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FEDERAL ELECTION REFORM, 1973

HEARINGS

BEFORE THE

SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

AND THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 23, S. 343, S. 372, S. 1094, S. 1189, S. 1303, S. 1355, and S.J. Res. 110

Various Measures Relating to Federal Election Reform

APRIL 11, 12, JUNE 6, 7, 1973

Printed for the use of the Committee on Rules and Administration

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 23

TO LIMIT THE AMOUNT OF PERSONAL FUNDS AN INDIVIDUAL MAY CONTRIBUTE TO CANDIDATES FOR FEDERAL OFFICE IN CONNECTION WITH THE CAMPAIGNS OF THOSE CANDIDATES

S. 343

TO DESIGNATE THE TUESDAY NEXT AFTER THE FIRST MONDAY IN OCTOBER AS THE DAY FOR FEDERAL ELECTIONS

S. 372

TO AMEND THE COMMUNICATIONS ACT OF 1934 TO RELIEVE BROADCASTERS OF THE EQUAL TIME REQUIREMENT OF SECTION 315 WITH RESPECT TO PRESIDENTIAL AND VICE PRESIDENTIAL CANDIDATES AND TO AMEND THE CAMPAIGN COMMUNICATIONS REFORM ACT TO PROVIDE A FURTHER LIMITATION ON EXPENDITURES IN ELECTION CAMPAIGNS FOR FEDERAL ELECTIVE OFFICE

S. 1094

TO IMPROVE THE REGULATIONS OF FEDERAL ELECTION CAMPAIGN ACTIVITIES

S. 1189

TO PROMOTE FAIR, UNDERSTANDABLE, AND ENFORCEABLE REGULATIONS FOR NOMINATION AND ELECTION TO FEDERAL OFFICE, BY LIMITING THE COLLECTION AND EXPENDITURE OF FUNDS, AND BY SIMPLIFYING REPORTING REGULATIONS

S. 1303

TO DESIGNATE THE FIRST SATURDAY IN NOVEMBER AS THE DAY FOR FEDERAL ELECTIONS

S. 1355

TO DESIGNATE THE FIRST SUNDAY IN NOVEMBER AS THE DAY FOR FEDERAL ELECTIONS

APRIL 11 AND 12, 1973

FEDERAL ELECTION REFORM, 1973

WEDNESDAY, APRIL 11, 1973

U.S. SENATE,
SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS OF THE
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m. in room 301, Russell Office Building, Senator Claiborne Pell (chairman of the subcommittee) presiding.

Present: Senators Pell (presiding), Robert C. Byrd, Allen, Scott of Pennsylvania, and Griffin.

Also present: Senators Harry F. Byrd, Jr., and Weicker.

Subcommittee staff present: James H. Duffy, chief counsel; James S. Medill, minority counsel; and Mary G. Daly, secretary.

Full committee staff present: William McWhorter Cochrane, staff director; Hugh Q. Alexander, chief counsel; Joseph E. O'Leary, professional staff member (minority); John P. Coder, professional staff member; Livingston L. Biddle, Jr., professional staff member; Gretchen Doss, secretarial assistant (minority); and Jack Sapp, editorial assistant.

OPENING STATEMENT OF HON. CLAIBORNE PELL, CHAIRMAN OF THE SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

Senator PELL. The Subcommittee on Privileges and Elections will come to order.

The Federal Election Campaign Act of 1971, which became effective on April 7, 1972, accomplished substantial improvements in laws governing the public accounting and disclosure of political contributions and expenditures by candidates for Federal office and political committees supporting them.

A comprehensive new law sometimes creates excessive burdens on some who must comply with all of the specific provisions.

Therefore, some complaints have arisen concerning the number of reports required or the time for filing such reports.

When the Federal Election Campaign Act became law, it abolished all limitations on contributions and expenditures, except with respect to the broadcast media.

Following the general elections of 1972, some are advocating the adoption of overall limitations on contributions and expenditures, and upon the number of committees which may be organized on behalf of a single candidate.

Many amendments to the law have been introduced this year and most of them are relevant to the purposes of the present and pending hearings.

Time is important if we are to improve the elective process before the next general election, and it is my intention to receive testimony from as many sources as possible, whose experience and expertise will help this subcommittee to report constructive and necessary legislation to the Senate.

Without objection, at this point, I submit for the hearing record copies of the Senate bills which are currently being considered: S. 23 (Mr. Harry F. Byrd, Jr.); S. 343 (Mr. Robert C. Byrd); S. 372 (Mr. Pastore); S. 1094 (Mr. Scott of Pennsylvania); S. 1189 (Mr. Weicker); S. 1303 (Mr. Pell); and S. 1355 (Mr. Pell).

[The texts of the bills referred to appear as exhibits 1A–1G in appendix I of these hearings, pp. 97–135.]

Also, for inclusion in the printed hearings, I submit a letter to Senator Cannon, chairman of the Committee on Rules and Administration, from Senator Mansfield, chairman of the Senate Democratic Policy Committee, enclosing a resolution adopted by the Policy Committee recommending an immediate inquiry concerning adoption of overall limitations on contributions and expenditures with respect to or tending to influence Federal elections; and a letter to the chairman of the Subcommittee on Privileges and Elections from Elmer B. Staats, Comptroller General of the United States, expressing the views of the General Accounting Office on S. 372.

[The letters referred to above appear as exhibit 2 (Mansfield letter) and exhibit 3 (Staats letter) in appendix I, pp. 136 and 137, respectively.]

The record will be kept open for 1 week for submission of statements or other pertinent material by persons or organizations that were unable to attend the hearings.

The first witness today is Senator Robert C. Byrd of West Virginia, a member of the subcommittee, who has been on it longer than I have, and who has some excellent legislation which he will discuss at this time.

STATEMENT OF HON. ROBERT C. BYRD, A U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator ROBERT C. BYRD. Mr. Chairman, I thank you.

I will be happy to yield to my famous namesake from the neighboring State of Virginia, if his time is such that he cannot wait.

Senator HARRY F. BYRD, Jr. I thank my distinguished colleague and close friend, but I want to sit here and listen to his testimony.

Senator ROBERT C. BYRD. Thank you very much.

First, Mr. Chairman, let me express my appreciation to you and the other members of the subcommittee for inviting me to testify today in support of S. 343, which I introduced on January 12, 1973.

The effect of S. 343 would be to move the elections for Federal offices ahead by 1 month, from the first Tuesday after the first Monday in November to the first Tuesday after the first Monday in October.

There are no restrictions in the Constitution on the date which Congress may establish for voting in Federal elections.

Clause 1, section 4, article I; and clause 4, section 1, article II of the U.S. Constitution clearly provide Congress with the discretion to

prescribe the date for holding elections for President, Vice President, U.S. Senator, and U.S. Representatives.

Pursuant to this authority, Congress has enacted statutes which prescribe the first Tuesday after the first Monday in November as the day for elections for Federal offices.

In 1792, Congress enacted legislation that provided for elections of Presidential and Vice Presidential electors to occur within 34 days prior to the first Wednesday in December (1 Stat. 239).

Prior to 1845, there was no national election day, and each State fixed its own date for appointment of Presidential electors "within 34 days" of the meeting of the electors.

This was required by the act of March 1, 1792, which provided that "electors shall be appointed in each State for the election of a President and Vice President of the United States, within 34 days preceding the first Wednesday in December * * *."

Thus, all the States had to choose their electors in November, but the dates varied.

During the discussion of the 1845 law, there was debate on the floor of the House on whether the uniform date should not be in October rather than in November.

This proposal was objected to because it would have necessitated an amendment to the existing law, just cited above, which required that the electors be appointed within 34 days preceding the first Wednesday in December.

The old law is no longer on the books, and the law now governing—the act of June 25, 1948, 3 U.S.C. 7—now requires the electors to meet on the first Monday after the second Wednesday in December.

Hardly a more obvious observation could be made than that our society has undergone dramatic changes since 1845.

The historical considerations in the 1845 debates on choosing a certain day within the month of November, perhaps valid in that era, have now been preempted by the emergency of pressing new priorities and realities.

For example, with the advent of the electronic age of television and other instant mass media communications, the lengthy campaign period of the horse-and-buggy age is no longer a necessity to insure a candidate sufficient time to bring his message to the voter.

In fact, the American voter, during today's extended campaigns, is inundated by such a constant barrage of prerecorded messages that a serious strain is placed on his interest and attention, and by the time the November elections arrive, he may have already had his fill of politics.

I believe that this was a major factor in the poor voter turnout of the last November election, when less than 55 percent of the eligible voters cast their ballots in that election.

This represented the smallest turnout since the election of 1948, when the era of television was being ushered in.

The length of the campaign, naturally, is not the only factor which contributes to the discouraging statistics of voter turnouts.

The severe winter weather of November, normally experienced by many of our States, further contributes to keeping voters at home.

On the other hand, in addition to the more temperate weather of October, the length of daylight that October offers may encourage still more voters to go to the polls.

Moreover, the shortening of the campaign by 1 month would aid in cutting back the skyrocketing costs of Presidential and congressional elections.

It has been estimated that as much as $400 million was spent on the November 1972 elections, and authorities claim that it now takes $40 million to elect a President, more than $200,000 to elect a U.S. Senator, and about $100,000 to elect a U.S. Representative.

There can be little doubt that the longer the campaign, the more money is needed to finance it. The concern over the exorbitant cost of financing a political campaign, and the serious threat which that may pose on our democratic system of government, was recognized by the 92d Congress when it passed the Federal Election Campaign Act of 1971.

Moving Federal elections up 1 month would further help, therefore, to stem this tide of rising campaign costs.

Furthermore, an October election would provide the additional time which is now greatly needed for resolving election disputes, such as investigating corrupt practices claims and conducting recounts.

I am aware, Mr. Chairman, that many people feel that the general election day should be a national holiday, or that it should be held on a Saturday or on a Sunday.

I feel that we would defeat our own objective of increasing the percentage of voters in elections by such action.

The American people are weekend wanderers in our great mobile society, and, if Tuesday were made a holiday, many citizens would take the opportunity to take leave from work on Monday, and use the resulting 4-day weekend for traveling and family recreation and thus further decrease the percentage of voters on election day.

I feel that a sound objection could also be made to holding the elections on Saturdays—which has the added disadvantage of being the Sabbath of the Jewish Orthodox faith and that of the Seventh Day Adventists—which, in my judgment, would infringe upon the free exercise of such religions and would certainly lessen the political participation of members of those religions.

If the election day were changed to a Sunday, then Christian churchgoers might be displeased because Sunday is their Sabbath.

Moreover, because State employees and voting machine technicians would have to work on the weekend to man the polls, the States themselves would likely be opposed because they could possibly be required to pay time-and-a-half, or double time, to their employees for working on the weekend.

I feel, Mr. Chairman, that much would be gained in practical advantages with the national election date set as the Tuesday next, following the first Monday in October, rather than November, and that the practical considerations of law and lack of communications back in 1845 that caused the date to be set in November no longer apply to the United States as we know it in 1973.

So, in summation, Mr. Chairman, I feel if the elections were to be moved forward by 1 month, to occur on the first Tuesday following the first Monday, it would shorten the time for the campaign, thus meeting with the approval of the voters. It ought to also meet with the approval of the candidates, and it ought to have a favorable impact upon the

cost of the elections. I think that the weather conditions in October would certainly be more conducive to a larger turnout of voters, for example, in States like Maine, Pennsylvania, Rhode Island, West Virginia, Wisconsin, North Dakota, New York, Kentucky, and so on, where we can expect heavy snowfalls during the month of November.

Senator PELL. Thank you, Senator Byrd. I am aware of your strong interest in the bill, which is one of the reasons we set the hearings at this early date.

I wonder if you think by moving the election forward this way, if an adverse effect might not be the creation of a longer "lameduck" period? Would you also recommend we try to bring forward the inauguration date by a month?

Senator ROBERT C. BYRD. No, I would not suggest that. The longer "lameduck" period really does not trouble me. More time is really needed anyhow for transition from one administration to another. I think the important thing here is to stimulate greater interest on the part of the voters, because this goes to the heart of our election process.

Senator PELL. Do you know what effort could be made if this bill were passed and enacted into law, to make sure that candidates did not move back their campaigns an additional month, or set the conventions a month earlier, instead of starting on the traditional Labor Day, starting on August 1?

Senator ROBERT C. BYRD. I suppose they could do that whether or not this law is enacted, Mr. Chairman.

Senator PELL. I agree with you, as a cosponsor, but these are the arguments we would have to face, and I think there would have to be some assumption the conventions would continue to occur at the time they do now to keep the period short.

Also, in connection with changing the election day, or making Tuesday an election holiday, I agree with you.

Another reason is, we have too many holidays now from the point of national productivity, and your argument about a long weekend is valid.

Senator ROBERT C. BYRD. Moreover, more people like to vote on the boss's time instead of on their own time.

Senator PELL. Now, when it comes to Saturday and Sunday, when the boss is gone, I realize, theoretically, that this is really quite a hornet's nest, as when I suggested Saturday, because it would prevent Orthodox Jews, and as you point out, Seventh Day Adventists, and others, from coming to the polls.

As a matter of fact, I understand that there are efforts where there are Orthodox Jews to hold elections on Saturdays to prevent them from voting, so I withdraw from that position. But, on Sunday elections, I would like to draw on for a moment.

There are Christian nations in Europe—Catholics and Protestants—and many have elections on Sundays with no very real problems involved at all, and wider participation.

Why would there be any objection to Sunday instead of Tuesday?

Senator ROBERT C. BYRD. I think that the proposal to hold elections on Sunday would run into a great deal of opposition in this country.

notwithstanding, as you have pointed out, this may be the practice of some European countries.

Senator PELL. Almost every one.

Senator ROBERT C. BYRD. But I can only speak for my own State, with some authority, I think it would meet with great opposition in the State of West Virginia, and if I were to promote it, I might be excommunicated, and be looking in on the next session, rather than participating in it.

Mr. Chairman, aside from the religious considerations, I do not think that Sunday elections would contribute to greater turnout.

As a matter of fact, I think they would contribute to a smaller turnout for the same reason that I have enumerated with respect to making election day a holiday.

I think people like to travel on Sunday, they like to get out and see the countryside. In October, they probably would like to take a few last trips around before the November snows begin to fall.

Senator PELL. To see the foliage.

Senator ROBERT C. BYRD. Yes, and I just cannot envision people going to the polls, manning the polls, and working in the polls all day on Sunday with enthusiasm.

I think it would be a mistake.

Senator SCOTT. The only observation I had, Senator Byrd, is the same as yours, with regard to Sunday. It is the custom of the majority of candidates for office in this country not to campaign on Sunday, and if they are in defiance to the rule of the Sabbath, it would seem a little ironic for everybody to violate that position by voting on Sunday.

I agree with you, too, with regard to the fact we do not need any additional holidays, especially with a few in favor of zero population.

I don't think holidays contribute to zero population.

I think you have a very interesting proposal, and I am very glad to have a chance to see you testify.

Senator PELL. Senator Allen.

Senator ALLEN. I think your proposal is intriguing and should receive careful study.

I am just wondering how this might affect the State elections that are also geared to the November date, and would apply to Governor, Lieutenant Governor, members of the State legislature.

Would they have to amend all the State laws, or would they have an election then in October, and then still another election in November?

Senator ROBERT C. BYRD. I would not think so. I should think that the States and counties would welcome the opportunity to move their elections forward to conform with Federal elections.

I speak in reference to West Virginia there again. In some years, we have very serious weather conditions, in many of our mountainous communities in November, and I think I can speak with confidence that our county and State officials would support moving the election forward. I do not think that there would be any problem.

