contribution even though the loan itself was not; (2) AO 1975-14, 40 Fed. Reg. 34084 (Aug. 13, 1975), in which the Commission held that the donation by a corporation of a computer, to analyze the results of a non-partisan public issue opinion poll issued by a Congressman, was a violation of Section 610; and (3) AO 1975-27, 40 Fed. Reg. 51351 (Nov. 4, 1975), in which the Commission held that expenses incurred by a candidate for legal and accounting fees for the purpose of complying with the election laws were expenditures.

For these reasons, we see no merit in the majority view that expenditures for SUN-EPA are lawful under §610.

Sun Oil has not asked and the Commission has not ruled whether the two plans are permissible under §611, assuming that Sun Oil is a government contractor. It should be noted, however, that the language of §611 is even broader than that of §610. It provides severe criminal penalties for any government contractor who "directly or indirectly makes any contribution of money or other thing of value . . . to any person

for any political purpose or use." And while §611 contains a special proviso, added by the 1974 Act, validating a "separate segregated fund" which meets the requirements of §610, it contains no exception in favor of a trustee plan, such as SUN-EPA.

Thomas E. Harris

Thomas E. Harris
Commissioner for the
Federal Election Commission

Robert O. Tiernan

Robert O. Tiernan
Commissioner for the
Federal Election Commission

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 2, 1976

MEMORANDUM TO THE CONFERENCE

RE: Nos. 75-436 Buckley v. Valeo, et al.
75-437 Buckley v. Valeo, et al.

The following are my present views concerning the drafts that have been circulated.

Chief Justice: I agree with Potter's suggested additions to the introduction to the opinion. The dispelling of any doubt that we might be rendering an advisory opinion presents no difficulty, and any standing problems are taken care of by the explicit provisions of Sec. 437h. Since these questions are common to all segments of the opinion, their treatment in the introduction would make unnecessary any references to them in each segment.

I am troubled by the extensive summary of the Court of Appeals' opinion primarily because it necessarily highlights reasoning of that Court with which none of us agrees, and I think our opinion would therefore deal with the Court of Appeals arguments in the substantive

parts of the opinion. That approach would enhance the persuasiveness of the opinion as a whole, and accordingly I agree with Potter and Lewis that the treatment of the Court of Appeals' opinion in the introduction should be eliminated or greatly reduced.

Potter: I am still not at rest with the holding invalidating Sec. 608(e)(1). I have trouble with the proposition that the ineffectiveness of legislation establishes constitutional infirmity (pp. 43-44). Many laws are ineffective (including the Corrupt Practices Act of 1925), yet constitutional. Since the legislation substantially burdens First Amendment rights, a proper constitutional inquiry is whether Sec. 608(e)(1) as construed is sufficiently related to the identified congressional interests; but is an analysis of whether the statute works -- that is, whether it can be easily circumvented -- a matter of constitutional dimension? If Sec. 608(e)(1) is so easily evaded, then its burden on First Amendment rights is necessarily easy to avoid. Would not the proper analysis therefore limit scrutiny of the contribution limits to whether they are related to the congressional objective, without any inquiry whether the limits are effective? My concern might be less acute if the draft did not also limit the reach of the definition of contributions (p. 46 and note 42). I don't see why we should not hold that the definition of contributions should be read as expansively as the legislation will permit. If the Court decides not to do so, I'll probably write separately to that effect.

At conference I indicated that contrary to my pre-conference view that Sec. 608(e)(1) was constitutional, conference discussion pointed up a possible fatal vagueness in the section, particularly since criminal penalties are imposed for violations. Potter's proposed construction does not wholly cure the vice of vagueness in my view. (pp. 41-42); there remain a myriad of examples of its uncertain application even as so construed. Finally, I perceive some conflict between Potter's treatment of Sec. 608(e)(1) and Lewis's discussion of Sec. 434(e), as will later appear. | 2.

I also have some reservations about the treatment of O'Brien (pp. 6-10). It is difficult for me to understand why that case involved "speech-plus" and this one involves only "speech," and I am uncertain about whether there is any real difference between the applicable test in the two instances. It is also unclear to me how the balancing aspects of the test stated in O'Brien (391 U.S., at 377) differ from the overall approach in the draft opinion.

I presently adhere to my vote in conference to sustain the limits on expenditures by candidates from personal or family funds (pp. 51-54). Does not the discussion on page 53 denigrate the congressional interests underlying the excerpt from the Conference Report in note 50? If the "primary governmental interest served by the Act . . . does not support the limitation on the candidate's expenditure of his own personal or

family funds," because there is a lesser prospect of improper influence, then what interest justifies the application of contribution limits to members of the immediate family? Also, although I gather that Potter would adopt the interpretation in the Conference Report, are there not some ambiguities in the conferees' construction (e.g., meaning of "access").

Lastly, Potter's treatment of the contribution limits seems to me unnecessarily to downplay the invasion of First Amendment freedoms, rather than frankly to acknowledge the seriousness of the invasion but justify it by the compelling governmental interests supporting contribution limits.

Lewis: As this draft and Potter's are now written, there is a basic conflict between the treatment of Sec. 434(e) and Sec. 608(e)(1). I gather from a telephone conversation with Lewis on New Year's Eve that he and Potter intend to re-work their segments to eliminate this. I therefore offer these comments only to say what troubles me. Since the two sections are given conforming constructions, the reasons for sustaining Sec. 434(e) and invalidating Sec. 608(e)(1) should, I submit, be carefully and explicitly detailed. That is, if Sec. 608(e)(1) is both ineffective and overbroad, why is not the same true of Sec. 434(e) as construed? If the answer is that the congressional interests in the one instance are greater, or its invasion of First Amendment freedoms is lesser, should

not these circumstances be spelled out with as much precision as possible? As written, for example, I do not find in Lewis's draft any treatment of the ineffectiveness point. Again, if Sec. 608(e)(1) reaches beyond the anti-corruption purpose of Congress, doesn't Sec. 434(e) also? If yes, but the vital information value of disclosure nevertheless sustains Sec. 434(e), see p. 32, but not Sec. 608(e)(1), because not served by the latter, I would hope that the opinion would clearly highlight this distinction.

In addition, my doubts about the treatment of O'Brien and the vagueness of Sec. 608(e)(1) as construed carry over into this segment of the opinion, since the draft incorporates Potter's analysis in these respects.

WJB: I will incorporate Lewis's suggestion and "leave the door open." There may also be further stylistic changes.

Byron and Bill Rehnquist: I fully agree with Lewis as to these drafts. I would add, however, that Bill's memo of December 18, containing a paragraph on standing, creates some problems for me. It should be clear that Congress could give all voters standing, without violating Article III, just as it could override the judicial limitations recognized in Flast v. Cohen and Frothingham v. Mellon.

W.J.B.Jr.

Chris - We can't accommodate

Supreme Court of the United States
Washington, D. C. 20543

J. White

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1976

MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436 & 75-437 - Buckley v. Valeo

I would reject all challenges to the act now before us except with respect to the selection of the members of the Federal Election Commission.

The introductory statement of The Chief Justice is satisfactory.

I agree with the result reached by Lewis with respect to the disclosure provisions; but to the extent he expresses agreement with some parts of Potter's draft, I cannot join his present submission. *| 2*

I agree with Potter that the contribution limits are valid and would also uphold the expenditure limits in their entirety. In this latter respect, therefore, I shall be in dissent.

I agree with Bill Brennan's treatment of the public financing provisions.

As I understand it Bill Rehnquist's submission re the election commission will become the Court's opinion. I shall join what I can and write separately what I must. *?*

Regards,

Byron

To: Justice Powell

Date: Jan. 5, 1976

From: Chris

Re: Buckley v. Valeo -- Public Financing section

I'll go ^{through} the section from pg. 1 back, pointing out things that stopped me short. Some of them are major problems. Others are very minor and are pointed out only to help you in reading the section.

page references are to 3d draft

(1) The discussion on pgs. 6-7 goes a little beyond the cases cited in saying that the power to decide what ~~xxxx~~ "will promote the general welfare" is completely left to Congress. Butler and Helvering both indicate that the grant of power is limited to the extent that the spending must be "in aid of the 'general welfare!'" ~~and~~ Helvering says that the "line must still be ~~xxx~~ drawn between ~~particular and general~~ one welfare and another, between particular and general." ~~xxxxxxx~~ It goes on to say that there is a "middle ground" or "penumbra" ~~xx~~ "in which discretion is at large" and that ~~xx~~ the "discretion belongs to Congress unless the choice is clearly wrong, a display of arbitrary power..." The text of the draft gives ~~xxxx~~ unqualified power to Congress to draw the line. I don't, however, think that this is very significant. When legislation is too ~~xx~~ "particular," ~~xxx~~ equal protection ^{notions/} ~~xxxxxxx~~ (through² the 5th ~~xxxx~~ amendment) will come into play. And, as a practical matter, the Court will never find that a ~~xx~~ given piece of legislation is not directed to the "general welfare."

Ask

Probably

One purpose of this ~~xxxxxxx~~ legislation, I think, comes close to the line -- that is the desire to free candidates from the rigors of fundraising. (see top of page 8) Surely there are some "impermissible" legislative purposes. ~~xxxxxx~~ To discriminate on the basis of race is ~~xxx~~ one -- ~~and~~ that is specifically ~~xx~~ prohibited by other

~~xxxx~~ parts of the Constitution. To give incumbent~~s~~ legislators special privileges ~~is~~ is another (perhaps present in this legislation) -- and again the equal protection clause is a check. To free candidates from some of the pain of campaigning seems quite similar to ~~the~~ the desire to give incumbents a break -- but when it ~~has~~ has that effect it can be reached through equal protection analysis.

(2) Pg. 8. This paragraph is indicative of something that bothers me about the whole draft -- i.e., a rather superficial ~~argument~~ and obviously unmeritorious argument is raised and answered in the text, while the more difficult questions ^{raised by appellants} are buried in the footnote. In this case, the textual paragraph ignores the most basic challenge to the check-off provision -- that it burdens First Amendment rights by ~~giving~~ failing to reflect the true popular strength of the candidates and that there is a less restrictive ~~alternative~~ alternative by which funds could be raised and actual strength (adequately) be measured. That argument is/answered in footnote 11.

(3) Pg. 10. Here, and ~~throughout~~ throughout, the term "compelling" is used -- in equal protection analysis, which, I take it, makes it completely unacceptable to some Justices, and inconsistent with ~~our part~~ our part. ~~which~~ We refrain from using it even in First Amendment analysis because of the equal-protection overtones.

(4) The paragraph on pgs. 10-12 is one of the parts of the section that I find most troublesome. First, it's very hard to understand. I ~~take it that~~ ^{think} the point is that the denial of public financing is less of a burden on First Amendment rights than is ~~the~~ a restriction on ballot access. If so, it is not made clearly.