Senator ALLEN. But it would take State action, would it not?

Senator ROBERT C. BYRD. I do not think that would be an obstacle in my State. I speak with respect to my own State. I think all of the States would move in this direction.

Senator ALLEN. Would it not be a little simpler to leave the November election as is, and then get the States to move their primaries, and the national parties to move their conventions nearer to November? Would that not accomplish the same result other than the weather?

Senator ROBERT C. BYRD. It would not accomplish the same result with respect to the weather, and I think it would be easier for us from the Federal end to encourage their moving their general elections forward a month than it would be for us to encourage them to move their primaries to a later date by way of 1 month.

If we were to enact this legislation, the Federal elections would be moved forward to the first Tuesday after the first Monday in October. The tail is not then wagging the dog.

I think the States then would make the necessary changes.

Senator ALLEN. Would you give them an opportunity and time to accomplish this?

Otherwise, the first November that you came to, you would have a statewide election.

Would you not provide for some sort of moratorium to give the States an opportunity to conform their laws?

Senator ROBERT C. BYRD. We could do that, yes.

We could make this law effective in 1976, for example, rather than in 1974, if in the judgment of the committee and the Congress, it appears necessary to do that. I think you raise a valid question, Senator Allen.

Senator ALLEN. I certainly agree with the premise that we ought to narrow the gap there, but offhand, I would feel the best way to narrow it would be for the State level to move toward the November election.

West Virginia was one of the 13 original colonies. It was named Virginia at that time, but you had the same weather conditions back then that you have now, I assume.

They thought that November was a good time.

Senator ROBERT C. BYRD. In my statement, Senator Allen, I made reference to the reasons why November was chosen in 1845.

It was because of the laws which required that the election be held within a certain period just prior to the meeting of the electors.

That law is no longer in effect, so we are freed of that constraint.

I do think the committee ought to give consideration to making the law effective in 1976.

Senator ALLEN. I think that would improve it, certainly.

Senator ROBERT C. BYRD. May I ask you a question, how would you suggest, if we were to go at it from the other end, how would you suggest that we would go about encouraging the States to move their primaries to a later date?

Senator ALLEN. Well, I would call it to the attention of the legislature.

I might say there in Alabama, there would be legislation introduced that would move our primaries from May and June to August for

the very reason that you are suggesting, to narrow the gap there, and I believe that the same arguments that would justify this bill would also cause the State legislature to move in that direction if a campaign of education were carried on.

I think it is a very interesting proposal, certainly it does work toward the very desirable end, that of narrowing that time between the primaries or conventions and the national election.

Senator ROBERT C. BYRD. I would like to see both the general election brought forward a month and the primaries delayed a month, but I think we have a better handle on the general elections by virtue of the Federal elections being uniform, and if we can proceed to provide that the general elections be moved forward a month, it would seem to me that the States, from the standpoint of encouraging a better turnout, from the standpoint of saving election expenses, would be persuaded to move their State and county elections forward so that they would be held at the same time.

As to delaying the primaries, I would like us to do all we can to encourage moving in that direction also, but I do not think we would have as good a handle on the primaries as we do on the general elections.

Senator ALLEN. It is a very interesting proposal. I would want to give it further study.

Senator PELL. The Senator from Michigan.

Senator GRIFFIN. Mr. Chairman, I have listened with interest to the discussion. In 1972, the West Virginia primary was held in May. But it should be noted, I suggest, that there are 13 States which held their 1972 primaries in September.

Some of the primaries were as late as September 19. Obviously, the period between September 19 and the first Tuesday in October would be rather a short period of time for a general election campaign in those States. It would probably be necessary for those States to move their primary election dates forward, if this bill were enacted.

I wonder if the Senator from West Virginia has considered what would be an appropriate or ideal timespan for a general election campaign?

Senator ROBERT C. BYRD. Yes; West Virginia at one time had primaries in August, I believe in the off years. In the next election 2 years hence the primaries were in May.

There was August, September, and October—3 months, for the general election campaign—but at that time, Senator Griffin, as far back as 1946, television did not play the part that it plays now.

I would say now that we have television, that 2 months is ample for the Presidential campaigns with the facilities we have today as opposed to yesteryear.

Senator GRIFFIN. Mr. Chairman, in the interest of building a useful record, I ask that page 68 of the Election Law Guidebook, 1972, which sets forth the dates of primary elections in several States be printed at this point.

Senator PELL. Without objection, so ordered.

[The material referred to above follows:]

OFFICE OF THE SECRETARY OF THE SENATE

SCHEDULE OF SENATORIAL PRIMARY AND RUNOFF ELECTION DATES, BY STATE, TOGETHER WITH CONCOMMITANT REPORTING DATES AS REQUIRED BY THE FEDERAL ELECTION CAMPAIGN ACT OF 1971 (REVISED AS OF MARCH 1, 1972)

States in which senatorial elections occur in 1972 are designated by an asterisk (*)

1972—State	Primary election			Primary runoff election		
	Date	1st pre-primary report	2d pre-primary report	Date	1st pre-primary report	2d pre-primary report
Alabama*	May 2	Apr. 17	Apr. 27	May 30	May 15	May 25
Alaska*	Aug. 22	Aug. 7	Aug. 17	None		
Arizona	Sept. 12	Aug. 28	Sept. 7	None		
Arkansas*	May 30	May 15	May 25	June 13	May 29	June 8
California	June 6	May 22	June 1	None		
Colorado*	Sept. 12	Aug. 28	Sept. 7			
Connecticut:						
Democrat	Aug. 9	July 25	Aug. 4	None		
Republican	Aug. 16	Aug. 1	Aug. 11	None		
Delaware:*						
Democrat	(1)					
Republican	July 17	July 2	July 12			
District of Columbia	May 2	Apr. 17	Apr. 27	May 23	May 8	May 18
Florida	Sept. 12	Aug. 28	Sept. 7	Oct. 3	Sept. 18	Sept. 28
Georgia*	Aug. 8	July 24	Aug. 3	Aug. 22	Aug. 7	Aug. 17
Hawaii	Oct. 7	Sept. 23	Oct. 2			
Idaho*	Aug. 8	July 24	Aug. 3			
Illinois*	Mar. 21	Mar. 6	Mar. 16			
Indiana	May 2	Apr. 17	Apr. 27	None		
Iowa*	June 6	May 22	June 1	None		
Kansas*	Aug. 1	July 17	July 27	None		
Kentucky*	May 23	May 8	May 18	None		
Louisiana*	Aug. 19	Aug. 4	Aug. 14	Sept. 30	Sept. 15	Sept. 25
Maine*	June 19	June 4	June 14	None		
Maryland	May 16	May 1	May 11	None		
Massachusetts*	Sept. 19	Sept. 4	Sept. 14			
Michigan*	Aug. 8	July 24	Aug. 3	None		
Minnesota*	Sept. 12	Aug. 28	Sept. 7			
Mississippi*	June 6	May 22	June 1	June 27	June 12	June 22
Missouri	Aug. 8	July 24	Aug. 3	None		
Montana*	June 6	May 22	June 1	None		
Nebraska*	May 9	Apr. 24	May 4	None		
Nevada	Sept. 5	Aug. 21	Aug. 31	None		
New Hampshire*	Sept. 12	Aug. 28	Sept. 7	None		
New Jersey*	June 6	May 22	June 1	None		
New Mexico*	June 6	May 22	June 1	None		
New York	June 20	June 5	June 15			
North Carolina*	May 6	Apr. 21	May 1	June 3	May 19	May 29
North Dakota	Sept. 5	Aug. 21	Aug. 31	None		
Ohio	May 2	Apr. 17	Apr. 27	None		
Oklahoma*	Aug. 22	Aug. 7	Aug. 17	Sept. 19	Sept. 4	Sept. 14
Oregon*	May 23	May 8	May 18			
Pennsylvania	Apr. 25	Apr. 10	Apr. 20	None		
Rhode Island*	Sept. 12	Aug. 28	Sept. 7	None		
South Carolina*	June 13	May 29	June 8	June 27	June 12	June 22
South Dakota*	June 6	May 22	June 1			
Tennessee*	Aug. 3	July 19	July 29	None		
Texas*	May 6	Apr. 21	May 1	June 3	May 19	May 29
Utah	Sept. 12	Aug. 28	Sept. 7	None		
Vermont	Sept. 12	Aug. 28	Sept. 7			
Virginia*	June 13	May 29	June 8			
Washington	Sept. 19	Sept. 4	Sept. 14	None		
West Virginia*	May 9	Apr. 24	May 4	None		
Wisconsin	Sept. 12	Aug. 28	Sept. 7			
Wyoming*	Aug. 22	Aug. 7	Aug. 17	None		

[1] Convention undecided.

Senator GRIFFIN. What I have to say now is not so much a question as it is an observation. We, here in the Rules Committee, are appropriately and properly considering legislation having to do with elections. If we were to pass the bill before us, it would bring about an important change in the date of national elections. Yet, at the same time, there is on the floor of the Senate today a bill creating a Voter Registration Administration which would also have a great impact on voter qualifications. That bill was not even considered by this committee.

Presumably only because that bill contemplates the use of the Postal Service, it was referred to the Post Office and Civil Service Committee. That's like saying because income tax forms are sent through the mail to all the taxpayers, that bills to amend the Internal Revenue Code should be referred to the Post Office and Civil Service Committee rather than the Finance Committee.

For the record, I think we ought to note that the Standing Rules of the Senate, in delineating the jurisdiction of the Committee on Rules and Administration, specifically says that this committee shall have jurisdiction over "matters relating to the election of the President, Vice President, or Members of Congress; corrupt practices; contested elections; credentials and qualifications; Federal elections generally; and Presidential succession."

I would think that this committee should be very concerned about that particular bill, which purports to set up a system of post card voter registration. Surely such a system could have a profound effect on the election process.

Senator SCOTT. If the Senator would yield, I think that if the proposal for rubberstamp registration came before the Rules Committee, I would very seriously question whether it would ever leave the committee. I would suggest that the Rules Committee more certainly affirm its jurisdiction over matters pertaining to elections. There was a time in World War II when the President sent up a suggestion that all soldiers could vote by post card for President, but the President forgot to include the Vice President and the Members of Congress in the recommendation; so the commanding officers and lieutenants aboard ship would simply corral everybody and tell them to vote for Roosevelt and hand them cards. That move was beaten back because it was arrogant, it was a grab for power, and in my view it was downright crooked.

Now, this is another grab for power and control through pressure, through rubberstamp, and I would have to vote against it on the floor.

Senator ALLEN. Since we are speaking of the legislation, and questioning the distinguished assistant majority leader, and I note the distinguished senior Senator from Virginia present here to testify on his bill. You know, under the Voting Rights Act of 1965, and 1970, any act of the Legislature of Virginia or the Legislature of Alabama, dealing with the election laws is presumed to have a nefarious intent, and before that law can become effective, it must have the approval of the Attorney General. I am wondering if a bill that would require a change by the Alabama Legislature, and I assume the Virginia Legislature, if you would be willing to put an amendment in saying that any change by these States covered by the Voting Rights Act, any legislation of that sort would not have to be approved by the Attorney General of

the United States, that they would be assumed to be enacted with propriety, and without any improper intent?

You know, we might never get the approval of the Attorney General, and we might lose an election down in Alabama.

We might not be able to hold one if we cannot get the time change to have one in October, and one in November, and we might not want to undergo that expense.

Would the Senator have any thought on that?

Senator ROBERT C. BYRD. Mr. Chairman, I do not feel that the actions of the legislature of a State, the great State of Alabama, bringing into conformity, the dates for elections of State and county officials, bringing into conformity the date for such with the date set forth in this act would in any way infringe upon the constitutional rights of the electorate, or would by any stretch of the imagination be brought within the realm of antidiscrimination, or discrimination arguments.

Senator ALLEN. The Senator is not familiar with the fact that such an enactment by the Alabama Legislature would have to be approved by the Attorney General because of its dealing with an election.

Senator ROBERT C. BYRD. I cannot of course speak for the Attorney General of the United States, but I would find it very difficult to believe that they would pose a problem.

I would think that any Attorney General would require a State, even though it were a Southern State, to hold a separate election for State and county officials.

Senator ALLEN. We would have to go through that formality, do you not think?

Senator ROBERT C. BYRD. I am not sure. I voted against the Voting Rights Act of 1965. I may be the only present member of the Rules Committee who did that. I do not recall. That is not important, but I voted against it on a constitutional basis.

I felt that article 1, section 2 of the Constitution; article 2, section 1 of the Constitution; and the 17th amendment, said very clearly that the prerogative of determining the qualifications of voters should rest in the States.

I voted against it in 1965. I also voted against the extension.

I cannot answer the Senator's question, but I do not think that that would prove to be an obstacle.

I would be greatly surprised if it proved to be an obstacle to the States in bringing their own laws into conformity with the Federal law here being proposed.

Senator ALLEN. I want to commend the Senator for his vote on those two bills, to commend him for his wisdom, and the good of the Constitution.

Senator ROBERT C. BYRD. Thank you.

Senator GRIFFIN. One other consideration occurs to me. In this fast-moving age, with the kind of international problems that arise—when decisions must sometimes be made very quickly—it should be of some concern, I suggest, that the period during which we could have a "lameduck" President in office would be extended by moving the date of the election to the first Tuesday in October. While it is true that we have a President in office during the period after an election and before a new President is inaugurated, he stands in a different status; certainly he is handicapped. It will be recalled that for a period

of time we inaugurated our President in March. However, inauguration date was moved to January, primarily to shorten the "lameduck" period. Does this consideration bother you?

Senator ALLEN. The distinguished chairman of the committee raised the question.

Senator GRIFFIN. Before I came in. I am sorry. I think the point is that it is certainly worthy of consideration.

Senator ROBERT C. BYRD. It does not worry me, because any President would have to take an oath to uphold the Constitution before he assumes the office, and he does not do that just for a period of 46 months, or 45 months.

He takes an oath to uphold the Constitution for 48 months, and during that time the Senate, which is the same Senate as was convened in 1789, and will be the same Senate to the crack of doom, would be available; and that Senate with only one-third of its Members standing for reelection every 2 years, would not be a lameduck Senate. In addition to that, if you look at it from the lameduck aspect, it is just a matter of extending the transitional period for an additional month. I cannot become greatly exercised over the point.

I think it is a legitimate one to raise, it is a valid point, but it ought not to discourage us in passing a law that would increase the interest on the part of the people, and as a result of that stimulated interest, perhaps a better selection from the standpoint of quality of the officeholders.

Senator ALLEN. I thank the author of the legislation for a response.

Senator SCOTT. Mr. Chairman, I have to go to another committee at this time, but I would like to say I am in favor of a limitation on individual contributions to any one campaign, as will be proposed by the Senator from Virginia. It now, of course, is up for discussion, but there ought to be a limitation.

Senator PELL. Thank you. I also revert to the point you raised earlier about jurisdiction.

I must say I share a little bit of your surprise, referring to the Post Office and Civil Service Committee, and I read through rule XXV assigning matters relating to elections, and so on, Federal elections generally, Presidential succession to the Subcommittee on Privileges and Elections, but I guess I have a conflict of interest, because I feel very strongly that voter registration should be improved and am therefore reluctant to raise the jurisdictional issue.

Ninety percent of those registered apparently vote, while only 55 percent of our entire population take the trouble to vote. I must say, I cannot understand.

Senator ROBERT C. BYRD. May I speak to that just for a moment.

I probably would vote for the measure that is on the floor, but I likewise have a concern with respect to committee jurisdictions.

I think that the rules of the Senate and the residence requirements are very much like the Constitution of the United States.

They ought to be tampered with with great caution, and they ought to be adhered to almost religiously.

It does trouble me that the committee has had no jurisdiction over the legislation.

It would seem to me that a month to refer to the legislation to this committee with a provision that it be reported back within a certain time would protect the committee's rights and at the same time would give those Senators who support the legislation an opportunity still to debate it on the floor.

Senator PELL. I see your point.

Senator ROBERT C. BYRD. I perhaps should not have made this very small contribution, because I am imposing on my colleague's time who has sat very patiently.

Senator PELL. I see your suggestion, where, as chairman of the subcommittee, I feel I would have to support that motion for a date certain to report it out. However, what was the rationale of the Parliamentarian in referring it to the Post Office Committee in the beginning, not giving us jurisdiction?

Senator ROBERT C. BYRD. I do not recall if that was a request on the part of the authors of the bill.

Senator PELL. Thank you very much, Senator Byrd.

Senator ROBERT C. BYRD. Thank you. I will sit and listen to my colleague.

Senator PELL. This is really senatorial courtesy.

Without objection, I submit statements by Senator Hugh Scott and Senator Mathias to be printed at this point in the hearing record.

[The statements of Senators Scott and Mathias follow:]

STATEMENT OF HON. HUGH SCOTT, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SCOTT. Mr Chairman, as a member of the Committee on Rules and Administration, I am pleased that you have called these hearings to consider various legislative proposals, including my own, to improve the Federal election process.

On March 6, 1973, I introduced S. 1094, a bill proposing the creation of a six-member independent Federal Elections Commission, appointed by the President and confirmed by the Senate, to administer and enforce the new campaign expenditures law. This proposal is similar to, but much stronger than, a bill I sponsored in 1971. Under my new bill, the Commission would have full legal powers, including the power to subpena witnesses and evidence. Furthermore, it would be empowered to "initiate, prosecute, defend or appeal any court action * * * through its own legal representative."

When the Senate debated the campaign expenditures bill in 1971, it passed by an overwhelming vote—89 to 2—and with administration support, an amendment creating a Federal Elections Commission. My new bill incorporates this amendment but now includes independent legal powers for the Commission. In conference with the House, this amendment was unfortunately dropped from the final bill.

Some legitimate concern has been raised about the existence of a new Commission and its size. My bill seeks to avoid an overly large, year-round staff, by allowing the Commission to use, at peak periods, the personnel and facilities of the Department of Justice and the General Accounting Office—GAO.

My bill further proposes that the Commission submit its budget directly to Congress along with any recommendations it may have for legislation. Those functions now maintained in the GAO, the Secretary of the Senate and the Clerk of the House would be transferred in an orderly manner to the new Commission.

There are a number of new features in S. 1094 aimed at reducing the volume of paperwork and eliminating the temptation to obfuscate the law. First, every candidate would be required to utilize the concept of a central campaign committee, through which all of his expenditure reports must pass. Regardless of the number of different committees supporting a candidate's election, each must submit its report to the parent committee. The parent committee would, in turn, file its report with the Commission. Second, reports would include each amount contributed in amounts of $100 or more. Current law requires only amounts in excess of $100. Obviously, there is a substantial gap in the law here and I hope to close it. Third, my bill would require that cash contributions of $2,500 or more be reported within 24 hours during the last 10 days before an election. Current law stipulates that contributions of $5,000 or more be filed within 48 hours during this preelection period. I would hope to pick up on the public record more large contributions in a shorter period of time. Fourth, my bill would eliminate the two reports now filed 15 and 5 days before an election and replace them with one report filed 10 days before an election. It is a small change, but it would mean greater public disclosure through a more simplified filing procedure.

Mr. Chairman, as we have seen all too graphically, the issues of campaign spending and public confidence are interrelated. My bill addresses these issues squarely by providing for an independent mechanism, acting in full public view, to administer the campaign expenditures law. I intend to work hard for the enactment of my proposal.

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. Mr. Chairman, I deeply regret that, because of a prior commitment this morning, I am unable to deliver this testimony in person. Let me assure you, however, that I consider strengthening the Federal Election Act of 1971 so important that I wish to offer a written statement.

Like a record that has gotten stuck in a single groove, congressional pessimists keep talking these days about "the decline of Congress." To those of us who have been working on ways to restore this branch of Government, such harsh and negative pronouncements, endlessly repeated, are especially disturbing. The legislative branch is not all bad and not, in many respects, in a decline at all. To some extent, what we are witnessing may be a growing gap between the realities of government and the appearance of government to the public.

It is not enough that we legislate wisely on matters of war and peace, taxation and appropriations, and what-have-you, when the people's confidence in our branch has plummeted to 26 percent. There is no love lost for government because people do not know what is

going on and what they read in newspapers suggests that scandals are the order of the day. Moreover, the doubt about the activities within the Congress is multiplied by suspicions concerning the type of conduct which is required for one to be elected to Congress in the first place.

It is the election process that I am most concerned about today. As Senator Scott already knows, he and I introduced Senate bill 956 more than 2 years ago in order to deal comprehensively with campaign practices. Much of that bill is contained in the present Campaign Reform Act of 1971, plus 13 amendments I added on the floor of the Senate. This act goes a long way toward establishing good ground rules for reporting—and therefore opening to the public view—candidates' campaign contributions and expenses. Our purpose was to make the election process comprehensible to the public and to extend the disclosure principle to the campaign level. Thorough reporting, honest and forthright campaigns, and public respect in the governmental process are inextricably linked.

The same concern has prompted the introduction of Senate bill 1094. This amendment, sponsored by Senator Scott and Senator Stevenson in addition to myself, reflects our collective judgment of the effectiveness of the existing act in the 1972 elections. While the 1971 act took a giant step forward in reforming our election process, there are still problems. Some necessary teeth were left out. Two provisions in particular we now consider essential for future elections: Specifically, a national Federal Election Commission with subpena power to monitor campaign spending, and a requirement that one central campaign committee for each candidate handle all financial reports to the national commission. We have moved to offer these additional amendments because our study of the 1972 elections has convinced us that the 1971 act still needs strengthening in order to be an effective preventive to campaign secrecy.

Last December when Senator Stevenson and I held 3 days of ad hoc hearings on the state of Congress, witness after witness pointed out that it is the election process, not just internal structural reforms, which is the primary arbiter of the quality of men in the legislative branch. If we do not focus our attention on making the electoral system as fair as we can, we lose not only the public's confidence but often the best men for the job.

And on a practical level, the 1972 elections were the most expensive in history—an estimated $400 million was spent in Federal elections on national and local levels—so that if the present rate of escalation continues we will see a billion dollar election by 1984. It is crucial that we make our regulation of contributions and expenditures effective so that our citizens do not receive, or believe they have been duped by, a billion dollar fraud.

The Federal Elections Commission will be composed of six members who, by reason of maturity, experience, and public service, have achieved a reputation for integrity, impartiality, and good judgment. No more than three members will come from the same political party and all will serve staggered 6-year terms. The Commission and its staff will have the power to decide whether a report is in violation of the law and the power to take enforcement action. The Commission will

be able to investigate, subpena, and prosecute violators. When Phillip S. Hughes, the Director of the Office of Federal Elections in the General Accounting Office, testified before our ad hoc committee, he called the present regulation of campaign disclosures simply inadequate. The monitoring and enforcement efforts are presently divided between four offices—the Justice Department, the Government Accounting Office, the Clerk of the House, and the Secretary of the Senate.

Furthermore, the practice of allowing each committee a candidate has to file its own reports has created unnecessary confusion in disclosure procedures. Our amendment, requiring a central committee to file all financial reports for a candidate does not preclude the creation of other committees by the candidate, but it does streamline the process of filing reports of contributions and expenditures.

Several other smaller additional aspects of this amendment are included to correct some of the minor difficulties we have encountered with the present act. Let me enumerate them here. First, the wording of this act should be changed to read "contributions of $100 or more must be reported * * *." As it is now, a good many $100 contributions have been shielded from public view by this loophole.

Second, this amendment includes a provision that will change the reporting dates to the 10th of April, July, and October, and 10 days prior to the special, primary, or general election, leaving the final report required by January 31 unchanged. There were numerous complaints about the cumbersome process of fulfilling these reporting requirements which this provision will correct. To assure a more accurate and timely accounting of expenses, we have moved the monthly reports up a full month from March to April. To alleviate many of the redtape complaints, we have combined the 5- and 15-day reports prior to the election. Then, to discourage last-minute large contributions, we require that gifts amounting to $2,500 or more be reported within 24 hours of receipt. The present cutoff point for this provision is $5,000.

Next, this amendment would permit the Commission to waive the reporting dates for multistate committees or organizations which give money to candidates in more than one State, in order to eliminate the expense and hardship these committees have faced when they have been required on occasion to file as many as three or four reports a week. These committees will be required to file reports at least once a month, however.

Section 5 of this amendment specifies that the financial reports of a candidate accurately reflect the character of every contribution and the purpose of every expenditure. When the candidate's debt is canceled, this section would require the report to indicate the circumstances under which it was extinguished. Presently, the way a debt is satisfied by a candidate does not have to be reported, and the circumstances under which it was canceled cannot therefore be determined by the public.

Another loophole in the 1971 act which our amendment addresses is the shielding of dues-paying members of clubs or organizations not specifically created to influence the outcome of an election. At the present time, if such organizations contribute more than $1,000 to an election they do qualify as a political committee. Only the names of

the officers of these committees must be filed. Section 6 of this amendment requires the reporting of names and addresses of members of a nonpolitical committee which attempts to influence the outcome of an election. This provision will eliminate some of the so-called pass-through donations we witnessed in the 1972 elections, that is, the shielding of the identity of the original donor so that his relationship with the candidate is not made public. No legislation can deal as effectively with this problem as a strong independent commission with effective enforcement and monitoring capabilities. Section 6 of our amendment only deals with one small loophole in this area, but one which we determined would be important to write in to the present law.

Finally, our amendment authorizes additional appropriations so that the additional purposes of this act—specifically the creation of the Commission—can be carried out.

Although, as you know, I have proposed three other strengthening amendments to the Federal Election Campaign Act, S. 1094 includes some of the key provisions needed to improve the 1971 act. This amendment takes the enforcement of the election process out of the hands of the Department of Justice and thus out of the political arena, and into the hands of an impartial professional staff. It further corrects the reporting confusion candidates experienced by consolidating reports into a central campaign committee.

Your favorable consideration of this amendment will demonstrate to the public that we in Congress are concerned about the caliber of elected officials—their honesty and their accountability—down to the level of the political campaign. It is time that we put to rest the slogan that "politics is a dirty business," and replace it with a law that is strong enough to inspire the confidence of the American people in the democratic election process.

Senator PELL. Senator Harry F. Byrd, Jr., of Virginia, will now present his testimony on his bill.

STATEMENT OF HON. HARRY F. BYRD, JR., A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator HARRY F. BYRD, JR. Thank you, Mr. Chairman, gentlemen of the committee. I appreciate the opportunity to appear before the subcommittee this morning.

I am pleased that the subcommittee is looking into proposed reforms of Federal election laws.

I might say that the Senator from West Virginia has made a proposal that has a great deal of merit. I think if we could find a way to shorten the campaigns, the public would be the benefactor.

Senator GRIFFIN. To say nothing of the candidates.

Senator HARRY F. BYRD, JR. The candidates most certainly would benefit. One aspect of the British Parliamentary system that I like so much is that those campaigns are held to a minimum time. That can be done under the British system.

It is difficult to work out such a time limitation under our system here in the United States, but it is certainly worth looking into.

I was interested in the discussion with regard to the post card legislation. I personally would call it the tombstone legislation. I think it will have the effect of increasing employment, because if it is enacted,

there will be a very thriving business, there will be many persons employed to examine the tombstones throughout the Nation, the post cards will be sent in as a result.

Senator PELL. The tomb card legislation.

Senator HARRY F. BYRD, JR. The tomb card legislation would be an appropriate title, but I do not want to get too far off the subject I came in to discuss this morning.

S. 23 would limit the total contribution that can be made by any individual in a campaign for Federal office. The ceiling I am proposing is $25,000.

It is important that we impose a ceiling on the sums that individual citizens can put into campaigns. This applies to the campaigns conducted by candidates of both political parties. It is not a partisan issue.

Campaign spending has gone beyond all reasonable bounds. One way to limit campaign spending is to limit the amount individuals may contribute to a particular candidate.

In some instances, wealthy individuals have contributed hundreds of thousands of dollars to political campaigns by dividing their donations among a multiplicity of committees.

One man in Texas was reported to have contributed $300,000 to the primary campaign of an aspirant for the Democratic presidential nomination.

Later, he gave $305,000 to the campaign of the Republican candidate for President.

I point to this case to emphasize that this is not a party issue.

Other enormous contributions have been reported in connection with the presidential campaign of 1972.

Individual contributions of $2 million and $1 million were reported to have been made to the campaign of President Nixon, and one man reportedly contributed $375,000 in support of Senator McGovern.

I think it is bad for the country when such huge sums are plowed into political campaigns.

Enormous sums, spent by the individuals in campaigns, in my view, constitute a threat to the democratic process.

I might say that many of these large contributions are made by individuals with a pretty unselfish motive. On the other hand, dozens are made perhaps with not such unselfish motives, but regardless of motive, I believe it to be bad for democracy for it to be permitted by law that an individual can make such huge contributions.

I believe we should tighten up our laws dealing with campaign contributions, so that big concentrations of wealth do not become big concentrations of political power.

I think there is a real danger that wealth may become too great a factor in determining the success or failure of political candidacies.

I support the position of the distinguished majority leader, Senator Mansfield, as set forth in his statement to the Democratic conference on January 3.

Senator Mansfield said:

> In my judgment, both Congressional and Presidential campaigns are too repetitive, too dull and too hard on candidates and electorate. Most serious, the factor of finance begins to overshadow all other considerations in determining who runs for public office and who does not, in determining who gets adequate exposure and who does not. It is not healthy for free government when vast wealth becomes the principal arbiter of questions of this kind. It is not healthy for the nation, for politics to become a sporting game of the rich.

A reasonable restriction on individual political contributions, such as I have proposed today, will represent a major step toward restricting the power of wealth in politics.

During the last days of the 92d Congress, former Senator John Sherman Cooper of Kentucky and I cosponsored an amendment to a campaign contributions bill which would have had the effect of limiting individual donations to campaigns.

This legislation was not acted upon by the Senate, but in this new Congress we have a fresh opportunity to impose a reasonable ceiling on big campaign contributions.

I hope we will take that opportunity.

I think establishment of a reasonable limit on individual political campaign contributions will help strengthen the confidence of the public in our electoral process and our democratic institutions.

In summary, Mr. Chairman, and gentlemen of the committee, it seems to me very important that legislation be enacted to put a tight expenditure ceiling on political spending, and it seems to me very important also that a tight limit be placed on the amount of contributions that can be made by any one individual to any one particular candidate or campaign.

Senator PELL. Thank you very much, Senator Byrd.

I see the merits of what you are saying, but I am wondering if we should not give full opportunity for success to the present philosophy which is that there is no limit on contributions as long as they are open to public gaze.

That means, not in little black bags of cash, but as long as they are published and recorded, that that in itself acts as an automatic control, and we have not really had an opportunity to see whether this philosophy is going to work or not, so before we put the limitation on, don't you believe it might be a good idea to see if the public exposure of everything that is given would not in itself provide and give the public protection?