Put
in Text
rather
than
note

Potter

The sentence beginning "These were of course direct burdens ..." suggests that it is more compatible with the First Amendment to burden a candidate's ability to run for office than it is to burden a voter's ability to voice preferences. I would ~~x~~ have thought they were both protected. The statement that the denial of public financing is "not similarly restrictive" confuses me. you

you Again, I would have thought ~~xxxxxxx~~ that any burden on ~~xxxxxxx~~ First Amendment rights (including the candidate's) would require close ~~x~~ scrutiny. And, incidentally, it is ~~difficult~~ difficult to see how a restriction on a candidate's ability to run for ~~office~~ office does not have at least some indirect effect on the rights of his supporters to voice their preferences. We took this concern seriously in the contribution and expenditure section. In short, I do not think it true that the formulae "do not substantially burden First Amendment ~~xx~~ rights" (p. 12), although it may be true that they burden them less than the ballot restrictions do. al

Other problems with the paragraph: What does the last sentence mean? Is it an introduction to the next paragraph? Is ~~xx~~ Justice Brennan saying that the ballot access cases are distinguishable ~~from~~ ^{this case} and, in ~~any case~~ ^{the alternative,} that the test they set out ~~x~~ is met? If so, ^{the point} it is confusing, since the ~~point of~~ ^{really} distinction goes ~~rather~~ to the question of whether the test is met. ~~—i.e.,~~ [^] If the restriction on First Amendment rights is less, that does not mean that Jenness and ~~xxx~~ the related cases are irrelevant, but rather ~~that~~ ^{meets the test set out in Jenness because it} the legislation in this case/does not "unfairly or unnecessarily burden" political opportunity.

The section attached to fn. 15 is incomplete. ~~xx~~ To be accurate,

~~non-eligible~~ non-eligible candidates and those who ~~will~~ do not accept public funds are not subject to the ~~spending~~ spending limits.

A great deal is made of the quid pro quo that arises out of our general invalidation of the ~~spending~~ spending limits. Justice Brennan stresses that ~~eligible~~ ^{who get funds} candidates/suffer a burden too because they are subject to the ~~spending~~ limits. But this is an illusory ~~compensation~~ compensation since, as the opinion admits (indeed stresses), it is unlikely that ineligible candidates could raise amounts anywhere ~~anything~~ close to the spending limits. That is admitted in fn. 15 and the incongruity is ~~not~~ acknowledged on pg. 17 ("those limits may be a largely academic matter to them"), but it's something that gnaws on me everytime I read the opinion.

me too!

~~5.~~ 5. The beginning of the paragraph that starts on pg. 12 refers to a "compelling government interest" but does not spell it out. Is it anything other than those discussed ~~below~~ below -- relieving candidates from the burdens of fundraising and saving money ~~by~~ by not funding hopeless ~~canidacies~~ canidacies. I, for one, do not find these "compelling" or even "substantial" enough to ~~outweigh~~ ^{significant} ~~infringements~~ ^{infringements} on First Amendment rights.

Not compelling

Justice Brennan says that the cases say that there is a "compelling" interest in limiting places on the ballot to candidates with substantial support. I don't think the cases hold that. Storer says that there is a "compelling" interest in the stability of the political system; Jenness says that there is an "important" interest in avoiding voter confusion. But I don't think that the ~~need~~ need to limit ballot places is "compelling." Rather, *it may be if anything in this area* it is administratively inevitable. And, as Justice ~~Rhenquist~~ ^{Rhenquist} indicates in his memo, we have a different case here, for the ~~legislation~~ ^{is giving} ~~legislation~~ ^{the Congress} giving a benefit that ~~it~~ need not give, rather

than trying to perform an ~~inherent~~ inescapable government function in an administratively feasible manner.

Moreover, the whole analysis ignores the argument made by appellants that, ~~if~~ if there is an interest in requiring a show of substantial support, it should be of current support rather than ^{of} support in the past election.

6. ~~Backtracking~~ Backtracking a bit to some footnotes I missed --
Fn. 12 says * "the concern" is not a basis for invalidation of the public financing scheme..." I would add "on its face." *clear with clerk*

Brush off
Fn 14 - The burden that public financing imposes on nonfunded candidates is minimized here and throughout. But the opinion consistently ignores the one-two punch created by the funding in combination with the contribution limits. The entire answer to that ~~problem~~ problem (a problem that bothers me greatly) is in footnote 20, which merely refers to Justice Stewart's section. Needless to say, Justice Stewart doesn't discuss the combination either. I think the answer in Justice Brennan's mind is found in fn. 15, which is a much more significant footnote than would appear at first. The entire analysis of the ~~entire analysis~~ ^{opinion} is based on the assumptions ~~implied by the~~ hinted at there -- that major parties would raise the money anyway in a relatively quick and effortless fashion, and that minor parties would never raise anything close to the same amount. If you assume that, the public funding system is palatable, for it gives no advantages that were not there already.

I agree

Fn 16 -- * I don't think White stands for the proposition that public financing is "inherently less restrictive." Rather, it merely indicates that when primaries are required by law of only certain parties it is not improper for the state to fund the

primaries. The effect is the same as if the state ran the primaries and required certain major parties to participate in them.

76. p. 17 -- ~~THE~~ The sentence that begins "But since any major-party candidate...x" assumes that major party candidates have exceeded the ~~xpenn~~ spending limits in the past. I think that is true, but I don't remember it ever being explicitly ~~xx~~ stated.

¶ Incidentally, the paragraph has a "First," but no "Second," point.

¶ The sentence that runs from page 17 to page 18 recalls again

~~xx~~ the ~~xx~~ assumptions I discussed above ~~xx~~ (in point 6). I think it errs, however, in ^{indicating they then ~~as~~ are} ~~stating this as an~~ absolute truth. ^S ~~The we are~~ aware of the ^{equivalent to} ability of major parties to raise ~~xxxxx~~ large funds ~~xx~~ the amounts to be provided through public financing ^{as} ~~is true in~~ a practical matter ^{because of} ~~xxxxx~~ ^{or logical} sense ~~given~~ our prior experience. But ~~xxxxxx~~ it is not inevitable as a theoretical ~~xxxx~~ matter. The opinion indicates the that/public financing system would be ~~xxxxxx~~ more suspect if it did not ^{accurately} ~~xxxxx~~ reflect the ability of parties to raise funds privately. I ~~xxxx~~ think we should point out that our assumption that it does so is based on experience, and thereby leave the door open for parties to come in and prove that it is no longer an accurate assumption.

8. At the top of the page, the opinion says ^{that} ~~determining~~ strength by opinion polls would be a worse alternative because it would involve the government in certifying private polls ~~x~~ or conducting its own. It is suggested that that would be improper. I don't see why. *Polls do fluctuate widely: e.g. Dewey/Truman*

9. p. 20. I am not sure what the sentence beginning "Any risk of harm..." means. Surely "risk of harm" does not "arise from" our lack of knowledge. And I'm not sure that the government interests identified are sufficient if there is some real burden on First

Amendment rights and a less burdensome alternative is feasible.

I suggest that what Justice Brennan is trying to say is: ~~The~~ ~~xxxxxxx~~ important governmental interest in avoiding factionalism outweighs the speculative risk ^{of harm} ~~This~~ ~~xxxxxxx~~ This formulation is preferable because it leaves the door open to proof of significant harm.

10. P. 21. The paragraph that takes up this page is another section I find very troublesome. Again, the ballot access cases have not been dealt with fairly. I explained my problems in some detail in the memo I wrote you over Christmas. Basically, the draft plays games with the "goals" of the parties. The "goal" ^{as} in the ballot ~~xxx~~ cases is defined ~~xxxxxxx~~ qualifying for the ballot, ~~xx~~ while the goal in this case is defined as ~~waging~~ waging an effective ~~xxx~~ campaign. The opinion ~~xxxx~~ says that the cases are compatible because there are alternative means to ballot qualification and alternative means to waging a good campaign. But the question is: are there alternative means to getting public funding. The proper approach to this section is as follows: In both the ballot cases and here, the end goal is election. Qualifying for the ballot and qualifying for public funding are subsidiary steps to that goal. Ballot qualification, however, is absolutely crucial ~~xxx~~ if a candidate is to have any ~~chance~~ chance of winning, while public financing is not because of Therefore, we need not require alternative means to public funding. the private financing alternatives. ^{next-to-} (I'm not sure that I buy that last sentence as a practical matter, but it's ~~the~~ ~~xxxxxx~~ best argument that can be made.)

Should be written this way

The sentence beginning "And, after all..." is another one of those callous statements that drive w me ~~xxxxxxx~~ crazy. Minor parties had a chance when no one had public funds. The question

is whether they still do if the major parties are funded.

~~p. 23-top of page.~~

11. ^A As a practical matter, is the prospect of post-election funding enough for an institutional lender? And at what interest rate? *No*

12. ^(12.) p. 23. It becomes clear in this paragraph and in fn. 25 that the earlier section ^{discussed in ¶4 above} ^A was intended to indicate that the restrictions incident to public financing are less burdensome on first amendment freedoms than the ballot-access regulations.

^{two}
The/sentences^{beginning} "Further..." ~~xxx~~ are just plain wrong.
In both cases, the burden is 5% -- proportionately exactly the same. I can't make any ~~xxxx~~ sense of the point made by the opinion.

13. Top of page 25. No parties are subject to the contribution limit. See ~~fn.~~ ^fn. 26a. That point doesn't dilute the impact of the argument, but may be ~~xxx~~ confusing.

14. Fn. ~~19~~ 29 -- I agree that Moore is distinguishable. The problem there was that the legislation created a ~~fx~~ flat barrier to nomination.

15. Fn. 31 -- what is the relevance of the last paragraph?

16. P. 28 -- The sentence beginning "In addition..." is a little unclear, but makes sense. I take it to mean: The ceiling imposes a limit on the amount available to those who can raise lots of money, so ~~xxxxx~~ candidates who are poor fundraisers won't have as far to go to keep up with them.

Please ask me to explain anything that is unclear. This is a very messy ~~problem~~ area and I'm not sure that I have been ~~xx~~ very illuminating. The points that bother me most are in ¶ 4, 7, ~~10~~ and 10 of my memo.

Chris

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 6, 1976

Re: Nos. 75-436/6 - Buckley v. Valeo

Dear Lewis:

I realize that all drafts are undergoing revision in the light of the correspondence that is being exchanged among members of the "writing team." I therefore shall refrain from final comment until later when the revised drafts are at hand. I write now to you to raise only the following:

(1) I am on formal record in Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark. 1968), which, I believe, is not cited in your opinion. I regard that case as of some importance on the disclosure issue because it was early and because it was summarily affirmed here, 393 U.S. 14 (1968) (only Hugo would have noted probable jurisdiction). I am convinced that the 3-judge court's decision in Pollard was right, and I would adhere to it even now.

7
What concerns me specifically is the approach taken in your draft on pages 21-22. You suggest that in order to obtain protection from disclosure under the First Amendment, a party must show that it is unlikely to have any political success -- "the party is so lacking in political strength that it is unlikely to command any significant share of the votes." I suspect that the Republican Party of Arkansas, to which we gave protection in Pollard in its context, could not have met this test, being at that time in control of the State's governorship.