Senator HARRY F. BYRD, JR. No, I do not think so, Mr. Chairman.

I do not think that would solve the problem at all. A great many individuals do not mind the exposure. As a matter of fact, that is how we know about these huge contributions now, because they were published, and I do not think that is going to solve the problem.

I think what we need to do is to say to each individual citizen, you cannot contribute more than a certain number of dollars to a campaign, whether it is published or not published.

Under the law now it must be published.

Senator PELL. Then with a thought to refine your bill, do you intend a $25,000 limit as an overall aggregate from a contributor to all candidates in a single year, or does it apply to a single candidate?

Senator HARRY F. BYRD, JR. It would be a limit of $25,000 that a particular individual could make to a particular campaign or a particular candidate.

Senator PELL. Would this include his wife, children, and parents, or could they each make $25,000 contributions?

Senator HARRY F. BYRD, JR. It would be individually.

Let me think that through just a moment. The way the bill is drawn, it would be to the individual contributor, the individual could make a contribution up to $25,000.

Senator PELL. That would mean a man like myself, with a wife and four children could contribute $150,000.

Senator HARRY F. BYRD, JR. It would.

Senator PELL. And if I had more children, more money.

Senator HARRY F. BYRD, JR. It would have to be the children's money, I might point out.

You could not make it in the name of the children.

Senator PELL. Also does this mean a $25,000 limit to a particular committee, or do you mean to the whole campaign?

Senator HARRY F. BYRD, JR. To the entire campaign.

As it is now, you can contribute $3,000 to as many committees and names as you can think of.

Senator PELL. Would the gift tax apply to $3,000 automatically in this case?

Senator HARRY F. BYRD, JR. This does not have anything to do with the gift tax.

Senator PELL. Would it basically?

You could divide the $25,000 up to different committees to avoid the gift tax.

Senator HARRY F. BYRD, JR. Yes. This attempts to put a ceiling.

Senator PELL. Would this apply to the primary elections and general elections together, or would it apply separately to each one?

Senator HARRY F. BYRD, JR. I would envision that it would apply separately to each election.

Senator PELL. All right.

Thank you.

I think if we move ahead with this, the bill should be perhaps spelled out a bit more to cover those points.

Senator HARRY F. BYRD, JR. I think so. I think the chairman raises very good points; that would need to be spelled out if the committee is willing to go into this.

Senator PELL. Another question here, and this is my final one, but somewhat on the subject, the chairman of the Foreign Relations Committee is considering proposing a bill saying that nobody should be appointed to an ambassadorial post who has contributed more than $10,000.

In another way, seeking to limit the amount.

Do you think this would have a similar effect on your bill?

Senator HARRY F. BYRD, JR. I think if he would raise that to $25,000, it would be in conformity with this proposal.

Senator PELL. Truly, I thought of offering an amendment to his bill, if he does offer it, saying it should be related to the gross national product and population of the country to which the individual would be employed in, but I am not quite sure.

Senator HARRY F. BYRD, JR. I have not thought of that aspect of it.

Senator PELL. In that case, the Ambassador to Luxemburg would be overcharged.

Senator HARRY F. BYRD, JR. The enactment of this legislation we are talking about today would accomplish, I think, what the chairman of the Foreign Relations Committee is seeking to accomplish, except it would not hold it as low as $10,000.

Senator PELL. Thank you very much.

The Senator from Michigan.

Senator GRIFFIN. I thought the questions posed by the chairman were very appropriate; I had some of the same questions on my mind, so I am glad they were asked.

Carrying the inquiry a step further, supposing that a person with wealth were to contribute not directly to a candidate or his campaign committee, but instead to a Businessmen's Association for Good Legislation or the Citizens for an Effective Congress or to the Americans for Democratic Action. Suppose that such a committee were in turn, to make contributions to the campaigns of candidates. Would the limit imposed by your bill apply?

Senator HARRY F. BYRD, JR. That would have to be handled separately. It is not handled in this particular bill.

Senator GRIFFIN. There are various ways of skinning the cat.

Senator HARRY F. BYRD, JR. There are, and it is very difficult to plug all of the so-called loopholes in a matter of this type.

This, as I see it, would be a start. It would not necessarily solve all of the problems, but I think it would be a start.

Senator GRIFFIN. Thank you. I think it might have to be supplemented by imposing limits on contributions to organizations of the type I referred to.

Senator PELL. Senator Allen.

Senator ALLEN. Senator Byrd, I want to commend you on your bill, and certainly I will support it when it comes before the Senate for a vote, assuming it carries out the intent that you have.

One possible loophole occurs to me that you might want to plug, would it not also be well to put in loans?

Senator HARRY F. BYRD, JR. Well, I think that is covered.

Loans would be covered.

The bill as drawn would apply to loans and allowances for this reason, that is, because the definition of contribution is already in the code, namely, title 18, section 591, I think.

Senator ALLEN. You do not think it is necessary to spell it out?

Senator HARRY F. BYRD, JR. It would not hurt to spell it out.

Senator ALLEN. As a matter of interest, I recall reading a couple of years ago that one of the leading candidates for the Republican nomination of President saved several millions of dollars in contributions for a relative who paid more than $1 million in gift taxes, and I was just wondering on the $1 and $2 million contributions that are mentioned in your statement, and the $375,000, were they split in such a way that no committee received more than $3,000?

Senator HARRY F. BYRD, JR. That is my understanding.

I am certain that one of them was, and I am sure that was the case.

Senator ALLEN. In other words, it would have to be 500 or 600 committees then, is that not right, if none were given over $3,000?

In the case of $1 million contribution, it would require 333 committees?

It makes me look with more favor on Senator Weicker's bill to allow only one committee.

I think something along that line would be a step in the right direction, rather than having such a proliferation of committees.

Senator HARRY F. BYRD, JR. I think the Congress must do something about permitting an unlimited number of committees, otherwise you have no ceiling at all.

As of today, we have no ceiling at all. We have a ceiling of $3,000 per committee, but there is no limit on the number of committees you have, so as a practical matter, we have no ceiling. And if I could emphasize one other aspect, we should put a strict limit on expenditures, then that in itself would reduce the need for these huge contributions.

I want to emphasize again that this legislation is not directed at any party or campaign. It was first introduced by Senator John Sherman Cooper and myself last fall.

It just seems to me there should be a limit, No. 1, on expenditures, and No. 2, on contributions.

Senator ALLEN. You do plan, of course, to continue a study of the matter with respect to your amendment in order to polish it up and cover some of the loopholes that have been mentioned here by the chairman and by Senator Griffin?

Senator HARRY F. BYRD, JR. I would hope the committee would do just that. This presents just the framework as I see it.

It does not purport to cover every conceivable avoidance that one might be able to dig up, but it is just a framework which if the committee were willing to go into something like this, it would be, I think, in the long run pretty helpful.

Senator ALLEN. I thank you.

Senator PELL. I thank the Senator very much for offering his bill.

I think we all agree on his objective. The problem with all of these bills, like disclosure, they are a nuisance, an embarrassment.

Sometimes when I file a disclosure it costs me an accountant's fee of $1,500. Then there are other rascals that always find a way around the laws, and the problem is to work out a bill that is strict enough, stringent enough that no rascal can work his way around it.

Senator HARRY F. BYRD, JR. I think the chairman has put it in focus. It is very much like the tax laws, the Congress will enact tax laws and then a very smart lawyer will see an aspect of it that the Congress itself does not see.

Senator PELL. You are not necessarily a rascal in that case. You are still following the law.

Senator HARRY F. BYRD, JR. That is right.

Senator PELL. You are permitted to take advantage of the law as far as the law will permit you.

Senator HARRY F. BYRD, JR. That is what is happening on these campaign contributions.

The persons making the contributions are following the law. The law has no ceiling as a practical matter.

Senator PELL. I am not sure that the law is fully followed as vigorously as it should with regard to full reporting.

A great deal of reporting has surfaced, but again there is a jurisdictional problem, but other committees seem to be moving along discovering new little caches of money that have not been reported.

What we really want to make sure of is that the present law is really observed and is absolutely tight.

Senator HARRY F. BYRD, JR. That is a different aspect—the disclosure aspect is one, but the overall ceiling is a different aspect entirely.

Senator PELL. Thank you very much indeed.

Senator GRIFFIN. If I may make the further comment that although your bill is not addressed directly to the matter of a ceiling on expenditures, the Senator from Virginia has referred to it several times and it is a desirable goal in many respects.

What would you do about the labor union organizations which have a good government drive registering and getting out the vote, only in those particular areas where they have done a figurative campaign job, and where they are going to get a high percentage of votes for the candidates on their slate? Would that expenditure of manpower and money be included in the ceiling, and how would you do it?

Do you think you could ever get it through the Congress if you tried to limit it?

Senator HARRY F. BYRD, JR. This bill does not address itself to that aspect.

Senator GRIFFIN. I recognize that, but the Senator said several times we ought to put a ceiling on expenditures, and I am just wondering how you are going to make it figurative.

Senator HARRY F. BYRD, JR. The Senator from Michigan raises a very important point.

Senator GRIFFIN. Would we leave that out?

Senator HARRY F. BYRD, JR. If you do not, if we are not able to tackle that part of the problem, we have not put an effective ceiling.

Senator GRIFFIN. That is one of the reasons it will be difficult to have an effective ceiling, just as an example.

Senator HARRY F. BYRD, JR. I think that is correct, but because it will be difficult to do, that ought not to be adequate reason to refuse to address ourselves to the problem, to try to work out some method of limiting both the expenditures and the contributions.

Senator GRIFFIN. Thank you.

Senator PELL. Thank you very much.

Senator HARRY F. BYRD, JR. Thank you, Mr. Chairman.

I thank the committee.

Senator PELL. Our final witness this morning is Senator Weicker of Connecticut.

STATEMENT OF HON. LOWELL P. WEICKER, JR., A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator WEICKER. Good morning, Mr. Chairman, Senator Griffin.

Let me say at the outset that I think the task of this particular committee, is one of the most important tasks of any committee, including the Senate Watergate Committee on which I now serve, because I think that your work product can do more toward positive restoration of faith in the political system than anything that is being flashed across the headlines today.

What you can do, in a very real sense, restore credibility between the people and their politicians.

Even as I address your distinguished subcommittee this morning, American politics is in trouble, not because of communism, or socialism, but because of American politics.

It must upset you as it upsets me, whenever they take a poll to find themselves at the bottom of that poll.

I am not talking of any single personality, but rather of the profession.

The power of the purse has become the most undisciplined, uncontrolled, and irresponsible force in politics. Without question, our method of financing campaigns has done more to demean the practitioners of politics and to discredit the political system in the eyes of the public than anything else.

What all this means is that realization of the American dream now depends on correcting, not just commenting on, campaign conduct. Because politics has, in the public eye, become the apprentice of corruption, rather than the master over it, and this above all must be corrected.

The "Federal Election Campaign Reform Act" that I introduced on March 13, 1973, attempts to begin the process of reform by revising the morass of campaign regulations, that have grown like elephant grass, until men everywhere, candidates and voters alike, can neither understand nor obey them.

I don't know what the Democratic Party did prior to the campaign election of 1972. But on the Republican side, we who helped pass the election laws had to caucus on more than one occasion to try to figure out what laws we passed. Just as we didn't understand them, I am sure the Democrats had similar gatherings to try to understand the morass of these laws.

This bill that I have presented relies on simplicity.

It would limit the time period for expenditures and contributions.

It would limit each candidate to one political committee.

It would limit the use of his personal funds.

It would tell the complete financial story—before the election.

This same legislation includes recording and publication requirements that would be meaningful, to voters, before election day.

And the penalties will finally mean something, to politicians, by applying monetary fines, equal to the amount of the infraction, toward effective public notice of that infraction.

The drafting of this legislative proposal was based on one thing, my own practical experience in eight election contests over the past 10 years.

I am not sitting here pointing the finger at anybody else but myself. I can say this is not hearsay, this is a matter of personal experience, the best basis that one can produce.

I am not here to chastise others for contorted campaign financing practices that have confused the public.

I refer to the flood of post-election donations, money that has financed as much as one-fifth of my own campaigns.

I refer to the use of multiple finance committees, that obscure the real facts about donations and allow bigger tax breaks for contributors.

I refer to the use of personal funds, and the condoning of large campaign deficits.

These are all things that I have known firsthand. Yes, they are all legal practices, but they do nothing for the faith and confidence of America in its political system. And I know of no more solid ground for attacking such practices than my own practical experience.

Which brings me back to the specifics of the bill I introduced, S. 1189.

The first step it would take is to limit time periods. This bill would for the first time not allow money to be spent or collected, in any way whatsoever, except during the calendar year of the election.

In addition, all collections or contracting for new obligations would be cut off 2 weeks before the election, and a complete financial report would be issued at that time.

Money could still be spent during the last 2 weeks of the campaign, but only for items contracted for and duly reported.

Clearly, any deficit would become public knowledge before the election, and such a deficit would, under this bill, become the personal liability of the candidate.

This set of expenditure and collection limitations would accomplish a number of results.

First, it would effectively monitor financial activity by narrowing it to a manageable time period, the period from January 1 to election day.

Second, it would give the public vital information in an area they have never shown an interest in before now, but an area in which they should have an interest, the postelection donation. One-quarter to a third of all money is raised after the election. It is bad money, money that rides on the winner's new office.

Finally, and most important, these regulations would bring complete facts to the voters' attention, 2 weeks before the election, in time for voters to express their own opinion of the campaign's conduct.

This would be one portion of the input in judging a man, both as to the moneys he spent, as to any deficits occurred, as to who his contributors are, and as to what he spent his money on. Most important, it controls the time period; and time is money, especially the time after the election.

The next step is to regulate financial conduct of a campaign. In this legislation, all money would be controlled by one committee, and only one committee, for each candidate. No more confusing the public, one repository where we look to monitor what is happening.

An equally important regulation would prohibit contributions back and forth between political committees. What happens today is that a committee, such as a congressional campaign committee, gets money from a donor. It brings that money into a common fund. When it is handed to a candidate, often a candidate specified by the original donor, only the ambiguous name of a committee appears on the candidate's financial reports.

This is called laundering of donations, and it would be prevented. Committees and other political organizations would still be able to function, but they would have to modify their methods of operation. They would still be able to solicit or administer contributions, but if they collected a donation, it would have to be given to the eventual candidate in the name of the original donor.

In an additional regulation, no candidate could spend more than $5,000 of his personal funds on his campaign except for deficits.

An important step in implementing all the regulations, is to get some reports that are meaningful, and timely.

First, all reporting under S. 1189 would be done to two places, and only two places, the Comptroller General and the appropriate State election supervisory office.

Second, there would, at most, be only two reporting times: 2 weeks prior to a primary, if there is one, and 2 weeks before the election

itself. The important point here is that the key statistics, the whole story, will come to the voters' attention 2 weeks before the election.

Finally, this legislation would impose a unique form of penalty.

It would impose no jail terms, because that has proved totally unrealistic, in terms of enforcement, under the present law, for obvious reasons.

There would be no simplistic fine, such as the $5,000 under present law, which is easily paid, and then forgotten.

Instead, a fine would be levied and the money collected from the fine would be used to publish the violation. If it is a monetary violation, the fine would be three times the amount of the violation. If it is a nonmonetary violation, the fine would be an amount set by the Comptroller General which would be sufficient to notify the public of the offense.

In all cases, the fine can be increased to provide adequate public notice. And most important, the violator must be the one to notify the public of his offense.

This, then, is the substance of the bill. It is presented in understandable form, and simplifies the thousands and thousands of regulatory words now on the books, which in their maze of provisions are so often only counterproductive.