(2) Of course, I am not sure that Pollard requires that the Republican Party of Arkansas be protected from disclosure under the statute we are considering. My adherence to the result in Pollard, however, does give me pause to question whether the

standards set out on pages 21-22 are the correct ones. I believe they are dicta and they leave a number of questions hanging. Would the Republican Party in the South never obtain protection because nationally it is somewhat powerful? Is it logical or fair to require a political party, devoting itself out of court to the task of persuading its adherents of the possibility of success, to argue in court that there is no such possibility? I wonder whether we must attempt to decide all this now. We have been asked to strike the statute on its face. Clearly, it is not invalid on its face and I wonder whether we need to go beyond that. Do we need to say more than that the federal courts are open to a party to show that in a particular case the relevant constitutional standards entitle it to relief?

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States

Memorandum

January 6, 1976

of the United States

D. C. 20543

Dear Lewis:

6, 1976

That word in the center of the 11th line on page 17 brings me up short. Would Chris be content with something like "survive"?

ley

erest in including in our opinion
ion union "loophole".

agraph, together with notes, which
to add to your draft at some
d fit, quite logically, at the
" discussion on page 44. The
§ 608(e) is diluted by the pro-
of thousands of corporations
to \$5,000 to a particular candidate
608(e) expenditures.

Indeed, the more I reflect on this Act the more discriminatory I find it to be with respect to individuals. The principal sources of influence in federal elections, as everyone knows, are the media, corporations and unions. Congress has left these three elements of society largely free to continue to exert a dominating influence. At the same time, the Act severely circumscribes the already limited role of most individual citizens in election campaigns. Moreover, despite my reluctant willingness to sustain all of the disclosure provisions, the limitations therein inevitably will deter small contributors from participating in the political process. The average citizen who gives \$25 is likely to save his money rather than run the risk, as he will view it, of having his political preference publicized.

In any event, and returning to my point in writing, I would like your reaction to the enclosed draft.

Sincerely,

Mr. Justice Stewart

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 6, 1976

Buckley

Dear Potter:

You will recall my interest in including in our opinion a reference to the corporation union "loophole".

I enclose a single paragraph, together with notes, which I hope you will be willing to add to your draft at some appropriate place. It would fit, quite logically, at the end of the "ineffectiveness" discussion on page 44. The potential effectiveness of § 608(e) is diluted by the provisions that allow the tens of thousands of corporations and unions to contribute up to \$5,000 to a particular candidate and in addition make the § 608(e) expenditures.

Indeed, the more I reflect on this Act the more discriminatory I find it to be with respect to individuals. The principal sources of influence in federal elections, as everyone knows, are the media, corporations and unions. Congress has left these three elements of society largely free to continue to exert a dominating influence. At the same time, the Act severely circumscribes the already limited role of most individual citizens in election campaigns. Moreover, despite my reluctant willingness to sustain all of the disclosure provisions, the limitations therein inevitably will deter small contributors from participating in the political process. The average citizen who gives \$25 is likely to save his money rather than run the risk, as he will view it, of having his political preference publicized.

In any event, and returning to my point in writing, I would like your reaction to the enclosed draft.

Sincerely,

Mr. Justice Stewart

lfp/ss

1/6/76

Buckley Part II
Proposed Addition, with
Accompanying Notes to be
Incorporated at the End
of Page 44

A further reason for believing that § 608(e)(1) would be ineffective is found in the treatment of corporations and unions. While justifying the far-reaching limitations imposed by § 608(e) on individuals and groups as necessary to close a loophole in the general contribution limitations, Congress took no meaningful steps to curb the power of unions and corporations to influence the outcome of elections. This leaves a significantly larger loophole than that sought to be plugged by § 608(e), for the techniques identified and approved by this Court in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972), and embodied in § 610¹ as amended, enable these "special interest" groups to wield far more influence on political decision-making than can isolated individuals.² Even if the segregated funds established by corporations and unions under the imprimatur of § 610 are "political committees,"³ subject to the \$5,000 contribution limitation of § 608(b)(2) and the \$1,000 independent expenditure limitation of § 608(e)(1),⁴ an organization's collective strength can be vastly expanded by the proliferation of individual committees at each organizational level - a committee, say, for each subsidiary of a parent corporation or for every local⁵ and regional unit of a national labor union.

NOTES

1. More stringent restrictions are imposed on government contractors under § 611, which flatly forbids all ~~direct~~ or indirect political contributions or ~~promises~~ to make such contributions.

2. The District Court found that labor groups donated \$ 4.3 million to the 1974 Congressional campaigns, and that business groups gave \$1.6 million. Findings IIA, ¶¶ 96-97; II A. 464-465.

3. The Commission in Advisory Opinion 1975-23 (Nov. 24, 1974), at 5, has held that committees formed by corporations are "political committees" subject to the reporting requirements of the Act and the limitation of § 608.

4. Section 608(e)(2)(B) provides that payments that are not "expenditures" under § 610 do not constitute "expenditures" for purposes of § 608(e)(1). This allows corporations and unions to communicate with their stockholders and members, to conduct "nonpartisan registration and get-out-the-vote campaigns" aimed at stockholders or members, and to establish, administer, and solicit contributions to segregated funds to be used for political purposes, free of the limitations imposed by § 608(e)(1).

5. The potential for proliferation is immense. In 1972, approximately 1,824,000 corporations filed federal income tax returns. Internal Revenue Service, Preliminary Statistics of Income, Corporation Income Tax Returns, p. 1 (1972). It is not clear whether this total includes subsidiary corporations where the parent filed a consolidated return. As of June 30, 1974, there were 1,865 corporations large enough to be listed on the New York Stock Exchange. SEC, Annual Report, p. 166, Table 19 (1974). In 1972, 71,409 local unions were chartered by national unions. Unaffiliated local unions numbered 884 in 1967. Department of Labor, Directory of National Unions and Employee Associations, p. 5, 67 (1973). Presumably, each of these organizations could form its own "political committee."

contributions is not insignificant.

of these sources of special interest. 2.

(A) → ~~5.~~ The potential for proliferation is immense. In 1972, approximately 1,824,000 corporations filed federal income tax returns. Internal Revenue Service, Preliminary Statistics of Income, Corporation Income Tax Returns, p. 1 (1972). (It is not clear whether this total includes subsidiary corporations where the parent filed a consolidated return.) As of June 30, 1974, there were 1,865 corporations large enough to be listed on the New York Stock Exchange. SEC, Annual Report, p. 166, Table 19 (1974). In 1972, 71,409 local unions were chartered by national unions. ~~Unaffiliated local unions numbered 884 in 1967.~~ Department of Labor, Directory of National Unions and Employee Associations, p. 5, 67 (1973). ~~Presumably, each of these organizations could form its own "political committee."~~

~~Tk~~ To: Justice Powell

Date: Jan. 7, 1976

From: Chris

Re: Buckley v. Valeo

This draft is the result of my collaboration with Ron. It ~~xxx~~ also incorporates your changes. I think it will be easier for you to evaluate in this form (rather than in a retyped version) ~~xxxxxx~~ for you can see what has been removed. There are not so many changes that it is difficult to read. I have clipped on inserts at the appropriate places and written brief explanations of the excisions.

I think it might be a good idea to print the relevant sections ^{as an appendix} of the Act/at the end of the whole opinion, ~~so~~ so they can be referred to easily and ~~xxx~~ will not unduly lengthen the individual sections. If that is done, I can remove some of the footnotes, such as note 4. I also plan to remove footnote 2 if the Chief retains that material in his introduction.

One more matter of note. There are certified questions ~~xxxxxx~~ relating to the criminal provisions (questions 3(i), 4(b), and 7(f)) that have not been addressed in ~~xxxxxxxxxxxxxxxx~~ our section or by Justice Stewart. (7(f) is the one relevant to the disclosure laws) ^{summarily} They were discussed/in a footnote by the Court of Appeals (n. 205 of that opinion) and were not briefed or argued by the parties ~~xxxxxx~~ before this Court. Ron plans to ignore the two that are relevant to his ~~x~~ section. Do you have any misgivings about doing the same?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 8, 1976

Re: Buckley

Dear Lewis:

I have carefully reviewed the present draft opinion with the thought of incorporating your proposed addition regarding the corporate/union "loophole." I do not believe that the paragraph can appropriately be worked into the discussion of §608(e)(1) at page 44, because the corporate/union discussion, in my view, implicates a distinct concern -- that the Act's contribution limitations will not check the power of these groups but may even enhance that power relative to individual contributors because of the advantage reaped through the ability to proliferate committees and the additional expenditures permitted unions and corporations by §610 of the Act.

One way of incorporating your views regarding the Act's treatment of corporations and labor unions is to raise the question whether the Act's contribution limitations are unconstitutional because of the practical advantages of corporations and labor unions in forming political committees. While this option would spotlight the problems that trouble you, it would also lengthen an already long opinion and would ultimately lead to a conclusion upholding the constitutionality of the Act's treatment of corporations and labor unions.

I believe that any claim of invidious discrimination in favor of labor unions and corporations would fail because the Act provides the same opportunities to all membership organizations and corporations to communicate with their members

and stockholders regarding elections, to engage in nonpartisan registration and get-out-the-vote campaigns, and to form political committees subject to the higher \$5,000 contribution limitation. Compare §§591(f)(4)(B), (C) with §610. It may well be as easy for the AMA or the ACLU to proliferate committees as it is for General Motors or the UAW. The major distinction between corporations and labor unions and other economic or political interest groups is the danger that contributions by employees or union members will be "voluntary" in only a technical or legalistic sense of the word. However, the decision in Pipefitters and the conforming limitations set forth in §610 eliminate the relevance of this distinction to the equal protection analysis. Finally, there is considerable force to the argument that the First Amendment protects the right of employees, stockholders, and union members to form and contribute to segregated funds just as it safeguards their right to join and financially assist other special interest groups and political parties.

Hardly!

Another approach would be to acknowledge candidly, in either text or footnote, that the Act's contribution limitations are only partial measures to reduce the principal sources of influence in federal elections. And to note that regardless of whatever measures are taken, organized interests will always play significant roles in the election process. This sort of treatment would not add up to much more than by-the-way dicta.

My guess is that either of these approaches would not satisfactorily express your special, focused concerns regarding the practical problem of corporate and labor union power under the Act. It is possible, therefore, that those concerns might best be exposed through a brief separate opinion by you, which other individual Justices might well join.

I shall be interested in knowing your further reactions at your convenience.