It takes a giant step, to be sure, but giant steps are needed.

This business of integrity in politics is well worth keeping, and well worth rebuilding.

If you cheapen a politician, or he cheapens himself, then how about the Constitution next, how about a bill of rights, how about the concept of America itself?

The real threat has been from within, for some time now. And the time is late.

First, it is corruption that is concealed.

Then, corruption that is condoned.

Then, corruption that collapses us all.

Each drop of water erodes the rock a little more. And every violation of ethics, justice, and common decency that is accepted without protest makes the climate of receptivity toward new outrages that much more hospitable.

I believe in the original and not the modified American dream.

I don't believe we have become a nation of moral zombies. Americans will not stand by forever, watching the cancer of corruption.

The truth is that a good 99 percent of people in Government are good, honest, decent men and women. But I do say that it is time for the 99 percent to shake off the bemused lethargy when they come face to face with corruption and lack of integrity.

We have got to restore the code of integrity and honor to our society, to the politicians that make the laws, and to the electorate that goes ahead and puts those politicians in.

These are principles that have always given us a strength way beyond our numbers.

When I spoke on this issue last fall, I noted that the election would soon be over and the temptation would be, as it always is with Americans, to dust off their hands, grin sheepishly, and try to forget what has gone on both during and before that particular election campaign.

But not this time.

There can be no philosophical or political rationalization for law-breaking, physical or mental. There was adult criticism of youth antics several years ago, and we all remember that. Well, what I see today are the adults of America throwing the bricks, only this time it is not a store window that is being shattered. It is the American dream.

To all of which I say "No."

Too many of us believe in it still. Too many are in need of it still.

The legislation we are considering today has placed before the Congress its first order of business—its own honor.

All of these present reporting practices that we have certainly do nothing, insofar as the voter is concerned, to give him an understanding of what has transpired or what is transpiring.

That is the substance of the bill, and I cannot tell you how deeply I feel about this.

And that is why this task, Senator Pell, is so important. It rests with able men, men like you, because we have come to that point where we must once again restore the American people's belief in the political system.

A political system that has gone soft is subject to the slightest push, from philosophies that are totally alien to any of us in this room.

Senator PELL. Thank you. I know, I am familiar with and concur in the intensity of your views in this regard.

I think as you do, the word "politics" should be an honorable word, and I know it is sometimes listed in Who's Who as occupation. It should be an honorable trade but it is not an honorable trade in the eyes of the public.

I think the American public have very low standards themselves. They have elected people from jail to go to Congress, and I think that they have come to expect a low standard, when, as you suggested, the standards are really very high, because standards in politics, not only in our Nation, but I think in all nations, are as a rule higher than in business.

I think probably the British have the most honorable system, and I guess we are a pretty close second. Looking at other countries around the world, usually political levels are a little higher than business levels, but the public always seems to hold the politicians in lower esteem.

What you are trying to do, and what I am trying to do is to show that the standards we have, 99 times out of a 100, are pretty high.

I think your objectives are great. I think that there are some complexities in it, if you will forgive a couple of questions to try to clarify your proposals.

My own personal view is I think the present law is a pretty good law, but it asks for a few too many forms, and it is a tremendously expensive one for the candidate.

You have to have a CPA in there, he has to have a secretary, and you have to disclose, you have to pay for all of this. If we can simplify the present bill and have the hot light of publicity focused on every nickel that is given, so that if it is a Mafia nickel or a labor nickel, or business nickel, or a million dollars, you know exactly where it is coming from, and this in itself acts as an inhibiting factor.

We have not yet really given this law a chance to work itself out, and my own hope is that out of our subcommittee might come, with

the help of the able counsel, some way of translating all of these legal terms into a bill or a set of rules that the candidate can follow with greater ease, because it is a most complicated set of rules.

Did you run this last time?

Senator WEICKER. No.

Senator PELL. It was really unbelieveable.

Senator WEICKER. I completely concur with the chairman. I think simplicity is the key, it is the key to public understanding, and quite frankly, simplicity is the toughest criteria as far as we are concerned.

Senator PELL. On your bill to clarify it, since the purchase of time or space for use of the media is sometimes more economical when planned in advance, when you contract a year ahead, your bill if passed would tend to penalize those who want to have a well structured campaign that they organize in the odd year, a year ahead of time.

Senator WEICKER. Well, I suppose it would. On the other hand, the way this bill is structured where 2 weeks before the election you have to have your financial report, it almost forces you to go ahead and carefully plan your affairs from the start.

No man will be able to sit down 3 weeks before an election and start to pull together all of this material.

It will have to be an ongoing operation with discipline right from the start insofar as accounting is concerned.

As to the television time, I am not in position to comment whether it should be done in a year ahead of time. I still think there is plenty of time allowed in this bill as to most election campaigns.

It is a reasonable length of time in which to plan, and certainly you are going to have to keep tight fiscal reporting right from January 1, otherwise you are not going to be able to meet the reporting requirements before the election.

Senator PELL. Another problem is after an election, when you are left with a deficit, where we usually are.

How would you handle that deficit, if you did not get money after the election?

Senator WEICKER. Well, it makes the deficit an unfortunate occurrance. Right now we all accept the fact we are going to have a deficit, and I think it is one of the things that frighten us the most. What I am saying here is that a deficit is going to be known, 2 weeks before the election, and that deficit becomes the responsibility of the candidate.

Senator PELL. I don't really agree with you on this.

I think you can have tremendous amounts of last minute expenses, somebody dumps a particular story, and it has to be responded to 10 days before the election, 1 week before election.

In my case, I found myself 2 weeks before election, thinking I had more than enough money, and I diverted some of the funds to candidates more hard pressed. I found we had misestimated, and we wound up with a deficit.

These are things that can happen and are most aggravating.

Senator WEICKER. I usually find out that everybody comes in with a crazy idea at the end of an election campaign, with about 1 or 2 weeks to go. They think we are weak here, and weak there, and those are not the ideas that carry the day.

Senator PELL. Another question, you would have one committee. I think that would be a great idea.

You really avoid the proliferation, but do you think that the gift tax would have to be paid, all contributions of more than $3,000?

Senator WEICKER. That is right.

Senator PELL. Then what about things like the campaign committees, the Republican and Democratic National Campaign Committees, could they act as a conduit to give moneys?

Senator WEICKER. They could go ahead and act as a conduit, but they would have to identify where the money came from.

Senator PELL. They do now.

Senator WEICKER. I don't believe they identify the specific original donor.

Senator PELL. They are supposed to.

Senator WEICKER. This is why we still have a great deal of "laundering" of contributions.

Senator PELL. Every contribution, unless either committee takes a little black suitcase, that is a different thing.

We trust they don't as a national campaign committee, but every contribution in excess of $100 is reported, in the name of its donor.

Senator WEICKER. Not in the name of the original donor.

Senator PELL. Is that true among large organizations that contribute, every name of every contributor.

Senator WEICKER. Let's say COPE makes a donation to a Democratic financial committee, they give the name of the contributors.

Senator PELL. But COPE, I am asking Counsel a technical question. Does not COPE have to publish the names of the contributors to its campaign?

Staff COUNSEL. In its report to the supervisor's office.

Senator PELL. So this is a matter of record.

Senator WEICKER. And that is as it should be.

Senator PELL. What is not a matter of record is not where the money goes from the campaign committee, but whether your contribution is going to a particular campaign.

If I have a friend who gives a thousand dollars to the Democratic Senate Campaign Committee for me, it is not identified when the thousand dollars comes to me.

Senator WEICKER. This is what we are trying to do.

Senator PELL. I don't see how you could do that.

I am just trying to figure how you could handle it.

Senator WEICKER. Why not? We are simply talking about reporting everybody that gave to my campaign, every single individual.

Senator PELL. But you could not tell.

Let's say you gave a thousand dollars, or your friend gives a thousand dollars, to the Republican Senatorial Campaign Committee, and eventually you get a contribution of $2,500 from the Senatorial Campaign Committee which includes the thousand dollars.

How could you identify that thousand dollars which came from John Doe?

You could not do that.

Senator WEICKER. I agree there are increased administrative problems, but I think you have got to meet this issue head on, otherwise you have created a loophole.

Senator PELL. Your bill also seeks to set a limit on the amount a candidate may contribute or spend from his personal funds.

Does this mean from his family funds, as well?

Senator WEICKER. Yes.

Senator PELL. What about his wife and three children.

Senator WEICKER. Any expenditures in excess of $5,000 from the personal funds, or the personal funds of his immediate family.

Senator PELL. Would that include adult children?

Senator WEICKER. Yes.

Senator PELL. Would it include spouse?

Senator WEICKER. Yes.

Senator PELL. Brothers and sisters?

Senator WEICKER. Yes.

Senator PELL. Then we come to this, which I found in my campaign. I have brothers who made a contribution to me, would you mean half brothers and half sisters?

Senator WEICKER. I would like to use that standard.

Senator PELL. Parents?

Senator WEICKER. Yes.

Senator PELL. In-laws?

Senator WEICKER. I would say so.

Senator PELL. That would be even tougher under the present law. We don't have in-laws, we have just both parents.

Then it would be exactly the same standards that we have now?

Could one candidate contribute $5,000 to the committee of another candidate?

Senator WEICKER. I don't see why there should be any limitations on one candidate giving another candidate money.

He comes under the same reporting requirements as other contributors.

Senator PELL. I would like to read into the record the definition of "immediate family" which might be applicable to yourself.

"Immediate family" means the candidates' spouse, child, any child, parent, grandparent, brother or sister and the spouses of said persons, hence it does include in-laws.

Senator WEICKER. But I think it should add the interpretation of half-brother as a member of the immediate family.

I think that is all to the good, the standards you applied to yourself, which were higher than the standard in the present law.

Senator PELL. Is your provision intended only as a limitation on personal funds used by a candidate, or do you feel that a candidate could make a variety of contributions to other candidates who would in turn support him?

Senator WEICKER. That could happen. I can see where that could happen. I think he has the rights that anybody else has to contribute to campaigns. I don't see in my legislation how you could block something like that.

Senator PELL. And finally.

Senator WEICKER. To this extent, my legislative assistant indicates that we do prevent funds being contributed in such a manner through prohibitions on the use of a "third party" to get around the $5,000 limit.

Senator PELL. Finally, you have the fact that there cannot be more than one committee to solicit, receive, and make contributions.

Senator WEICKER. Right.

Senator PELL. But you could have other committees that would be active in the campaign from the administrative view point?

Senator WEICKER. Sure; as long as they have nothing to do with monetary aspects.

Senator PELL. Right; I think you are right about the single committee.

I know we tried to do that, and we found that it made it simpler, but then we found that the name we had chosen was not a very phonetically pleasing one, and we had to choose another name to please the radio broacasters so it would sound better.

But I think you are right—one committee.

Senator Griffin?

Senator GRIFFIN. I have no comment except to join the chairman in commending our colleague from Connecticut on a very enlightening and important statement. I believe that many of the points are well taken, and his presentation ought to be very helpful to this committee as we deliberate and try to define and improve the laws in effect.

I want to join in the concern already expressed, that the existing laws are too complicated. It will be difficult to tighten up the laws and simplify the laws at the same time. But I hope we can do that.

We must keep in mind, as we go along, that it is not only very expensive in terms of money that must be raised, to run for office these days, but campaigns require the services of a lot of people, some who are paid, and many who volunteer. If the laws are so complex, so difficult, or so unreasonable that ordinary, well-intentioned, honest citizens run great risk of ending up in jail by participating in a campaign, then, needless to say, such laws can make it more and more difficult for good people to run for public office.

Senator PELL. Particularly to be your campaign chairman or treasurer.

Senator GRIFFIN. Absolutely, or some of the other jobs that are involved. So I only want to underscore what has already been expressed here, that while it is desirable to tighten up the laws, I hope somehow we can also make them simpler—so that people will be encouraged to participate in political campaigns.

Of course, it is necessary and desirable to require reports, but I really question whether so many reports serve the purpose they are supposed to serve.

Furthermore, it is possible that criminal laws sometimes are not enforced in this area because the criminal penalties are not realistic, and to enforce them would discourage honest people from getting involved.

That is not to say we should not impose criminal penalties, but I think we ought to be rather careful about imposing a criminal penalty on everything.

Senator PELL. I thank you, Senator Griffin.

The first witness tomorrow will be the Secretary of the Senate, and we hope that he will address himself to this question, to the number of reports that are filed, this complexity, and what can be done to try to simplify the requirements.

I thank you, Senator Weicker, very much. The subcommittee is recessed until 10:30 tomorrow morning.

[Whereupon, the subcommittee recessed at 11:40 a.m., to reconvene at 10:30 a.m. Thursday, April 12, 1973.]

FEDERAL ELECTION REFORM, 1973

THURSDAY, APRIL 12, 1973

U.S. SENATE,
SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS
OF THE COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m. in room 301, Russell Office Building, Senator Claiborne Pell (chairman of the subcommittee) presiding.

Present: Senator Pell (presiding).

Subcommittee staff present: James H. Duffy, chief counsel; James S. Medill, minority counsel; and Mary G. Daly, secretary.

Full committee staff present: Joseph E. O'Leary, professional staff member (minority); Gretchen Doss, secretarial assistant (minority); and Jack Sapp, editorial assistant.

Senator PELL. The Subcommittee on Privileges and Elections will come to order.

Our first witness today is the Secretary of the Senate, Francis R. Valeo, accompanied by Orlando B. Potter.

STATEMENT OF FRANCIS R. VALEO, SECRETARY OF THE SENATE, ACCOMPANIED BY ORLANDO B. POTTER, CONSULTANT ON ADMINISTRATION TO THE SECRETARY OF THE SENATE

Mr. VALEO. Thank you, Mr. Chairman.

I have a rather extended statement, and it contains a great number of detailed proposals for changes in the law as now written.

If it is agreeable with you, I would like to read the entire statement into the record.

Senator PELL. Proceed as you wish, Mr. Valeo.

Mr. VALEO. Mr. Chairman, I appreciate this opportunity to appear here today to discuss the Federal Election Campaign Act.

The administration of title III of the act has been a major concern of the Office of the Secretary for the past 14 months, and we have built up a considerable body of experience which I hope may be of some assistance to this subcommittee as it considers refinements and revisions in the law.

I might note at the outset, Mr. Chairman, that we have described the administrative machinery in the Senate elections in a technical report, copies of which are before you and which I ask that you incorporate by reference into the record of this hearing. I also submit for the record a press release describing this report.

Senator PELL. Without objection, so ordered.

[The report referred to was cited as:]

FEDERAL ELECTION CAMPAIGN ACT

TECHNICAL REPORT
ON THE IMPLEMENTATION OF THE ACT
WITH RESPECT TO
ELECTIONS FOR THE U.S. SENATE

PREPARED BY

MARILYN E. COURTOT
Subcommittee on Computer Services
of the Committee on Rules and Administration

UNDER THE DIRECTION OF

FRANCIS R. VALEO
SECRETARY OF THE SENATE
SUPERVISORY OFFICER FOR SENATE ELECTIONS



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

[The press release referred to above follows:]

PRESS RELEASE FROM THE OFFICE OF THE SECRETARY OF THE SENATE, MARCH 2, 1973

Francis R. Valeo, Secretary of the Senate, today released a report describing the use of microfilm and computer technology in the implementation of the Federal Election Campaign Act, with respect to elections for the U.S. Senate in 1972:

"Without the support of modern data processing technology, we would have been hard put to provide for adequate public inspection of the large volume of reports submitted under the Act," Mr. Valeo declared in releasing the report.

Mr. Valeo issued the report in his capacity as Supervisory Officer for Senate elections under the Federal Election Campaign Act.

It was prepared by Marilyn E. Courtot, of the staff of the Subcommittee on Computer Services of the Senate Committee on Rules and Administration. The Subcommittee staff assisted the Office of the Secretary in making technical preparations for the implementation of the Act.

Mr. Valeo paid special tribute to the efficiency of the Subcommittee staff for its work in bringing the technical system into operation within the 60 day period allowed for implementation after the Act was signed on February 7, 1972.

The report released today disclosed that the Office of the Secretary received a total of 8,161 reports and registrations, totalling 69,564 pages in the first 10 months of operation. There were 306 candidates for the Senate from 33 States, including unsuccessful primary candidates, and 1,169 registered political committees.

Technical implementation, as required by the Act, involved maintenance of an up-to-date indexing system which would provide rapid cross reference between all committees and the candidates they supported. The Act also required that all documents be available for display and copying within 48 hours of receipt.

To meet these requirements, a system was devised to provide for in-house microfilming and key taping of index material upon receipt of documents, with each document made retrievable by a sequential page number automatically printed by the microfilm camera. Films were processed overnight, while updated indexes were run off on the Senate computer, thus assuring availability of the reports for inspection and copying on microfilm reader-printer machines, within the time required.

The Report concludes with the statement that "The Federal Election Campaign Act Reporting System is an example of how a system can be designed and implemented to satisfy a complex law in a very short period of time (60 days). Moreover, the system was immediately responsive, while being economical and easy to operate. The utilization of modern computer and microfilm techniques was a prime factor in the ease of implementation and operation of this system."

Mr. VALEO. The technical report sets forth the preparation and distribution of report forms and the provision for public display and reproduction of reports by microfilm, with a computerized indexing system providing cross-referencing as required by the act.

As of the close of business last Friday, April 6, which was the end of the first year of operations under the act, we had received and processed for Senate elections, 10,506 reports and registrations, amounting to 81,284 pages.

Senator PELL. Has it been your experience that the press has shown any journalistic initiative to use these figures, report them?

Mr. VALEO. The press here has shown a considerable amount of interest, and by the use of various techniques which are explained in that report, we have facilitated availability of this material.

The cross indexing system has been extremely valuable to the press. I am informed that the press has also been very active in the localities since copies of these reports are carried in the appropriate State capitols by appropriate State officials.

Senator PELL. The reason I raise this point, I thought I spent more than my own opponent on the election, and I found he spent a great deal more than I had.

The press requires real initiative in adding up these figures. I wonder if the press is taking advantage of the present law, and looking into this question of postelection expenditures and collections.

Mr. VALEO. Some are doing that, and I think some are waiting for us to do the actual tallying, which is now in process in keeping with the final audit.

Senator PELL. Will you have to make a press report and cover sheet to get the press to use it?

Mr. VALEO. We have not yet decided all the procedural details, but for the present, the basic data is available on microfilm and can be read in the office.

Senator PELL. Fine.

Mr. VALEO. I might say the technical implementation of the act in the Senate was accomplished with the assistance of the Subcommittee on Computer Services of the Committee on Rules.

The whole system was designed and brought into being in 60 days and I am proud of the fact that it has worked very effectively since the beginning.

If it would be helpful to your deliberations, I would urge the members of the subcommittee and its staff to inspect the operation of the Public Records Office of the Secretary of the Senate which is located in rooms ST–45, and ST–2 and 4 of the Capitol.

You might be interested in the fact that we are operating the whole system for Senate elections well within the budget of $213,000. The system is economical and it is highly effective.

In overall terms, Mr. Chairman, it seems to me that the Federal Election Campaign Act has gone a long way toward opening to public visibility the financial roots of American politics.

Vast amounts of information have been disclosed and made available promptly for public consumption.

Insofar as Senate elections are concerned, by and large, compliance with the disclosure provisions of the law has been very good, notwithstanding some statistics which I shall give you shortly with respect to enforcement.

To be sure, there have been some problems and ambiguities, and the purpose of my testimony today is to call your attention to these problem areas and to recommend certain changes in the law which are suggested by our first year's experience.

I realize, Mr. Chairman, that you have several bills pending which relate to the electoral process, but it seems appropriate that I comment only on those that have bearing on my present responsibilities as supervisory officer of Senate elections with respect to financial disclosure.

If I may, I would like to make my comments on the pending bills in the context of an overall review of title III of the Federal Election Campaign Act as it now stands. My review will proceed more or less on a section-by-section basis.

THE SUPERVISORY OFFICERS (SEC. 301 AND SEC. 308)

I would first like to address myself to the problems posed by the present system of three coequal supervisory officers as provided by section 301(g) of the act.

Specific duties of each supervisory officer are spelled out in section 308 but nowhere in the act is there any explicit directions as to the relationship between the three.

Nevertheless, the three supervisory officers concluded at the outset that there had to be a very intimate relationship because all are charged with administering the same provisions of the law.

The closest possible collaboration seemed essential to assure uniform interpretation and application of the law and minimize confusion for the hundreds of candidates and committees required to report.

Senator PELL. Does this mean all of your decisions had to be by consensus?

Mr. VALEO. I will come to that point presently, Mr. Chairman.

Representatives from my office were instructed to work closely and continuously with representatives of the Clerk of the House of Representatives and the Comptroller General to develop standard reporting forms and uniform regulations.

They were directed to pursue a separate course only if and when our interpretation of the full responsibilities of the Secretary of the Senate, under the law, might make that imperative.

It was not an easy process, but I can report to you that cooperation was excellent and a genuine sense of collaboration emerged; there was input into the deliberations from all three sources.

The committee might wish to consider in its revisions of the act, that this ad hoc and informal system of cooperative uniformity between the three supervisory officers be given firm legal standing by inserting a new paragraph in section 308 which would direct the three supervisors to act jointly to assure standardization and to eliminate duplication and, by vote, if necessary.

That is precisely the point you were interested in, Mr. Chairman.

One of the first consequences of such a provision might be to eliminate the necessity for the filing of identical reports with the three supervisory officers by nationwide or interstate committees which support candidates for all three offices, the Presidency, the Senate, and the House.

The present arrangement of three coequal supervisory officers is cumbersome in many respects. I would point out, however, that some the worst fears expressed for the system have not materialized in any way, shape, or form.

You will recall, I am sure, press comments which suggested that the Secretary of the Senate, as an elected officer of the Senate, could not effectively enforce disclosure of financing for Senate elections.

My own view is that such fears are grounded in a rather archaic view of the Government and of the political process.

My experience has been that when an officer of the Senate has a stated legal responsibility to fulfill, the membership will unhesitatingly honor his authority.

In the case of the Federal Election Campaign Act, the stated statutory responsibilities of the Secretary and the requirements imposed

on the members are spelled out with far greater clarity than ever before.

We have gone to some lengths to assert that the Secretary of the Senate has legal responsibilities as supervisory officer and the leadership and membership of the Senate has responded accordingly.

I can state for the record and without reservation that neither I nor any member of my staff has been subjected to any improper requests or any pressures or threats to compromise or in any way limit the application of the law.

We have accordingly been able to do our part in enforcing the act in an even-handed way, without regard to incumbency or party affiliation.

So far we have made 565 referrals to the Department of Justice for noncompliance or lateness.

I will say, frankly, that I am not fully satisfied that all of them were significant violations, but I will make a specific recommendation on this point at a subsequent point in my testimony.

In addition to providing even-handed enforcement, my office has also been able to give prompt and helpful guidance to persons attempting to comply with the law.

I think there are grounds for asserting that such advice has been more effective because it originates from a legally authorized Senate officer directly conversant with the electoral process, than it might be from another source.

I cite these details, Mr. Chairman, because I believe the record should show clearly that the Senate, and specifically the Office of the Secretary, has carried out its responsibilities, fully, under the law.

I appreciate the arguments in favor of consolidation, whether under a commission as proposed by Senators Scott, Mathias, and Stevenson, or by any other means.

I do not oppose the principle of consolidation as such, particularly to the extent that it will ease the burden of the participating public and further the objective of disclosure.

I reject, however, any presumption that an appointed board is more to be turned than an elected officer of the Senate.

Insofar as the Senate is concerned, if modifications in the direction of consolidation are to be made, they should be made to achieve these positive goals and not because of preconceived and presumptuous notions as to the reluctance of the Senate to insure the integrity of the electoral process with respect to the enforcement of the Federal Election Campaign Act.

The Senate's institutional stake in the effective enforcement of this law is as high as that of the Presidency and the House and it has acted accordingly.

That will continue to be the case.

Therefore, if the commission concept proposed in the Scott bill, S. 1094, were to be adopted, I would recommend that two revisions be made in the bill.

One would be to broaden the appointing authority as set forth in section 2(a) of the bill to provide that two members of the Commission be nominated by the presiding officer of the Senate, on the recommendation of the majority and minority leaders, two by the Speaker of the House and two by the President of the United States.

As it now stands, the Scott bill would provide only for Presidential appointments to the proposed commission.

The national experience with commissions, whether at the State or Federal level, as the committee well knows, has not been a uniformly happy one.

Commissions have displayed their share of corruptability, ineptitude, and unresponsiveness to public needs.

In the circumstances, it seems to me, therefore, that if the commission route is to be followed, the Senate had best keep a close contact with it by assuming a share of the appointing power, at least during the initial period of its development.

I refer, again, to the possibility of what amounts to an interim stage of consolidation, short of a commission, in which the three supervisory officers would be directed by law to work in concert to insure uniformity of practices.

All three elective bodies would be represented in that case, with the Comptroller General speaking for the Presidency, from which his appointment is derived, and the elected Clerk of the House and the elected Secretary of the Senate representing the concerns of their respective institutions.

Under these arrangements, the administrative experiences and practices of the three bodies, not to speak of their cost effectiveness, might be accumulated and compared as a guide for further consolidations in the future.

Mr. Chairman, the rest of my statement concerns a number of technical points in the act which appear to need clarification regardless of whether future administration of the act remains in the hands of the present supervisory officers or is assigned to a separate agency.

THE QUESTION OF CANDIDATE STATUS (SEC. 301)

I would like to call your attention to the problem of the definition of a candidate.

Section 301(b) of the act defines a candidate as an individual who has either taken action under State law to qualify himself as a candidate, or who has received contributions or made expenditures, or authorized others to do so, with a view to bringing about his nomination or election.

The essential point here is that the second part of this definition is extremely broad insofar as it quite properly makes a person a candidate for disclosure purposes as soon as he begins advance fundraising for a campaign.

This step may occur—and frequently does occur—long before he makes formal declaration of candidacy or even a final decision as to whether or not to run.

An initial fundraising venture which is not successful may, in fact, tip the decision against running.

Thus we are now carrying in our candidate index the names of many incumbent Senators whose terms may have as many as 5 years yet remaining, but who have been listed as the recipients of payments and benefits from their respective party campaign committees, or who have authorized advance, or continuous fundraising activities.

Undoubtedly, there are men and women in the States contemplating running against these incumbents and who may have had offers of financial assistance to that end but who will not make a final decision to become a candidate until a later date.

They are candidates for the purposes of this act nonetheless if funds have been received.

Recently, a group of incumbent Senators who may be candidates in 1974, have raised questions about the legal implications of these disclosure requirements.

If, by virtue of having initiated fundraising activities or fundraising activities having been initiated on their behalf, they have attained the status of a candidate for disclosure purposes under the definition of section 301(b), are they also candidates as far as other requirements of law are concerned?

Are they, for example, candidates under the equal time provision of the Communications Act, or under the media limitations of title I of the Federal Election Campaign Act?

Are they candidates with respect to whatever restrictions may appear to attach to their mailing privileges as a result of recent court cases?

After a careful review of several of the statutes involved, my office has tentatively concluded that it is possible for a person to be considered a candidate for disclosure purposes under title III of the Federal Election Campaign Act without implicating himself as a formally declared candidate—subject to requirements of other laws.

We have prepared and circulated a draft memorandum to this effect, and I submit a copy for the record of this hearing.

Senator PELL. Without objection, so ordered.

[The memorandum referred to follows:]

[DRAFT]

ADVISORY MEMORANDUM TO INCUMBENT SENATORS AND OTHER PERSONS WHO MAY BE CANDIDATES FOR THE SENATE IN FUTURE ELECTIONS

I. Disclosure requirements

(a) *Candidate.*—For purposes of *disclosure* of financial activities under the Federal Election Campaign Act, your attention is drawn to the definitions of "candidate" in Sec. 301(b) of the Act, and in particular the phrase numbered (2) which states that a person is a candidate if he has "received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures."

The accompanying definitions of "contribution" and "expenditure" (Sec. 301 (e) and (f) are based on the phrase "made for the purpose of influencing the nomination, for election, or election, of any person to federal office."

It is notable that there are no time restrictions in these definitions. A person could receive contributions or make expenditures (or authorize others to do so) in connection with an election two years past or four years in the future, and he would thus be a candidate for purposes of disclosure.

Persons in this category should also be fully cognizant of their obligations under Rules XLII and XLIV of the Senate.

(b) *Committee.*—You should also note that Sec. 301(d) of the Act defines a "political committee" for purposes of *disclosure* as "any committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."

While it is notable that the definition of "political committee" again is dependent on the definitions of "contribution" and "expenditure," there is no explicit requirement that a committee's eligibility under the Act be tied directly to the candidacy of a specific individual.

Technically, therefore, a political committee could be engaged in independent fund-raising before the prospective beneficiary candidate had given his consent for such activity, and before he therefore qualified as a "candidate" under the Act. To effect such a separation, however, it would appear that such independent committee would have to publish the disclaimer required by Sec. 302(e) of the Act stating that the committee is not authorized by the candidate.

As a practical matter for reasons outlined below, there would appear to be little value in maintaining such separation. The intent of the Act would be better served by the prospective beneficiary of a committee declaring himself a "candidate" for disclosure purposes only.

It should also be noted in this connection that Sec. 308 of the Act requires the Supervisory Officer to compile "cross-indexes" and "a current list of statements or parts of statements pertaining to each candidate." In compliance therewith, the Secretary of the Senate already compiles current cross-indexes which list the beneficiaries of all campaign expenditures, whether or not such beneficiaries have declared themselves to be candidates under the Act. As of February 28, 1973, a total of 33 Senators—19 Republicans and 14 Democrats—none of whom had been candidates in the 1972 elections, were nonetheless so indicated in the mandatory cross-indexing system.

II. Candidate status and media limitations

(a) *Expenditure quotas.*—Title I of the Federal Election Campaign Act sets dollar limits on expenditures for media purposes by each "candidate" depending on the size of the voting age population in the constituency involved.

It is notable, however, that the definition of candidate for Title I is *not* the same as that for title III. The Title I definition in Sec. 102(4) states that:

The term "legally qualified candidate" means any person who (A) meets the qualifications prescribed by the applicable laws to hold the Federal elective office for which he is a candidate, and (B) is eligible under applicable State law to be noted for by the electorate directly or by means of delegates or electors.

In general, phase (B) is taken to mean that a formal status of candidacy is determined by state laws with respect to official filing, or in some cases, with respect to write-in-candidacy.

At any rate, the restrictions of Title I of the Act depend on certain official acts on the part of an individual to acquire candidate status, and *not* on the unofficial act of receiving contributions or making expenditures, or authorizing others to do so, as stipulated for the disclosure purposes of Title III.

Thus a person may authorize advance fund raising and be classified as a "candidate" for disclosure purposes long before he assumes the official status of candidate for the purposes of incurring a media limitation.