Sincerely yours,

Mr. Justice Powell

P.S.
[Signature]

Another reason for voting ~~608~~ (e)
is to ~~offer~~ ^{offer} individuals =

Q

file

A troublesome aspect of this far-reaching legislation is that its limitations fall most heavily on individuals. As contrasted with such limitations, Congress took no meaningful steps to curb the power of unions and corporations to influence the outcome of elections. The techniques identified and approved by this Court in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972), are embodied in essence in § 610 as amended, thereby enabling these "special interest" groups to wield far more influence on political decisionmaking than will be possible for isolated individuals. Even if the segregated funds established by corporations and unions under the imprimatur of § 610 are "political committees", subject to the \$5,000 contribution limitation of § 608(b)(2) and the \$1,000 independent expenditure limitation of § 608(e)(1), an organization's collective strength can be expanded by the proliferation of individual committees at each organizational level - a committee, say, for each subsidiary of a parent corporation or for every local

lfp/ss 1/10/76

Buckley, Part II
Suggested Addition Possibly
in the Discussion of
"Contributions"

A troublesome aspect of this far-reaching legislation is that its limitations fall most heavily on individuals. As contrasted with such limitations, Congress took no meaningful steps to curb the power of unions and corporations to influence the outcome of elections. The techniques identified and approved by this Court in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972), are embodied in essence in § 610 as amended, thereby enabling these "special interest" groups to wield far more influence on political decisionmaking than will be possible for isolated individuals. Even if the segregated funds established by corporations and unions under the imprimatur of § 610 are "political committees", subject to the \$5,000 contribution limitation of § 608(b)(2) and the \$1,000 independent expenditure limitation of § 608(e)(1), an organization's collective strength can be expanded by the proliferation of individual committees at each organizational level - a committee, say, for each subsidiary of a parent corporation or for every local

and regional unit of a national labor union. We are not asked to consider separately the validity of the corporate/union "loophole", apart from the general challenge to the Act. In view of the inherent power of organized interests and the First Amendment implications of limiting associational activities, there may be no effective way to ameliorate the disadvantage suffered by individuals. We do note that this legislation, on its face, could have the effect of accentuating this disadvantage.

1/10/76

19a. While providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds each authorized under the Act to contribute to candidates. As a prime example, 18 U.S.C. § 610 permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes. Corporate and union resources without limitation may be employed to administer these funds and to solicit contributions from employees, stockholders, and union members. Each separate fund may contribute up to \$5,000 per candidate per election so long as the Fund qualifies as a political committee under § 608(b)(2) of the Act. See S. Rep. No. 93-1237, at pp. 51-52; Federal Election Comm'n. Advisory Opinion 1975-23 (Nov. 24, 1975).

The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union. The potential for proliferation of these sources of contributions is not insignificant. In 1972, approximately 1,824,000 corporations filed federal income tax returns. Internal Revenue Service, Preliminary Statistics of Income, Corporation Income Tax Returns, p. 1 (1972). (It is not clear whether this total includes subsidiary corporations where the parent filed a consolidated return.) In the same year, 71,409

local unions were chartered by national unions. Department of Labor, Directory of National Unions and Employee Associations, pp. 5, 67 (1973).

The Act allows the maximum contribution to be made by each unit's fund provided the decision or judgment to contribute to particular candidates is made by the fund independently of control or direction by the parent corporation or the national or regional union. See S. Rep. No. 93-1237, at pp. 51-52.

19a/ While providing significant limitations on the ability of special interest groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose *some* organized interests from making ^{as} substantial contributions to candidates through the combined effect of individual gifts from their adherents or the proliferation of ^{many} political committees each authorized to contribute to ~~one~~ ^(S) candidate under the Act. As a prime example, ^(18 U.S.C.) ~~§ 610~~ § 610 permits labor unions and corporations to establish ~~segregated funds~~ ^{for receipt of voluntary contributions} segregated funds to be utilized for political purposes. Corporate and ~~union~~ union resources may be employed to administer these funds and to solicit voluntary contributions to the funds from employees, stockholders, and union members. Each separate fund may contribute up to \$5,000 per candidate per election so long as the fund qualifies ^{(S. Rep. No. 93-1237, at pp. 51-52;} as a political committee under § 608(b)(2) of the Act. See ^(S) Federal Election Comm'n, Advisory Opinion 1975-23 (Nov. 24, 1975). The Act places no limit on the number of funds that may be formed through the use of subsidiaries of the parent organization, but requires that contributions ^{to candidates} from each fund be controlled by a separate sub-unit acting independently of the parent organization. See S. Rep. No. 93-1237, at pp. 51-52.

David S. Broder

Post 1/11/76

Unions and the Campaign Law

BOSTON—Henry M. Jackson told a roomful of Massachusetts labor leaders the other morning that the best thing they could do to help his campaign for the Democratic presidential nomination would be to distribute his voting record to their members. It was said with the confidence of one who knows his word is likely to be taken seriously in labor circles.

Not only would it be helpful, Jackson said, but it could be done without any worry about running afoul of the complex reporting and disclosure provisions of the campaign finance law.

"You can use dues money from your treasury to distribute voting records," Jackson assured them. "It's perfectly legal."

And so it is. When the Democratic Congress passed the 1974 "Reform" law, it thoughtfully excluded from the limitations on campaign spending the costs which organizations incur in communicating about candidates and elections with their own members. The Federal Election Commission (FEC) has confirmed that unions can do mailing, run phone banks and organize to get their own members out to vote for preferred candidates. And it has extended the same privilege to corporations who wish to communicate with their employees and stockholders—all quite legally.

The unions tested their new technique in the special Senate election in New Hampshire last year and their "internal communications" network played a major role in electing Democrat John Durkin.

The Jackson meeting suggests just one of the many ways in which organized labor can play a crucial role in the selection of the Democratic nominee—if it mobilizes its forces to do so. But, like everything else in this year's Democratic nomination

picture the tactics of labor are complex and their ultimate impact unforeseeable.

By edict of its president, George Meany, the AFL-CIO is officially neutral in the pre-convention Democratic maneuvering. Meany was affronted when the Democrats ignored his warnings and nominated George McGovern in 1972. He was further angered when Democratic National Chairman Robert S. Strauss accepted some of the demands of the "new politics" forces on party rules and delegate-selection reforms in the past three years.

Last February, the federation's executive committee loftily announced the AFL-CIO would play no part in the choice of the Democratic nominee. But even then, Meany opened the door for a different policy by saying he could see "no reason why" individual unions would not become active in electing delegates and backing candidates on their own.

Many unions are doing just that. Jackson this week announced endorsements by four international union presidents and six other international officers. Other labor leaders have signed on for Birch Bayh, Jimmy Carter, Fred Harris, Lloyd Bentsen, and Morris Udall in various states.

For the most part, labor leaders are working harder to get delegates to Madison Square Garden than they are for any particular candidate. Meany invited Jackson, Bayh, and Bentsen to speak at the AFL-CIO convention in San Francisco last fall. But the hero of that session was the old labor favorite, Hubert H. Humphrey.

"Holding for Hubert" buttons are popular at union gatherings, and one of the unstated but plausible goals of the union political organizing is to have a bloc of votes that could swing to Humphrey if the

convention moves past the active contenders in its search for a nominee.

The most politically active unions at the moment are from the liberal flank of the labor movement. They began working together in 1972, when they supported McGovern despite official AFL-CIO neutrality in the Nixon-McGovern race.

Nine big unions have joined with the National Education Association in a Labor Coalition Clearinghouse. They pool information and resources in their efforts to get their people elected as delegates to the convention.

But there is no unanimity among them on a candidate. And Jackson, who is widely regarded as "too conservative" for such unions, has already picked up endorsements from national officers of half the unions in the coalition.

The one thing almost all of labor's leadership do agree on is their opposition to George Wallace. But even there, it is not certain how effective labor will be. Wallace has worked hard to cultivate labor support in his own state since returning to the governorship in 1970 and was endorsed for reelection in 1974 by the Alabama AFL-CIO Committee on Political Education.

While Alabama's wage scale and unemployment benefits are still low by national standards, state AFL-CIO president Barney Weeks says frankly that he no longer regards Wallace as being "anti-labor." On issues from workmen's compensation to the financing of a labor leadership training institute, Wallace has made a real effort in Weeks' view to assist organized labor.

That will not prevent labor unions in other states from opposing Wallace. But in that drive, as in others, it remains to be seen whether labor can use its political machine and its privileged position under the law to achieve its objectives in 1976.

To: Justice Powell

Date: Jan. 14, 1976

From: Chris

Re: Nos. 75-436, 75-437 Buckley v. Valeo

I have read this through and made some changes. The changes ^(mostly printers' errors) that I think should be indicated on the draft we circulate [^] are noted by page number on the first page and indicated by arrows. There are ~~many~~ other, merely technical changes that could be made on a later ~~xxx~~ draft if you would like to circulate this right away.

~~xxxxxxx~~ We can remove footnotes 1 and 3 if they are incorporated into the Chief's section.

Ron, Rick, and I have made no effort to coordinate the footnotes (i.e., number them serially) or the pagination, since this cannot be ~~fixxxx finally~~ done until we have a final version of the first section and have decided definitely on whether we will cite the relevant sections of the statute in footnotes or in an appendix. ~~x~~ As I said, I would prefer the appendix.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 15, 1976



RE: Nos. 75-436 & 75-437 Buckley v. Valeo, et al.

Dear Lewis:

I agree with your Memorandum in the above
"Reporting and Disclosure Requirements."

Sincerely,

A handwritten signature, appearing to be "Bill", is written in cursive below the word "Sincerely,".

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 16, 1976

MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436 & 75-437, Buckley v. Valeo

I have sent the attached concurrence and dissent to the printer. You will note that Part II, which is not included here, will be a somewhat truncated version of the previous circulation dealing with the FEC.


B.R.W.

January 16, 1976

Buckley

Dear Potter:

I will join your January 15, draft of "Contribution and Expenditure Limitations".

I do have a suggestion but it will not affect my overall approval of your fine draft.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

This argument, certainly when viewed in light of the entire Act, is not without force. One who wished to challenge an incumbent member of the House of Representatives, would confront the limitations on contributions and expenditures by individuals and committees, the limitation on the use of his own personal and family resources, and the overall ceiling on campaign expenditures. To be sure, his incumbent opponent is subject to these same limitations and therefore, on its face, the Act may appear to be even-handed.

The appearance of fairness, however, may not reflect political reality. Although some incumbents are defeated in every congressional election it is axiomatic in politics that -absent special circumstances - an incumbent has significant advantages. In addition^{to} the factors of voter recognition and the status accruing to holding federal office, the government itself makes available substantial resources to incumbents. These include local offices in addition to the Washington office, staff support^{that} traditionally^{is} available in political campaigns, and the[^]

franking privilege.* The concern engendered with respect to the handicapping of challengers to incumbents applies with special force to minor party and independent candidates.

71

In view, however, of the decision of the Court today invalidating certain provisions of the Act, we need not express any opinion as to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted. If the apparent imbalance briefly described above assumed constitutional dimensions (an issue we do not address), the balance has been significantly righted by our decision that First Amendment rights were infringed by the ceiling on independent expenditures, on the candidate's own expenditures, and on overall campaign spending. In view of the holding of the Court with respect to these particular limitations, we conclude that the remaining provisions of

*These built-in advantages of incumbents may, in particular districts, be significantly augmented by support of special-interest groups, e.g., corporations, unions and other organizations, which are not subject to significant limitations on contributions by individuals. See note 20, supra. If the incumbent has the support of major special interest groups, and is further supported by the media, the overall limitations prescribed by this Act could operate to foreclose any fair opportunity of a successful challenge.

the Act properly apply with equal force to challengers

and ~~incumbents~~ incumbents. We are mindful, in this respect,

and
that the danger of corruption/~~in~~ the appearance thereof

apply with equal force to challengers and ~~incumbents~~

incumbents, a consideration Congress was fully justified

in taking into account.

20a. In this discussion, we address only the argument that the contribution limitations alone impermissibly discriminates against challengers to incumbents. We do not address the more serious argument that these limitations, in combination with the limitation on expenditures by individuals and groups, the limitation on a candidate's use of his own personal and family resources, and the overall ceiling on campaign expenditures invidiously discriminate against challengers.

Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be even-handed. The appearance of a fairness, however, may not reflect political reality. Although some incumbents are defeated in every congressional election, it is axiomatic that - absent special circumstances - an incumbent begins the race with significant advantages. In addition to the factors of voter recognition and the status accruing to holding federal office, the incumbent has access to substantial resources provided by the government. These include local and Washington offices, staff support, and the franking privilege. Where the incumbent has the support of major special interest groups which have the flexibility described in note 20, supra, and is further supported

by the media, the overall limitations enacted by Congress could foreclose any fair opportunity of a successful challenge.

Since we have decided that First Amendment rights are infringed by the ceilings on independent expenditures, on the candidate's expenditures from his personal and family funds, and on overall campaign expenditures, however, we need not express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted.

January 19, 1976

Buckley

Dear Bill, Potter and Bill:

I have now had an opportunity to read the printed circulations of your respective Parts for the Court's opinion in the above case.

Subject to relatively minor comments that I may make to each of you (and which do not affect ~~my~~ basic approval), I write to confirm my willingness to join each of you.

This also will confirm that my clerk, Chris Whitman, will be available to serve on the "Clerks Committee" to harmonize stylistic and verbiage differences between the several Parts subject, of course, to review by each of us.

Sincerely,

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1976

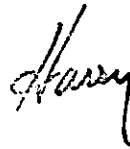
Re: Nos. 75-436/7 - Buckley v. Valeo

Dear Chief:

Your revision of the introductory section, circulated today, meets with my approval. I defer, however, to the members of the writing team with respect to details.

My own preference as to footnote 6 is to leave it as it is, rather than to decide the case only on the judgment of the Court of Appeals.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1976

Re: Nos. 75-436/7 - Buckley v. Valeo

Dear Bill:

Subject to what may be forthcoming from the "reconciliation team," I join your Part (V ?) as circulated January 17.

I also join the proposed answers to the several divisions of certified question 8.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 19, 1976

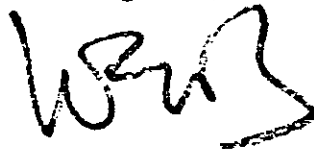
Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

Enclosed is a typed draft of the introductory section,
modified as to the contentions and description of the Court of
Appeals opinion, since each section now deals with those areas.

I welcome any suggestions.

Regards,

A handwritten signature in dark ink, appearing to be "Warren", written in a cursive style.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1976

Re: Nos. 75-436/7 - Buckley v. Valeo

Dear Lewis:

Subject to what the "reconciliation" efforts may bring forth, I am in accord with your proposed Part II (III ?) as circulated January 15. Specifically, I am in accord with the proposed answers to certified questions 7(a), (b), (c) and (d).

Sincerely,

A handwritten signature in black ink, appearing to read "Harry", with a horizontal line underneath.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1976

Re: Nos. 75-436/7 - Buckley v. Valeo

Dear Potter:

For the moment, and subject to what the "reconciliation" efforts produce, I join division C of your Part II. This relates to expenditure limitations. I am not at rest with respect to division B and shall await any further writing in dissent as to it. I am, of course, in accord with such part of division A as is consistent with what I have said above. Furthermore, I specifically join your answers in note 55 to certified questions 3(a), (d), (e), (f) and (g), and 4(a). I reserve with respect to certified questions 3(b), (c) and (h).

Sincerely,



Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1976

Re: Nos. 75-436/7 - Buckley v. Valeo

Dear Bill:

It is my understanding that the repeated use of the reference to "compelling governmental interests" (on pages 10, 11, 12, 20 and perhaps elsewhere) in your Part IV will be changed. I therefore find myself generally in accord with your Part IV as circulated January 16. I join the proposed answers to certified questions 5 and 6.

Sincerely,



Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 19, 1976

Re: Buckley, Nos. 75-436 & 75-437

Dear Bill,

This will confirm that I join your
printed recirculation in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 19, 1976



MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436 and 75-437 -- Buckley v. Valeo

I agree with Lewis's circulation on the disclosure provisions, Bill Brennan's circulation on the public financing provisions, and Bill Rehnquist's circulation on the Commission. I agree with Potter's circulation on the contribution and expenditure limitations -- except the invalidation of section 608 (a), which limits the amount a candidate can spend from his personal funds and from family funds under his control.

T.M.
T.M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 19, 1976

Re: Buckley, Nos. 75-436 & 75-437

Dear Lewis,

This will confirm that I join your
printed recirculation in this case.

Sincerely yours,

P.S.
/

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 19, 1976

Re: Buckley, Nos. 75-436 & 75-437

Dear Lewis,

This will confirm that I join your
printed recirculation in this case.

Sincerely yours,

P.S.
✓

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 19, 1976



RE: Nos. 75-436 & 437 - Buckley v. Valeo, et al.

Dear Potter:

I agree with your Memorandum in the above on
"Contribution and Expenditure Limitations."

Sincerely,



Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

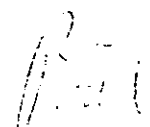
January 19, 1976

RE: Nos. 75-436 and 437 - Buckley v. Valeo, et al.

Dear Bill:

I agree with your Memorandum in the above of
January 17th on the Federal Election Commission.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 19, 1976

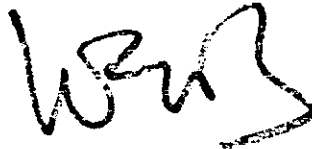
Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

Enclosed is a typed draft of the introductory section,
modified as to the contentions and description of the Court of
Appeals opinion, since each section now deals with those areas.

I welcome any suggestions.

Regards,

A handwritten signature in dark ink, appearing to be "Warren", written in a cursive style.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1976

MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436/7 - Buckley v. Valeo

My initial reaction about the proposed addition to the WHR section of the opinion was in accord with Bill Rehnquist's letter of this morning. Inasmuch, however, as he now acquiesces in what was worked out by Bill Brennan, Potter, Byron and Lewis at lunch today, I, too, go along.

Harry

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 20, 1976

Re: Nos. 75-436 and 437 — Buckley v. Valeo, et al.

Dear Bill:

I agree with your suggested addition
as to the de facto status of the Commission.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

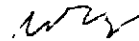
January 20, 1976

MEMORANDUM TO THE CONFERENCE

Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

My typed draft, concurring and dissenting in part, which was circulated today, contains two errors. On page 1, bottom line, it should read, "interests in a manner in which it might not do if simply. . ." (Not was missing from my draft.) And on page 3, fourth line from the bottom, please remove "as".

Sincerely,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 20, 1976

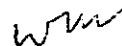
Re: Nos. 75-436 & 75-437 - Buckley v. Valeo

Dear Bill:

As you indicated in your memorandum of January 20th, I acquiesce in the proposed language to be included in my portion of the opinion.

I suggest that in the third line from the bottom of the first page of the draft you submitted, there be added after the word FEC the words "by law", in order to make clear that the reconstitution must occur by legislation passed by Congress and signed by the President. Ordinarily I would not make any point of it, but since so much of that part of the opinion deals with what Congress may do and what the President may do that I think precision here is desirable. I have discussed this with Byron and he has led me to believe he agrees.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 20, 1976

Re: Nos. 75-436 and 437, Buckley v. Valeo

Dear Bill:

TH I agree with your suggested addition to
Bill Rehnquist's section of the opinion.

Sincerely,

TH
T.M.

Mr. Justice Brennan

cc: The Conference

TH I understand the
Clerk's Committee has
made stylistic changes
that are acceptable.

January 20, 1976

Nos. 75-436 and 437, Buckley v. Valeo

Dear Bill:

I agree with your suggested addition to Bill Rehnquist's section of the opinion.

I understand the Clerks' Committee has made stylistic changes that are acceptable.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

File

CHAMBERS OF

JUSTICE WM. J. BRENNAN, JR.

January 20, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 75-436 & 437 - Buckley v. Valeo , et al.

At the luncheon conference today Potter, Byron, Lewis and I agreed that substantially the attached should be added to Bill Rehnquist's section of the opinion. Because the four of us were of this view, Bill Rehnquist stated that he could acquiesce.

In light of our printing problems will each of you (save, of course, John) please promptly return to me your reaction.

W.J.B. Jr.

RE: Nos. 75-436 & 437 - Buckley v. Valeo, et al.

It is also our view that the invalidity of the method by which the members of the FEC have been selected should not affect the validity of the FEC's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections.

The past acts of the FEC ^{, taken in accord with the substantive} are therefore accorded de facto ^{provisional} validity, [just as we have recognized should be the case ^{of the Act,} with respect to legislative acts performed by legislators

held to have been elected in accordance with an unconstitutional apportionment plan.] Connor v. Williams, 404 U.S. 549, 550-551 (1972); Schaefer v. Thomson, 251 F. Supp. 450, 453 (Wyo. 1965), aff'd, 383 U.S. 269 (1966); Ryan v. Tinsley, 316 F. 2d 430-432 (CA 10), appeal dismissed and cert. denied, 375 U.S. 17 (1963); cf. Richmond v. United States, 422 U.S. 358, 389 (1975) (BRENNAN, J., dissenting).

We also draw on the Court's practice in the apportionment and voting rights cases and stay the Court's judgment for a reasonable period not to exceed 30 days from this date to afford the Congress ^{an} ~~at least a brief~~ ^{, if it so desires,} opportunity [^] to reconstitute the FEC or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commis-

Buckley - 2

sion in the ~~brief~~ interim to function de facto in accordance with the substantive provisions of the Act. Cf.

Fortson v. Morris, 385 U.S. 231, 235 (1965); WMCA, Inc. v. Lomongo, 377 U.S. 656, 675-676 (1964); Georgia v. United States, 411 U.S. 526, 541 (1973).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 20, 1976

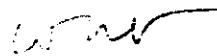
Re: Nos. 75-436 and 75-437 - Buckley v. Valeo

Dear Byron:

I have seen, expressing your views at the holding of invalidity as to the manner of selection of the FEC "should not affect the validity of the FEC's administrative actions and determinations to this date, and putting its administration of those proceedings, upheld today, authorizing the public financing of federal elections."

I think you may well be right under the cases, and while I think it entirely desirable that this view be expressed in a separate opinion, I do not think it would be wise for the Court to make a holding of this sort without the benefit of any argument or briefing. I would prefer to see the Court's opinion treat the matter by saying that all of these issues should be open to the Court of Appeals or the District Court on remand, reserving judgment as to what our decision on any particular fact situation should be. I think we have gone far enough in this case to give what amounts to almost an advisory opinion without carrying the matter still further and expressing views on a quite important question with respect to which we have never had the benefit of briefing or argument.

Sincerely,



Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 20, 1976

MEMORANDUM TO THE CONFERENCE

re: BUCKLEY v. VALEO

I have made various stylistic changes suggested by others as to the Introductory part.

I cannot accept one suggestion (from Bill Brennan) that we say only

"Appellants also view the federal subsidy provisions of Subtitle H primarily as discriminatory in violation of the Fifth Amendment, since subsidies are denied or severely restricted as to certain parties and candidates."

Appellants explicitly attack Subtitle H of the Act on First and Fifth Amendment grounds, and as violative of the General Welfare Clause and they are entitled to have their contentions acknowledged, however each of us views them.

I therefore strongly suggest we let the opening part recite precisely what Appellants claim (See Pg. 145, Appellants' Brief), as follows:

"Appellants also view the federal subsidy provisions of Subtitle H as violative of the General Welfare Clause, and as inconsistent with the First and Fifth Amendments."

This will make the sentence also reflect the way Bill Brennan treats these points in his part.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 21, 1976

Re: Buckley, Nos. 75-436 & 75-437

Dear Chief,

This will confirm that I join your printed
recirculation in this case.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 22, 1976

Re: Nos. 75-436 & 75-437 - Buckley v. Valeo

Dear Chief:

I agree with your draft of the introductory section
of this opinion.

Sincerely,

The Chief Justice

Copies to the Conference

*If I confer, for your
file, my approval of your*

January 22, 1976

No. 75-436 and 75-437 Buckley v. Valeo

Dear Chief:

I confirm, for your file, my approval of your introductory section.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 26, 1976

in January rather than February!

*As to Bill's suggestion that we
might ~~announce~~ announce on Friday afternoon,
I hope we can do this by 4 P.M.*

MEMORANDUM TO THE CONFERENCE

RE: Nos. 75-436 & 437 Buckley v. Valeo, et al.

The printer advises that he will need at least 48 hours notice before the time scheduled to hand down the opinions. He advises it will take him two working days to print the number of corrected copies. I expect this means that each of us having responsibility for a Part should get his corrected copy to the printer as soon as possible. I understand that the law clerks committee hopes to have a corrected copy completed by the end of today.

In these circumstances I doubt that we can count on handing down the case, even if all separate writing is completed and printed, before Friday next, January 30. I think too that it will be easier for the printer if we are ready by Friday to announce at some hour in the afternoon rather than the usual 10:00 A.M.

W.J.B. Jr.

*A note from Bill Brennan's
memo that the target date
~~is~~ is probably in Friday, Jan 30th.*

*It is important to make that
date if possible. The Act directs us
to "expedite" this case. It sounds
more "expedient" for the record
to show we brought the case down*

January 26, 1976

MEMORANDUM TO THE CONFERENCE

Nos. 75-436 & 75-437   BUCKLEY v. VALEO, et al.

I note from Bill Brennan's memo that the target date is Friday, January 30th.

It is important to make that date if possible. The Act directs us to "expedite" this case. It sounds more "expeditious" for the record to show we brought the case down in January rather than February!

L.F.P., Jr.

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 27, 1976

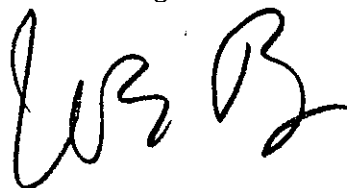
Re: 75-436 - Buckley v. Valeo
75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

Late last evening having received the full printed text of the above I completed my concurrence-dissent which is enclosed in typed form.

I observed that on page 137 the paragraph under "conclusion" begins, "In brief, we sustain, etc..." My primary responsibilities are limited to the neutral introductory part of the Court's opinion and my separate opinion, but I hope I will not be faulted for suggesting consideration be given to substituting some other phrase for "In brief...", i. e., "Finally", or "In conclusion".

Regards,

A handwritten signature in dark ink, appearing to be the initials 'W.B.' followed by a stylized flourish.

Enclosure

DRAFT

1/29/76

- Buckley v. Valeo

Reviewed

p 5

*9:00
called
Lew Ruppel*

PROPOSED DRAFT - ORAL ARGUMENT SUMMARY.

I have the per curiam opinion and judgment to announce on behalf of the Court in No. 75-436 and No. 75-437, Buckley v. Valeo. The question before the Court in these cases involves the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974.

The Federal Election Campaign Act ~~places a series of limits~~ governing^s financial aspects of campaigns for federal offices:

- (1) It limits contributions to candidates and committees.
- (2) It limits expenditures "relative to a clearly identified candidate."
- (3) It limits expenditures by a candidate from his personal or family funds.
- (4) It restricts overall general election and primary campaign expenditures.
- (5) The Act requires political committees to keep detailed records of contributions and expenditures, including the name and address of each individual contributing in excess of \$10, and his occupation and principal place of business if his contribution exceeds \$100.
- (6) Political committees must file quarterly reports with the Federal Election Commission disclosing the source of every contribution

exceeding \$100 and the recipient and purpose of every expenditure over \$100.

(7) Every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding \$100 "other than by contribution to a political committee or candidate" must file a statement with the Commission.

(8) The Act creates an eight-member Commission with record-keeping, disclosure, and investigatory functions and with rule-making, adjudicatory, and enforcement powers.

(9) The Commission consists of two members appointed by the President pro tempore of the Senate, two by the Speaker of the House, and two by the President (all subject to confirmation by both Houses of Congress). It also includes the Secretary of the Senate and the Clerk of the House as ex officio non-voting members.

(10) Subtitle H of the Internal Revenue Code, as amended in 1974, provides for public financing of Presidential nominating conventions and general election and primary campaigns from a fund created by an optional check-off system under which each taxpayer may indicate approval of placing \$1.00 of tax revenue in the fund for the purposes of the Act. The resulting amount is allocated for funding of conventions and presidential election campaigns.

(11) Subtitle H establishes three categories of parties: (a) "major" parties, (b) "minor" parties, and (c) "new" parties. A primary candidate

for the Presidential nomination by a major political party who receives more than \$5,000 from private sources (counting only the first \$250 of each contribution) in each of at least 20 states is eligible for matching public funds.

Appellants sought declaratory and injunctive relief against these statutory provisions on various constitutional grounds. The Court of Appeals, on certified questions from the District Court, upheld all but one of the statutory provisions. A three-judge District Court upheld the constitutionality of Subtitle H.

I am authorized to announce on behalf of the Court the following judgment: the Court holds that this litigation presents an Art. III "case or controversy," since the complaint discloses that at least some of the appellants have a sufficient "personal stake" in a determination of the constitutional validity of each of the challenged provisions.

AS TO THE CONTRIBUTION AND EXPENDITURE LIMITATIONS

(1) The Court holds that the Act's contribution provisions are constitutional as appropriate legislative measures to deal with the reality and appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The Court holds that the contribution limits do not directly impinge upon the rights of individual citizens and candidates to engage in political debate and discussion.

(2) The expenditure provisions, however, are violative of First Amendment guarantees and the Court holds them unconstitutional. Those provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in political expression protected by the First Amendment.

AS TO THE DISCLOSURE PROVISIONS

The Court holds as follows:

(1) The Act's disclosure and recordkeeping provisions are a constitutional exercise of legislative power. They serve substantial governmental interests. It was reasonable for Congress to conclude that disclosure of contributions informs the public and serves a legitimate governmental interest in relation to the political processes.

(2) The disclosure provisions challenged here are not overbroad insofar as they apply to contributions to minor parties and independent candidates; Congress could appropriately conclude that a blanket exemption for minor parties was not warranted. Minor parties will be free to show a reasonable probability that compelled disclosure of contributors' names will subject them to threats or harassment as a result of disclosure.

(3) As narrowly construed by the Court's holding today, the Act's provision for disclosure by those who make independent contributions

and expenditures is also constitutional. In construing the provision, we limit its application to narrow and precise circumstances: (a) when contributions are either earmarked for political purposes or have been ^{or requested} authorized by a candidate or his agent to be made to some person other than a candidate or political committee, and (b) when expenditures are made for a communication that expressly advocates the election or defeat of a clearly identified candidate. As construed, this provision is not unconstitutionally vague, nor does it constitute an unlawful prior restraint.

(4) The particular dollar thresholds chosen by Congress are related to the goals of the Act and constitute line-drawing of a kind within legislative power. Application of the recordkeeping and disclosure requirements to contributions of \$10 and \$100 is not overbroad on this record.

AS TO PUBLIC FINANCING PROVISIONS

The Court holds Subtitle H of the Internal Revenue Code constitutional. Congress, under the General Welfare Clause, has power to decide what expenditures will promote the general welfare and this Subtitle is a permissible congressional choice as a means to reform the electoral process. The Court holds also that the Subtitle does not violate the First Amendment; rather it represents an effort to use public money to facilitate and to enlarge public discussion and participation in the electoral process. Being less burdensome than ballot-access regulations and having been enacted in furtherance of vital governmental interests, the Subtitle

does not invidiously discriminate against minor and new parties in violation of the Due Process Clause of the Fifth Amendment. Finally the Court's invalidation of the spending-limit provisions of the Act does not render Subtitle H unconstitutional; the Subtitle is severable from such provisions.

AS TO THE FEDERAL ELECTION COMMISSION

The Commission's composition as to all but its investigatory and informative powers violates Art. II, § 2, cl. 2 to the extent that a majority of the voting members are appointed by the President pro tempore of the Senate and the Speaker of the House. Hence, although the Commission's past acts are accorded de facto validity and a stay is granted permitting it to function under the Act for not more than 30 days, the Commission, as presently constituted, is violative of constitutional limitations and it may exercise only such investigatory and other powers as are in the same category as Congress may delegate to one of its own committees.

Accordingly, the judgment of the Court of Appeals in 75-436 is affirmed in part and reversed in part; the judgment the District Court for the District of Columbia in 75-437 is affirmed.

Mr. Justice White, Mr. Justice Marshall, Mr. Justice Blackmun, Mr. Justice Rehnquist and I, have each filed separate opinions in which each has separately concurred in part and dissented in part from the opinion of the Court.

Mr. Justice Stevens took no part in the consideration or decision of these cases.

Campaign Finance: Second Thoughts

ONE FUNCTION OF THE Supreme Court is to provide a sober second thought about laws and policies adopted in times of stress. The Court has met this reflective obligation with impressive care in its decision on the 1974 campaign financing law, Congress' complex attempt to reduce the corrosive influence of money in politics. In upholding many parts of the law and striking down others, the Court has established a legal framework for this year's campaigns. It has also emphasized some constitutional issues which the advocates of regulation, including ourselves, may not have paid enough attention to in the first post-Watergate clamor for controls.

The most important aspects of the ruling define how far the regulation of campaign spending may reach without running into the First Amendment's guarantee of free political expression. The Court emphatically upheld detailed disclosure of the sources and uses of campaign funds. A majority also approved limits on contributions to presidential and congressional campaigns, but rejected ceilings on spending as an interference with free speech. This means that candidates are free to spend as much as they can raise from their own funds or contributions that do not exceed the limits. It also means that individuals and groups may not give huge amounts to candidates, but may spend whatever they want to independently. The only private political outlays Congress may constitutionally limit, the Court concluded, are those involving some transaction between a candidate and a supporter—a contribution, a loan, a prearrangement or a deal. Those are the areas in which corruption and the appearance of corruption most readily arise.

Full disclosure and contributions limits should do much to combat the excessive or improper influence of moneyed interests. But serious problems remain. Without spending ceilings, some well-financed candidates may still be able to drown their opposition in a flood of advertising, mailings and telephone appeals. Wealthy candidates will have at least an initial edge over those who have to solicit large numbers of small contributions. Moreover, in practice the distinction between "coordinated" and "independent" spending will be hard to make; groups backing candidates are likely to launch lavish "independent" drives to get around the contributions limits.

Many opponents of unchecked spending view these possibilities as loopholes opened by the Court. But one man's loophole is another man's liberty. To the Court, these are fundamental aspects of freedom which, however troubling in some ways, may not be abridged. "The First Amendment," the Court said, "denies

government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." The Constitution leaves such judgments to the people. In our view this is persuasive—which is another way of saying that the Court's well-reasoned opinion has afflicted us with some sober second thoughts about our advocacy of spending controls. While we persist in our belief that we had our eye on the right problem—the inequitable advantage which easy access to money gives to some well-situated candidates—we may well not have had the right solution. We are persuaded by the constitutional questions raised by the Court. But we remain convinced that there are important inequities which the Court's constitutional argument leaves unresolved, and indeed some which the decision has aggravated.

The Court did sanction one promising alternative by upholding public financing of presidential campaigns. This approach, being tried for the first time this year, gives a financial boost to all qualified candidates and lessens their dependence on private funds. It also offers a means of holding down campaign costs because the Court did approve the imposition of spending limits as a condition of public grants—as long as candidates are free to forego public funds and spend unlimited amounts from private sources if they prefer. All this makes public financing attractive. But the program is still at an experimental stage and should not be touted as a panacea, especially not until it can be evaluated after this year's campaigns.

Finally, in the step that will have the greatest immediate impact, the Court unanimously struck down enforcement of any campaign laws by the Federal Elections Commission on the ground that Congress had violated the principle of separation of powers by retaining too large a role in appointing the panel's membership. The Court thus slapped the hands of Rep. Wayne L. Hays (D-Ohio) and other legislators who have tried to keep the FEC under their thumbs. Congress, the Court said in effect, must choose between truly independent enforcement and no elections board at all. Furthermore, the choice must be made in the next 30 days, before the FEC closes its doors. Otherwise all the parts of the law upheld last week—including public disclosure and matching grants to presidential candidates—will be in limbo. Such disarray would be intolerable with so many campaigns already under way. The task for Congress could not be more clear. Both houses should resist any impulses to toy with the law, and quickly pass a simple act reshaping the elections panel in a form that will meet the constitutional test.

David S. Broder

Undoing Hays' Mischief

Of the many ways in which it is possible to commend the Supreme Court decision on the Federal Election Campaign Act of 1974, perhaps the simplest is to say that the high court systematically undid the mischief of Rep. Wayne Hays.

The Ohio Democrat—who heads both the House Administration Committee and the Democratic Congressional Campaign Committee—had used his strategic legislative position to assure the well-being of his fellow-Democratic incumbents when the post-Watergate campaign finance bill was going through Congress.

By bottling up the measure in his committee for months, Hays managed to extract a high price from the bill's Senate sponsor—so high a price that some observers, including this reporter, concluded that the legislative cure was worse than the Watergate disease.

The bill the Senate sent to Hays set stiff disclosure requirements for campaign finances, to be enforced by an independent Federal Election Commission. It limited the size of private campaign contributions and provided substantial public financing for all federal offices.

When that bill reached the House Administration Committee, Hays—one of the few surviving autocrats of the gavel—went to work gutting it on behalf of the incumbents' club.

The first casualty was the provision giving public funds to candidates for the House and Senate. Hays was not about to allow the challengers to compete effectively against the incumbents by assuring them a parity of financial resources.

Instead, he moved in the other direction—putting a low ceiling on how much private money House candidates could spend on their races. Incumbents enjoy more than half-a-million dollars worth of taxpayer-financed staff assistance, travel, mailing and publicity services each term. But Hays tried to limit expenditures by congressional candidates to a fraction of

that sum, finally agreeing to an allowable maximum for a House race of only \$70,000—substantially less than the average expenditures for those challengers who were able to oust incumbents in 1972 or 1974.

As a final fillip, Hays insisted that the majority of the members of the "independent" Federal Election Commission be appointed by Congress—hoping to assure that they would be dominated by the very people they were supposed to police.

It was those Hays-inspired revisions that the high court struck down in its decision last week while approving the basic and much-needed reforms.

The justices sustained the constitutionality of the disclosure requirement and the limitation on private contributions. They also validated the principle of public financing for presidential campaigns. While they could not command Congress to extend that financing to House and Senate elections, they certainly gave an impetus to that effort by their decision.

The court cracked down hard—and rightly so—on the spurious arguments for expenditure limitations that had been concocted by Hays and his allies and accepted in the court of appeals.

The phoniest of those rationalizations was that campaign expenditures are too high or are increasing too rapidly. The majority opinion challenged the factualness of that claim and said, "In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions...the First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise. In the free society ordained by our Constitution, it is not the government but the people...and candidates...who must retain control over the quantity and range of debate on public issues in a political campaign."

In addition to that strong affirmation of the practical reality that in modern society, freedom of speech requires the free expenditure of funds, the justices took measured but effective cognizance of the fact that the Hays' provisions had turned the supposed "reform law" into an incumbents' security bill.

The equalization of permissible campaign expenditures, through tight-spending ceilings, they observed, "might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign," i.e., a challenger.

In a final demonstration of good sense, the high court told Mr. Hays that the Constitution forbids his clever scheme to have Congress name the majority of the commission members.

The Supreme Court decision saved what was useful in Congress' first try at a campaign finance reform law and discarded what is most dangerous. Now, the Congress has the opportunity to build onto that sound foundation—by reconstituting the Federal Election Commission as a genuinely independent body, and by ending the anomaly of providing public financing for the presidential candidates, who need it least, but not for the congressional candidates, who need it most.

It would be nice to think this effort will have the assistance of chairman Wayne Hays. But nobody should bet on it.

The Court on election reform

The Supreme Court's verdict on the Federal Elections Act seems curiously pleasing to almost everyone. Presidential candidates are pleased that the court didn't close up the candy store — their campaigns will after all be underwritten by the taxpayers. Civil libertarians, right and left, are pleased that the court agreed that money talks and has a right to talk — the limits placed by Congress on certain forms of paid political advocacy were disallowed. Only the Federal Elections Commission, which now has a life expectancy of 30 days, is unhappy. And we suppose that its scourge, Rep. Wayne Hays, is happy about that.

But pleasures can be deceiving. Really, the decision is in several respects a damning comment on the constitutional ineptitude of Congress — the most severe judgment on an important congressional act in many years. And the comment is well warranted, in our view.

If one can speak of outraging the First Amendment, it was certainly outraged by the clumsy attempt to restrict individuals to a thousand dollars' worth of independent advocacy "relative to a clearly identified candidate" — especially since businesses, unions and other lobbies were granted the opportunity to raise and spend big political kitties.

Of course, everyone understood that it was Congress's purpose to zip the too talkative purses of the Stewart Motts and Clement Stones; but the result was to revise the First Amendment so as to exempt a whole class of big spenders who use their wealth for political purposes.

The present makeup of the Federal Elections Commission, which was found to violate the separation of powers principle, was an equally fundamental issue. The court found that Congress, when it retained control of four of the six voting appointees on the commission, had in effect usurped an executive function — enforcing law it had made. This legal defect is said to be chargeable to Representative Hays, although it seems an embarrassingly lame excuse to blame basic constitutional error on one committee chairman, however tyrannical.

On only one of the principal constitutional challenges to the act did the court, in our view, fail to rule convincingly. Its treatment of the effect of the financing provisions on third parties seems cavalier and evasive.

The established parties, to which most federal elected officials belong, will get their campaign-year handouts automatically. Third parties, and third party candidacies, will not. The court upheld this discrimination in part on the historical consideration that third parties rarely if ever succeed: "Since the presidential elections of 1856 and 1860, when the Whigs were replaced as a major party by the Republicans, no third party has posed a credible threat to the two major parties in presidential elections. Third parties have been completely incapable of matching the major parties' ability to raise money and win elections . . ." So the court said, not only forgetting Teddy Roosevelt's Bull Moose campaign of 1912 but implying that if the appellants had shown that the plan actually impedes third parties it might have ruled otherwise. But the role of the Federal Elections Act in preventing the formation of third parties would be difficult to show — which is not to say it will have no such effect! As the decision stands, it stands on the curious reasoning that the historic weakness of third parties is a constitutionally valid reason for keeping them weak.

On the whole, this welcome decision has the valuable effect of showing the pitfalls of hasty reform legislation. Congress was under immense pressure, after the Watergate scandal, to do something to disinfect an electoral system where big money, furtively raised by processes smacking of extortion, was thought to corrupt elections and reinforce public cynicism.

But Congress, in search of disinfectants, over-medicated and passed lightly over some important constitutional fundamentals. The Court has quite properly imposed constitutional limits on the reform process. It has said, in effect, that freedom of advocacy, even when underwritten by private fortunes, is a superior value in our system. It has cut short the breast-beating about the high cost of electioneering — and the problems it undoubtedly creates — by affirming that "the First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise." In other words, it is not for Congress or the courts to proclaim the point at which the American electorate has been supersaturated with political pleading. That judgment belongs to the voters themselves. We will know they have exercised it when everyone plays Rip Van Winkle on election day.

Discuss

DISCUSS

*Divide
equally
Sixty
Jaques. Chris*

February 20, 1976 Conference
List 9, Sheet 2

No. 74-436

Assessment or
Division of Costs

BUCKLEY

v.

VALEO

When the decision was handed down in this case, the Court provided that the mandate issue forthwith. No instructions as to the assessment or division of costs were given the Clerk. Accordingly, the mandate provided that costs would be assessed at a later date. Approximately \$6,300 in taxable costs are involved.

Rule 57(1) and (2) provide:

In all cases of affirmance of any judgment or decree by this court, costs shall be paid by appellant or petitioner unless otherwise ordered by the court.

In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court.

DISCUSSION: Given the nature of the case and the decision of the Court,
an equal division of the costs involved would seem appropriate.

There are no pleadings filed by the parties with respect to this matter.

2/19/76

Ginty

PJN

[illegible]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 26, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 75-436 Buckley v. Valeo, et al.

Henry Putzel suggests changing the Buckley v. Valeo lineup at the end of the syllabus as indicated in the attached xerox copy. The revision is satisfactory to me, and I have so informed Henry. I think, however, that each Justice should report his view directly to Henry.

W.J.B.Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1976

Re: (75-436 - Buckley v. Valeo
(75-437 - Buckley v. Valeo

MEMORANDUM TO THE CONFERENCE:

The enclosed was filed at 1:20 p.m. today.

It seems clear that there is no standing for
the movant.

No other motions have been received.

Regards,

WE RB

*Deny. There is no reason to keep
extending the stay so Congress
can tinker with other
changes in the Act. Besides,
movant is not even a party
Chris*

RECEIVED

MAR 22 1976

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Nos. 75-436' and 75-437

JAMES L. BUCKLEY, ET AL., APPELLANTS,

v.

FRANCIS R. VALEO, ET AL., APPELLEES,

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE SUGGESTION
AMICI CURIAE THAT STAY BE EXTENDED

The movants are the Democratic National Committee and seven campaign committees of candidates for the Democratic Presidential nomination. Movants hereby respectfully move for leave to file the attached suggestion amici curiae. Attorneys for the appellees in the above case have indicated that they have no objection to the granting of this motion. Attorneys for the appellants have been advised that movants intended to file this motion with the Court, but did not indicate to movants' counsel whether they would object to the granting of the motion.

The interest of the Democratic National Committee and the aforementioned campaign committees in the instant matter arises from the immediate and irreparable injury which would result if the Court does not continue the stay of its judgment herein as it affects the authority of the Federal Election Commission to exercise certain powers granted to it under the Federal Election Campaign Act of 1974, the constitutionality of which powers the Court has sustained.

The movants believe that the Court should have the benefit of the views set forth in the attached suggestion amici curiae so

that it may fully consider the extent and effect of such immediate and irreparable injury to movants and to the political process if the aforementioned stay is not extended.

Respectfully submitted,

(Signed) Stuart E. Seigel

Stuart E. Seigel

Cohen and Uretz
1775 K Street, N.W.
Washington, D.C. 20006

/s/ Ralph J. Gerson

Ralph J. Gerson

Democratic National Committee
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Democratic National
Committee

Jack H. Watson, Jr.
Jimmy Carter for President

Jerome E. Murphy
Church for President Committee

Reed Martin
Fred Harris for President

Walter Skallerup
Jackson for President

David E. Birenbaum
Shriver for President

Frederick D. Palmer
Udall '76

Alton Dauphin, Jr.
The Wallace Campaign

Dated: March 22, 1976

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Nos. 75-436 and 75-437

JAMES L. BUCKLEY, ET AL., APPELLANTS,

v.

FRANCIS R. VALEO, ET AL., APPELLEES,

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUGGESTION AMICI CURIAE
THAT STAY BE EXTENDED

The Democratic National Committee and seven campaign committees of candidates for the Democratic Presidential nomination respectfully suggest, as amici curiae, that the Court, on its own motion, extend for 21 days, to and including April 12, 1976, the stay of its judgment herein insofar as it affects the authority of the Federal Election Commission to exercise the duties and powers granted it under the Federal Election Campaign Act of 1974.

In its decision of January 30, 1976, the Court upheld Federal legislation providing for public financing of campaigns of candidates for nomination to the Office of President of the United States, campaigns of candidates for election to the Office of President of the United States, and Presidential nominating conventions of political parties. It was held, however, that the Federal Election Commission could not validly exercise many of the powers that Congress had conferred upon it because the members of the Commission had not been appointed in conformity with Article II, Section 2, Clause 2 of the Constitution. Among these powers are the required certification to the Secretary of the Treasury of eligibility for the payments

provided for in 26 U.S.C. §§9005, 9008(g), and 9036. The Court stayed its judgment for thirty days with respect only to the "authority of the Commission to exercise the duties and powers granted it under the Act." On February 27, 1976, the Court extended the stay for an additional 21 days, to and including March 22, 1976.

During the period of the additional stay of 21 days, the Congress has made substantial progress toward passage of legislation to amend the Federal Election Campaign Act of 1974. Although there are disagreements within the Congress over various proposals to amend other aspects of the Act, there appears to be no disagreement over the proposal to reconstitute the Commission so that its members would be appointed in accordance with the requirements of Article II, Section 2, Clause 2 of the Constitution.

The Senate Rules Committee has reported a bill to the Senate floor and substantial debate has already occurred with respect to its provisions. The House of Representatives Committee on House Administration has approved a bill and will ask the House Rules Committee for a rule for floor consideration of the bill on March 23, 1976. The leaders of the Senate and House of Representatives have publicly committed themselves to speedy completion of action on both bills. An additional extension of the stay herein for a period of 21 days will give the Congress and the President the time necessary to enact legislation providing for a constitutional mechanism to implement the portions of the Act held valid by the Court, without sanctioning unnecessary delay.

The amici curiae herein possess a direct and substantial interest in the continued implementation of the Federal Election Campaign Act, and would suffer immediate and irreparable injury

should the judgment concerning the authority of the Federal Election Commission become final at this time. Each of the campaign committees has made specific financial commitments in reliance upon the receipt of matching Federal funds as authorized by 26 U.S.C. §§9031, et seq. Indeed, to a considerable extent, their primary election campaigns are predicated upon continuing receipt of these funds. In recent weeks the Federal Election Commission has certified funds for matching payments on a weekly basis. If the availability of these funds were to be terminated, even for a brief interval, it would cause serious disruption in the conduct of forthcoming primary and caucus campaigns, and could possibly cause the withdrawal of some candidates. The disruption of these campaigns, and the possible withdrawal of candidates, would have a deleterious effect on the open and vigorous debate that is essential to the electoral process.

The Federal Election Campaign Act Amendments were in large part intended to minimize the impact of large private contributions on Federal election campaigns by making matching funds available to assist qualified candidates in communicating effectively with the electorate. Naturally the Democratic Presidential candidates herein assumed, in planning their campaign strategies, that these designated funds would be available in accordance with the statutory procedures. To prevent the Commission from certifying the disbursement of funds, the legality of which has been specifically sustained by the Court, would, accordingly, have two serious effects. First, it would fundamentally impair a central purpose of the statute to minimize the dependence of Presidential candidates on relatively small groups of contributors. Second, it would cause irremediable harm to Presidential candidates who, in good faith, relied upon and complied with the Act's provisions.

Success in the Presidential nomination process is attendant upon an ability to communicate with voters in key states and to build momentum which cannot be achieved at a later date. There are three Presidential primary elections to be held between March 22 and April 12:

North Carolina	March 23
New York	April 6
Wisconsin	April 6

In addition, eleven states will conduct Presidential nominating conventions or caucuses during this period:

Alaska	March 26 - 28
Florida	March 27
South Dakota	March 27
South Carolina	March 31
Virginia	April 3
Oklahoma	April 3
Kansas	April 3
Iowa	April 10
Nevada	April 9 - 11
California	April 11
Minnesota	April 10 - May 2

Failure to provide a mechanism for disbursement of legally authorized and anticipated public funds would seriously disrupt the orderly political process in these primary and caucus states.

The Democratic National Committee has entered into contracts and financial arrangements with respect to its national Presidential nominating convention on the basis of financing projections formulated in reliance upon the public financing of conventions in accordance with the provisions of 26 U.S.C. §9008. Due to the expenditure limitations imposed by acceptance of public financing the National Committee has not made plans to solicit private funds to defray convention costs, as has heretofore been the traditional practice. Under the quarterly payment schedule initiated by the Federal Election Commission, the next certification of convention funds is to be made on April 1, 1976. Any disruption of this procedure would seriously jeopardize the ability of the Democratic National Committee to conduct a full

and open convention. Further, such a disruption would result in increases in many convention expenses, increases which could not be paid for by the Party within the limitations set forth in 26 U.S.C. §9008. As is the case in the Presidential nominating process, continued availability of funds is essential to the execution of the complex plans for holding the convention.

In view of the fact that passage of legislation by the Congress is imminent, and in view of the immediate and irreparable harm that will be inflicted upon amici curiae if a certification mechanism for public matching funds and convention funds becomes unavailable, it is respectfully suggested that the Court, on its own motion, extend the stay previously granted for a period of 21 days, to and including April 12, 1976.

Respectfully submitted,

(Signed) Stuart E. Seigel

Stuart E. Seigel

Cohen and Uretz
1775 K Street, N.W.
Washington, D.C. 20006

/s/ Ralph J. Gerson

Ralph J. Gerson

Democratic National Committee
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Democratic National
Committee

Jack H. Watson, Jr.
Jimmy Carter for President

Jerome E. Murphy
Church for President Committee

Reed Martin
Fred Harris for President

Walter Skallerup
Jackson for President

David E. Birenbaum
Shriver for President

Frederick D. Palmer
Udall '76

Alton Dauphin, Jr.
The Wallace Campaign

Dated: March 22, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of March, 1976, caused copies of the foregoing Motion for Leave to File Suggestion Amici Curiae that Stay be Extended and attached Suggestion Amici Curiae that Stay be Extended to be served on the following persons by hand delivery:

Brice M. Clagett, Esquire
John R. Bolton, Esquire
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Edward H. Levi, Esquire
Attorney General
U.S. Department of Justice
Room 5111
Tenth and Constitution Avenue, N.W.
Washington, D.C. 20530

Robert M. Bork, Esquire
Daniel M. Friedman, Esquire
Louis F. Clairborne, Esquire
U.S. Department of Justice
Room 5143
Tenth and Constitution Avenue, N.W.
Washington, D.C. 20530

John G. Murphy, Jr., Esquire
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Lloyd N. Cutler, Esquire
Paul T. Mode, Jr., Esquire
William T. Lake, Esquire
Roger M. Witten, Esquire
Patricia D. Douglass, Esquire
1666 K Street, N.W.
Washington, D.C. 20006

Kenneth J. Guido, Jr., Esquire
Fred Wertheimer, Esquire
2030 M Street, N.W.
Washington, D.C. 20036

and to be served on the following persons by first class mail, postage prepaid:

Ralph K. Winter, Jr., Esquire
127 Wall Street
New Haven, Connecticut 06520

Joel M. Gora, Esquire
Melvin L. Wulf, Esquire
American Civil Liberties Union
22 East Fortieth Street
New York, New York 10016

Archibald Cox, Esquire
Harvard University
Langdell Hall
Cambridge, Massachusetts 02138

Ralph J. Spritzer, Esquire
Paul Bender, Esquire
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

(Signed) Stuart E. Seigel

Stuart E. Seigel

Cohen and Uretz
1775 K Street, N.W.
Washington, D.C. 20006

/s/ Ralph J. Gerson

Ralph J. Gerson

Democratic National Committee
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Democratic National
Committee

Dated: March 22, 1976

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 23, 1976

No. 75-436 and 75-437 Buckley v. Valeo

MR. JUSTICE POWELL, concurring.

I concur in the Court's denial of the petition to intervene. As these cases have been remanded to the Court of Appeals, jurisdiction to consider intervention of new parties at this time is vested in that court.

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
							PART II	
typed draft 1/19/76		agree with LFP 1/15/76	1st printed draft 1/15/76	concurring in part & dissenting in part	join LFP 1/19/76	join LFP 1/19/76	11/18/75	1st draft 1/17/76
typed draft 1/20/76		2nd draft 1/16/76	join WJB 1/19/76	typed draft 1/16/76	join WHR 1/19/76	join ~~WJB~~ 1/19/76	1st printed draft 1/15/76	join C J 1/22/76
1st printed draft 1/21/76		agree with PS 1/19/76	join WHR 1/19/76	2nd draft 1/20/76	join WJB 1/19/76	join same of PS	join PS 1/16/76	
concurring in part & dissenting in part - typed draft 1/27/76		agree with WHR 1/19/76	join LFP 1/19/76	3rd draft 1/26/76	join PS with one exception 1/19/76	1/19/76 join WHR	1/11/76 join WHR	
1st printed draft 1/28/76					concurring in part & dissenting in part 1/26/76	join C J 1/19/76	join C J 1/22/76	
					2nd draft 1/26/76	concurring in part & dissenting in part 1st draft		
P.C. 2nd draft 1/26/76								