(b) *Equal time requirements.*—Section 315 of the Communications Act of 1935 provides that licensed broadcasters who make their facilities available to a legally qualified candidate for elective office must "afford equal opportunities to all other such candidates for that office."

The pertinent Ruling of the F.C.C. states that:

"A legally qualified candidate means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate so that he may be voted for by the electorate directly or by means of delegates or electors, and who: (1) Has qualified for a place on the ballot (or) (2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be." (C.F.R. 73, 120A)

Here, too, the Equal Time requirement does not start to run until a candidate has made formal announcement of his candidacy and taken other official steps to qualify. The authorization of a fund raising committee *alone*, and consequent classification as a disclosing "candidate" under Title III of the Federal Election Campaign Act, would not appear to be sufficient grounds to incur liability under the equal time provisions of the Communications Act.

(c) *Fairness doctrine.*—The Fairness Doctrine has been promulgated by FCC regulation based on implied statutory intent. It simply provides that licensed broadcasters should afford "reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance."

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The Fairness Doctrine is always in effect, regardless of whether a person is an announced candidate or not. Therefore, it has no relevancy to the collection of campaign funds or the incurring of candidate obligations under the Federal Election Campaign Act.

III. Tax Considerations

(a) *Deductions and Credits for Contributors.*—The Internal Revenue Code of 1954 allows taxpayers to claim as a deduction or credit against their federal income tax a certain portion of "political contributions" made within the taxable year.

Sec. 41 of the code provides that:

The term "political contribution" means a contribution or gift of money to—

(A) an individual who is a candidate for nomination or election to any Federal, State, or local elective public office in any primary, general, or special election, for use by such individual to further his candidacy for nomination or election to such office;

(B) any committee, association, or organization (whether or not incorporated) organized and operated exclusively for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals who are candidates for nomination or election to any Federal, State, or local elective public office, for use by such committee, association, or organization to further the candidacy of such individual or individuals for nomination or election to such office: . . .

and that:

The term "candidate" means, with respect to any Federal, State, or local elective public office, an individual who—

(a) has *publicly announced* that he is a candidate for nomination or election to such office; and

(b) meets the qualification prescribed by law to hold such office.

The I.R.S. has ruled that contributions made any time during a calendar year will qualify for deduction or credit if the candidate involved announces his candidacy by the end of that calendar year. As a corollary, the I.R.S. will recognize the fact that the status of an announced candidate continues beyond the date of the election, and that contributions made to retire debts of a past election are eligible for tax deduction or credit, providing the candidate qualified prior to election.

Nonetheless, the I.R.S. code contains a clear incentive for formal declaration of candidacy. For the sake of consistency, however, the act of authorizing committee solicitation and consequent classification as a "candidate" under Title III of the Federal Election Campaign Act, is *not*, alone, sufficient grounds for qualifying for the deductions or credits provided by Sec. 41 of the I.R.S. code. In fact, candidates and committees must take the formal step of filing specified forms with I.R.S. to verify candidacy before the deductions and credits can be allowed. (See I.R.S. Technical Information Release No. 1145, February 23, 1972.)

Mr. VALEO. While these guidelines represent quite broad concurrence on the part of many different authorities, it seems to me that the matter should be further clarified by simple statutory revision.

One possibility would be to broaden the definition in section 301(b) to describe as a "prospective candidate" a person who may be authorizing or undertaking advance political fund raising or political expenditures prior to formal declaration of candidacy.

Section 304(a) should then be amended to provide that "prospective candidates" have the same reporting responsibilities as "candidates."

You may wish to note also that the definition of "candidate" as presently construed, appears to apply retrospectively as well as prospectively.

That is, a person who is paying off debts from a past election, or authorizing others to do so, appears to fall under the disclosure requirements of the act for as long as receipts or expenditures are made to retire debts of a past election.

DIFFERENT KINDS OF POLITICAL COMMITTEES (SEC. 301)

Next, I would like to suggest some new distinctions in the definition and reporting requirements with respect to political committees.

The definition of "political committee" in section 301(d) applies without differentiation to all groups which accept contributions or make expenditures in excess of $1,000 to influence a Federal election.

While there is no question that all such committees should make full disclosure, there is considerable evidence on the basis of the first year's experience to suggest that there are different categories of committees fulfilling different roles and that the reporting requirements should be adjusted accordingly.

My first suggestion is that the differences be acknowledged in the definition by amendment of section 301(d).

A basic distinction should be made between committees which are organized to support a single candidate, which might be designated as class A committees, and those that support several candidates which might be designated as class B committees.

It became apparent in 1972 that committees in the proposed class B category, that is, those that supported several candidates, were subjected to unfair and unduly burdensome reporting requirements.

A large labor union political fund or corporate political action committee, for example, which supported Senate candidates in several of the 33 States in which there could have been primary, runoff or convention contests for Senate seats, would have been required to report twice just each such preliminary contest regardless of how recently they had filed a prior report.

In 1972, dozens of committees in this category did file such reports continuously and conscientiously, even though it required them to close their books at frequent, brief and irregular intervals.

I submit for the record in this connection a schedule of reporting dates in connection with each Senate nominating contest in the various States.

[The schedule referred to was submitted earlier in the hearing by Senator Griffin for the record, and appears on p. 9.]

Mr. VALEO. I suggest, Mr. Chairman, that committees which I have proposed to designate as class B, that is, those supporting several candidates, be authorized to report on a monthly basis during an election year, and periodically on off years.

They would, of course, be expected to report before a general election, as well.

Provision for this arrangement could be made by an appropriate amendment to section 304(a).

I note, Mr. Chairman, that the Scott bill, S. 1094, makes provision for such an alternate reporting schedule in section 4(4), and I support in general the concept embodied therein.

The difference is that Senator Scott's provision would become effective only upon request of the committee involved, whereas mine would be automatic for any committee which meets the terms of the proposed revised definition—that is any committee supporting more than one candidate in a given year would go on a monthly reporting schedule.

I might note a slight variance in the test for relief: The Scott bill would permit monthly reporting for committees operating in more

than one State; my proposal would provide such relief for committees supporting more than one candidate.

Our experience has been that, as far as the Senate is concerned, a committee supporting one candidate may occasionally operate in more than one State, but that it is the committee which supports several different candidates in different States which entails the most burdensome requirements.

I fully realize that you must take into account the dynamics of the Presidential primaries as well as congressional contests and that you may wish to combine these two criteria; that is, you may conclude that eligibility for an alternative reporting schedule should be based on both the State and candidate criteria.

Senator PELL. I can assure your every suggestion will be studied carefully by the committee. Our inclination is that you have administered the bill well. You can be sure of a very close study.

Mr. VALEO. Thank you very much.

CENTRAL CAMPAIGN COMMITTEES

I would like to turn to another point which does occur under the Scott bill and that is the question of central campaign committees.

As the law now operates, all political committees are coequal and have identical reporting responsibilities, whether they handle final transactions for a single candidate, or whether they operate as a collection arm for a given candidate or as a national collection agent for a certain interest group.

It is perfectly possible—and sometimes it did occur in the 1972 Senate races—that several different committees may make final expenditures on behalf of a single candidate.

In the Senate Public Records Office, a common link between these expenditures is provided through the computerized cross indexes which list on a daily basis all the committees reporting on behalf of each candidate.

But it is difficult, at best, under the present structure of the law to get a clear overall picture of the finances of campaigns managed by more than one committee.

In some cases, it will not be known until the completion of a final audit later this year whether the media allowances or personal spending limits assigned to the candidates involved may have been exceeded.

A solution, Mr. Chairman, and, to be sure, it would be a major change, would be a requirement in law that each candidate designate one committee as the central expenditure committee and that all expenditures be made through and reported by that committee, including any made by the candidate himself.

Senator Scott's bill makes such a provision as part of the proposed new sections under section 2 on page 7 of S. 1094.

The language of S. 1094 appears to require that all subsidiary committees report not only their expenditures but also their receipts through the central campaign committee of the candidate.

I can see no problem with this language insofar as it might pertain, for example, to a county committee or a special committee of professional people organized to support a particular candidate whose collections could be centrally reported.

But what of the receipts of a multicandidate committee, such as the National Committee for an Effective Congress, which might make a substantial contribution to the particular candidate?

The receipient candidate's central committee can hardly be held responsible for reporting all the comingled receipts of the contributing national committees.

Here the transfer mechanism would still be in effect, and with one important exception, the ultimate source of the funds would be disclosed in the reports of the national, multicandidate committee, which fall in the proposed class B category.

The one important exception would be that in the event a transfer had been earmarked for the recipient candidate by a donor to the national multicandidate committee, the recipient candidate's central committee would report the amount of the earmarked contribution and the full identity of the original contributor.

I might note, Mr. Chairman, that the supervisory officers are contemplating a regulation which would require such disclosure of earmarked contributions.

But I would suggest, if the language of S. 1904 is adjusted with respect to central campaign committees, that it be appropriately modified to take into account the status of national, multicandidate committees of the proposed class B variety.

A final note with respect to central campaign committees is that they would be absolutely essential to the enforcement of any overall limitation on campaign spending as contemplated by Senator Pastore's bill, S. 372.

Without an explicit requirement for centralized accounting and reporting for each campaign, the enforcement of an overall limitation would be cumbersome in the extreme—if not impossible.

And I might just add that the candidate himself would find that such centralization would be essential to keeping his expenditures within the proposed limits.

I would also note parenthetically, Mr. Chairman, as now written, the Pastore bill provides only for administration by the General Accounting Office.

I think in the event you continue the three Supervisory Officers, some adjustment ought to be made perhaps to give them the responsibility jointly.

SEMANTIC CLARIFICATION: "STATEMENTS" AND "REPORTS"

Next I would like to call your attention to a simple semantic problem which should be corrected either by inserting a new definition or making minor amendments at various places in title III.

The problem is that the word "statement" as used in title III appears to have variable meaning, and the exact intent of the act is thus not clear for those who must administer it.

The word first appears in section 303, which requires each political committee to file a "statement of organization," which is very clearly defined therein to mean a detailed list of information constituting the initial registration of each committee.

The date required is organizational information—such as the name and address of officers—and has nothing to do with the financial data required in reports of receipts and expenditures under section 304.

In section 306 and in section 308 (1), (2), (4), and (5), the act lays out certain requirements with respect to both statements and reports, thus clearly indicating the intent of the act to distinguish beween the two kinds of documents.

Thereafter, however, the word statement frequently appears alone in a context which suggests it is meant to have a broader, generic connotation which would cover all reports and not just statements as defined by section 303.

Section 308(a)(6), for example, states that the supervisory officer shall: "compile and maintain a current list of all statements or parts of statements pertaining to each candidate."

If this section is really meant to apply only to statements of organization, its effect would be quite limited in scope.

In practice, we have read this subsection in conjunction with section 308(a)(3) which directs the supervisory officer, "to develop a filing, coding, and cross-indexing system consonant with the purposes of the title," and we have developed a cross-indexing system which includes all reports as well as statements pertaining to each candidate. Clarification of the law would sanction this interpretation.

The semantic problem grows even murkier in section 309, entitled, "Statements Filed with State Officers."

Section 309(a) specifies that, "a copy of each statement to be filed with a supervisory officer by this title shall be filed with the Secretary of State * * * of the appropriate State."

One might assume that this requirement relates exclusively to "statements of organization," but subparagraphs (1) and (2) indicate that the term "statement" in this case includes "reports relating to expenditures and contributions."

Finally, while section 309(b) (1), (2), and (3) properly distinguish between reports and statements, subparagraph (4) reverts to the language of section 308 and directs State officials to compile and maintain a current list of all statements or parts of statements pertaining to each candidate.

As you can see, Mr. Chairman, this is a simple problem of wording, but it could lead to confusion or even challenges of the law, particularly with respect to State reports.

My suggestion is that it be remedied either by definition or by the simpler expedient of inserting the words "and reports" wherever the word "statements" stands alone.

ANNUAL COMMITTEE REPORTS (SEC. 302(f)(2))

Next I would like to report to you on a section of the act that has become quite controversial. This is the requirement that the supervisory officer assemble and submit to the Public Printer all reports submitted by each committee during the calendar year and that the Public Printer "shall make copies of such annual reports available for sale to the public."

Mr. Chairman, this provision of the act, as I see it, has been vastly distorted by rigid interpretation.

It has been assumed that the Public Printer would have to print and make formal publication of all the reports and automatically distribute this mass of paper to all depository libraries and other recipients of official publications.

On that basis, I believe it was estimated that the total cost of printing the committee reports of all three supervisory officers would be about $3 million.

My Office has taken the position from the beginning that this was an extremely costly and unnecessarily rigid approach to compliance with the act, particularly in the face of an uncertain demand for the reports which are to be produced.

In the alternative, we have transmitted our reports on Senate campaigns to the GPO in microfilm form, fully indexed, at an added cost of approximately $500 which is considerably short of the $3 million estimate.

We have recommended that the GPO reproduce the reports on demand only, and by the cheapest film-to-paper reproduction techniques, thus obviating formal publication.

Under this approach, only those reports would be reproduced for which there has been a request, and the cost would be largely recovered through sales.

I submit for the record a copy of my letter of transmittal of March 29 to the Public Printer and a copy of a letter of March 22 from the majority leader to the Comptroller General, both of which relate to this matter.

Senator PELL. Without objection, so ordered.

[The letters referred to follow:]

U.S. SENATE,
OFFICE OF THE SECRETARY,
Washington, D.C., March 29, 1973.

HON. THOMAS F. MCCORMICK,
Public Printer,
Government Printing Office,
Washington, D.C.

DEAR MR. MCCORMICK: In compliance with Sec. 302(f)(2)(A) of the Federal Election Campaign Act, I am transmitting herewith fourteen rolls of processed microfilm with a computer index thereto, which together constitute a full compilation of all statements of organizations and reports of receipts and expenditures submitted by duly registered political committees during the 1972 annual reporting cycle under the Act (April 7, 1972–January 31, 1973).

In all, the compilation comprises approximately 60,000 pages of documentation. It is transmitted in microfilm format in accordance with arrangements made on my behalf by Mr. Kenneth Yung of the Senate Subcommittee on Computer Services with Mr. John J. Boyle of the Government Printing Office.

While compliance with Sec. 302(f)(2)(B) relating to the copying of such documents is out of my hands, I must take this occasion to note an apparent misapprehension which came to light during recent testimony before a House Appropriations Subcommittee by Mr. Walter C. DeVaughn of the Government Printing Office, with respect to the appropriation of funds to cover the costs of making copies. Contrary to Mr. DeVaughn's assumption, there was no intention on my part that any of the expenditures authorized to this office to implement the Federal Election Campaign Act should be used to defray costs of making copies of reports as required by Sec. 302(f)(2)(B). I enclose a copy of my testimony in this regard, before the Senate Legislative Appropriations Subcommittee in 1972.

I would observe that Sec. 302(f)(2)(B) states only that "The Public Printer *shall make copies* of such annual reports *available for sale* to the public . . ." Accordingly, I intend to recommend to the Appropriations Committee that funds be made available to support only the most economical and flexible process for making copies, until there has been an adequate opportunity to assess the public

demand for the reports. I am advised that the reports could be produced on demand through the use of direct film to paper copying techniques, thus permitting the requirements of the law to be met without going to full publication of all the reports.

Sincerely yours,

FRANCIS R. VALEO,
Secretary of the Senate.

U.S. SENATE,
OFFICE OF THE MAJORITY LEADER,
Washington, D.C., March 22, 1973.

Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR MR. STAATS: I am writing in response to your recent letter with respect to Sec. 302(f) of the Federal Election Campaign Act, requiring the annual compilation of all reports submitted by political committees, for public purchase through the Government Printing Office.

Your observation that this particular feature of the Act may be redundant has been duly noted and I agree that it should be subjected to legislative review. However, it now appears that Senate consideration of such legislation will not be completed until later this year. In the meantime, there will be an opportunity to assess the public demand for the reports produced under the existing requirement.

I also share your concern about the cost of fulfilling the requirement, even on a trial basis this year, but I would observe that the estimate of cost which you cite, that is, $3 million for this operation, seems unduly excessive.

I note that Sec. 302(f)(2)(B) of the Act states only that "The Public Printer *shall make copies* of such annual reports *available for sale* to the public . . ." It does not state that all reports must be published at one time or that there should be any automatic wide-scale distribution of the reports, such as to depository libraries. It does not even specify that the reports be printed or published in the usual sense; it only requires that "copies" be made available for public sale.

Accordingly, it seems to me that the requirements of the Act could be fulfilled by making copies of reports available on demand only and that a major share of the costs could then be recovered from such sales as may be made. Conversely, if there is little or no demand for certain reports, expenses will be proportionally diminished. I am advised by the Supervisory Officer for Senate elections that such flexibility is technically feasible, particularly through the use of microfilm or paper copying processes.

I am further advised that the Secretary of the Senate has virtually completed microfilming the reports of committees supporting candidates for the Senate in 1972 and that the film, together with a computerized index thereto, will be delivered to the Public Printer prior to March 31. The added cost of the film has been estimated at less than $500 which puts this requirement of the law in a somewhat different level of expenditure than that suggested by your letter. I would suggest that you have your staff examine the techniques which are being used by the Supervisor of the Senate election to see whether or not they can be employed by the General Accounting Office.

With best personal wishes, I am

Sincerely yours,

MIKE MANSFIELD.

Mr. VALEO. Mr. Chairman, it may be that this provision of the law is superfluous and should be deleted.

My own position has been that we should test it in the most flexible and economical way until we can determine the public response to it.

I should think that a reference in the committee report endorsing the Senate's approach should be sufficient to end any further controversy on the matter.

REVISION OF REPORTING SCHEDULES (SEC. 304(a))

I have several recommendations to make with respect to section 304(a) of the act and the principal ones have to do with revisions of the reporting schedules.

It has been my view from the beginning, Mr. Chairman, that the purposes and intent of the act—namely maximum public disclosure—can and should be accomplished without imposing unfair burdens on candidates or their committees and without discouraging or deterring prospective candidates, while at the same time encouraging the broadest possible public participation in all aspects of the electoral process.

I submit for the record a memorandum which I have issued regarding the Senate Office of Public Records which sets forth guidelines on this score and which we sought to follow in administering the act.

Senator PELL. Without objection, the memorandum will be printed in the hearing record.

[The memorandum referred to follows:]

MEMORANDUM TO DARRELL ST. CLAIRE, ASSISTANT SECRETARY OF THE SENATE, FROM FRANCIS R. VALEO, SECRETARY OF THE SENATE, RELATING TO ADMINISTERING THE FEDERAL ELECTION CAMPAIGN ACT RECORDS OFFICE, OFFICE OF THE SECRETARY OF THE SENATE

APRIL 14, 1972.

In the administration of the Federal Election Campaign Act the Secretary's office and all employees thereof will be guided by the following general instructions:

1. To render equal treatment to contributors and supporting committees and to all candidates of all parties in Senate elections—whether sitting Senators or otherwise;

2. To make every reasonable effort to carry out the law as written, and, at the same time, to minimize, as far as the law permits, the burdens of record-keeping and form-filling which are imposed on those who seek to comply in good faith;

3. To act as neither prosecutor nor court in carrying out the law but to proceed on the basis of the fact-finding, recording, disclosure and referral responsibilities which are assigned to the Secretary by the law, employing those resources which may be available;

4. To treat with candidates and their supporters in a manner which, insofar as the law permits, will tend to encourage rather than discourage broad public participation in political campaigns;

5. To face frankly, as they may be revealed to us through experience, any shortcomings in the law with a view to making, if necessary, recommendations for adjustments to the appropriate committees of the Senate.

Please communicate these instructions to all members of the staff of the Public Records Office, and to other employees of the Secretary's office who may be assigned responsibilities associated with the Federal Election Campaign Act.

Mr. VALEO. It has seemed to me that the provision of section 304(a), requiring reports 15 and 5 days before an election, comes close to imposing an unfair burden without adding appreciably to the achievement of full disclosure.

The same purpose could be achieved, in my judgment, by consolidating the two preelection reports into a single report and tightening up on the special reports of large amounts received just before the election.

I, therefore, fully endorse those changes proposed by section 4(b) of Senator Scott's bill, S. 1094, which would provide for a single preelection report 10 days before election, combined with a reduction in the amount of special reportable contributions, received after that

report, from $5,000 to $2,500, and a reduction in the time lapse for such special reports from 48 to 24 hours.

Indeed, even further tightening of these restrictions, both in terms of time and amount may be in order.

There is a further technical point in section 304(a) that needs clarification regardless of any other changes in the section and this relates to the time within which special reports must be filed with respect to large contributions received before an election.

The act now requires that such special reports must be made for contributions of $5,000 or more "received after the last report is filed."

This language is in conflict with the provisions of the first part of the same sentence which states that all regular reports "shall be complete as of such date as the supervisory officer may prescribe."

Under this authority, the supervisory officers jointly determined and prescribed by regulation that books should be closed 7 days prior to the stipulated filing dates of preelection reports to allow adequate time for processing reports and mailing.

Thus as the law now stands, reports are complete as of the closing date rather than the filing date, and there is a technical 7 day loophole with respect to the reporting of special large contributions received prior to elections.

We have attempted to close that loophole by administrative fiat but our action should be confirmed by revision of this section to require that special reports should be made with respect to large contributions "received after the books are closed for the last report filed prior to an election."

I note that section 4 of Senator Scott's bill also provides for a change in the periodic reporting dates from the present schedule of March 10, June 10, and September 10 to April 10, July 10, and October 10 while retaining the January 31 report.

I can see no objection to this plan which shifts the balance of reporting toward the last half of the year, which may well be desirable.

DEFINITION OF THE WORD "FILE" (SEC. 304(a))

We had considerable difficulty, at the outset, in interpreting the word "file" as used in section 304(a).

Does it mean delivery at and receipt by the supervisor on the date specified, or does it mean deposit in a mailbox on the date specified?

The three supervisory officers had considerable debate on this point. My position was that mere deposit in a mailbox on the filing date might frustrate the intent of the law, particularly with respect to those reports filed just before an election.

Accordingly, we defined "filing" to mean either delivery in the Office of Public Records on the date specified, or a certified mailing no later than midnight of the second day next preceding the filing date.

This may have seemed like a rather cumbersome requirement to the reporting parties, but I think it did help to provide the kind of timely disclosure required by the law.

To simplify the situation for the reporting parties, moreover, we devised a mailing and delivery schedule card for primary and special elections in each State and for the general elections.

I submit for the hearing record a sample of this card, which was used for reporting in the 1972 elections and which will show how the concept of the mailing date was applied in practice.

Senator PELL. Without objection, so ordered.

[The card referred to follows:]

OFFICE OF THE SECRETARY OF THE SENATE

Dates for Closing Books, Mailing and Filing of Disclosure Reports in 1972

for candidates for the U.S. Senate, political committees supporting such candidates, and individuals subject to the Federal Election Campaign Act of 1971.

For the State of _____

Election and date		Type of report	Closing of books	Mailing date	Filing date
Primary		15-day report			
		5-day report			
Runoff		15-day report			
		5-day report			
General	Nov. 7	15-day report	Oct. 16	Oct. 21	Oct. 23
		5-day report	Oct. 26	Oct. 31	Nov. 2
		Periodic report:			
		June	May 31	June 8	June 10
		September	Aug. 31	Sept. 8	Sept. 10
		January 1973	Dec. 31	Jan. 29	Jan. 31

(All deadlines are midnight of the dates stated.)

The above schedule is based on information obtained from appropriate State officials by the Secretary of the Senate as a service to candidates for the U.S. Senate. However, the Secretary of the Senate does not assume responsibility for the accuracy of the above information, and all candidates for the U.S. Senate, treasurers of committees supporting such candidates and other persons required to file disclosure reports are advised to make independent verification of dates for closing books, mailing and filing, since they are personally responsible for timely compliance with the law.

76-874-h U.S. GOVERNMENT PRINTING OFFICE

Mr. VALEO. I would point out that if the committees were to decide to combine the 5- and 15-day report into a single 10-day preelection report, that the "filing" date might then be construed as the mailing date and the separate distinction of a mailing date would no longer be necessary.

CONDITIONAL RELIEF FOR CANDIDATES (SEC. 304(a))

Again, in the interests of simplification with no compromise of maximum disclosure, I would like to propose a revision that would conditionally reduce the reporting requirements as they apply to candidates.

The problem here is that the reporting requirements set out in section 302(a) apply without distinction to "each treasurer of a political committee * * * and each candidate * * *"

Thus, every time a reporting deadline comes up, whether periodic or preelection, candidates as well as committees must report.

As far as Senate elections are concerned, this provision as it applies to the candidates themselves, is often a meaningless exercise.

The vast majority of the candidates conduct all campaign financing through committees and, hence, do not report either receipts or expenditures themselves.

They file reports, as required by the law, which show zero receipts and zero expenditures. My suggestion is that the supervisory officers be permitted to relieve candidates from further filing of these meaningless reports if they make a sworn statement on their first reports to the effect that all receipts and expenditures are handled by committee and none by themselves.

If they cannot subscribe to such a statement, they would continue to be required to file regularly as the law now provides.

The sworn statement, moreover, would bind them to resume reporting if and as soon as they incur any personal receipts and expenditures in connection with the campaign.

Such a provision could either be added to section 304(a) or, preferably, added as a new paragraph (e) to section 306, which is entitled, "Formal Requirements Respecting Reports and Statements."

I might note in this same context that the supervisory officers should be provided further leeway to exempt certain categories of committees and candidates from nonrelevant reporting requirements.

I am thinking here of Senators and prospective candidates not running in a given year, but who may be reporting periodically nonetheless.

There is no reason, for example, why they should be required to file preelection reports for a general election in which they will not be a candidate, yet the law appears to require them to do so.

The same applies to candidates defeated in a primary whose committees may continue reporting periodically on the retirement of outstanding debts, but who should not be required to file reports prior to the general election.

We have attempted to grant reasonable administrative relief to such persons and committees on an ad hoc basis, but we really need clarification of the act.

Here, too, the problem could be alleviated by an addition to section 306.

IDENTITY OF CONTRIBUTORS, LENDERS, ETC. (SEC. 304(b))

I would call your attention to a particularly troublesome provision and that is the stipulation that persons be identified not only as to the full name and mailing address, but also as to occupation and principal place of business, if any.

This requirement appears in the following places with respect to information which must be disclosed on the reports filed by candidates and committees:

Section 304(b)(2)—as to contributors.

Section 304(b)(5)—as to lenders and endorsers of loans.

Section 304(b)(9)—as to recipients of general expenditures.

Section 304(b)(10)—as to recipients of expenditures for personal services, salaries, et cetera.

The business or professional affiliation of a contributor, indeed, is a valid and important part of the total information on the financing of the electoral process.

At the same time, I must report to you that, in terms of securing compliance, this requirement is among the most vexatious in the whole act.

We have sent out literally hundreds of notifications of error and omissions to committees or candidates who dutifully reported long lists of contributors but who left out the occupation and principal place of business.

In some cases, the amounts involved may be significant but in many cases they are not; in some cases there may have been a deliberate attempt to withhold significant information, but in most, it was pretty clearly a matter of forgetfulness, ignorance of the law, the unavailability of the information, or the inability to cope with the sheer complexity of gathering and reporting so much information.

We will not know until our detailed audit of reports is completed later this year how significant are the violations.

My tentative conclusion at this point, however, is that the absence of this data does not automatically constitute a significant violation of law.

Yet the statute appears to allow little leeway to the supervisory officers when it comes to referring or not referring certain cases to the attorney general for enforcement action.

The requirement for disclosure of "occupation and principal place of business, if any," is symbolic of the general enforcement problem.

If there is a statutory solution, it may well come through some sort of modification of section 308(a)(12) about which I will have more to say shortly.

I can well appreciate that the committee may conclude that any modification might compromise the spirit of the act, but you should be aware of the problem which it imposes on the reporting persons, the supervisory officers, and the attorney general.

REPORTING OF DEBTS (SEC. 304(b)(12))

The committee may wish to take note of the fact that section 304(b)(12) refers to the reporting of debts and obligations owed by or to political committees, and that there is no mention of political debts assumed by a candidate himself.

This is probably as it should be, for a debt assumed by a candidate becomes a personal matter, very much enmeshed in an individual's family and business affairs.

During the past year we had a classic example of what can happen in this respect. An unsuccessful candidate in a Senate primary assumed the debts of his committee and took out a 20-year mortgage on his home to pay them off.

We do not propose to require that gentleman to file reports for 20 years explaining how he is liquidating that personal debt.

He has been relieved of any responsibility for further filing, unless, of course, he should become politically active again and become the beneficiary of contributions which have a clear political character.

We do require, on the other hand, political committees to report continuously until their debts are retired or otherwise extinguished.

I might note that we have levied that requirement on some committees which are now actively engaged in receiving contributions and

making expenditures to retire debts even though the debts were incurred for elections which took place before the effective date of the act.

I have no recommendations to make with respect to this section, but merely thought you should be advised of its impact.

THE ANNUAL STATISTICAL REPORT (SEC. 308(7))

Section 308(7) requires the supervisory officers to compile an annual statistical report which will show the total cost of the elections they supervise, with figures broken down by candidate, State, party and other categories.

These summaries will provide a solid core of data for the study and analysis of election financing.

The Senate figures will be compiled by computer in conjunction with the final audit of all reports which began just last week.

There is one part of section 308(7), however, with which we cannot comply, literally, as the law is now structured and that is the requirement in clause (E) which directs us to compile: "Aggregate amounts contributed by any contributor shown to have contributed in excess of $100."

The problem is, Mr. Chairman, that we do not have adequate data to identify contributors for purposes of aggregation.

As noted earlier, section 304 requires that contributors be identified by full name and mailing address, together with occupation and principal place of business, if any.

But as you know, contributors do not always identify themselves in exactly the same way every time they give a donation, and some contributors of significant amounts often give from two or more addresses.

Even if the name and address on two or more contributions are identical, we cannot legally make the presumption that the donations, in fact, came from the same individual, although that may frequently be the case.

We are meeting the situation half way this year, Mr. Chairman, by compiling an alphabetical list of each and every contributor who gave more than $100 during 1972.

No matter how many times the same name may reappear, it will be listed separately, along with the city of residence, the amount of the donation, and the recipient.

If the committee concludes this is adequate, it should modify clause (E) to give proper sanction to our action.

If, however, the committee wishes us to compile true aggregates for all contributors who give in excess of $100, it will have to provide legal authority to require, with respect to the identity of contributors, a social security number, or other unique numerical identifier.

I am not committed to that course, but as a practical matter of administration, that would be the only way it could be done.

This is the procedure which, as you know, is followed by the Internal Revenue Service. This requirement could be added to the other aspects of identification already required by section 304(b) and it should be coupled with a prohibition against the acceptance by candidates or committees of contributions which do not contain this information.

I would hope that the committee will resolve the matter, one way or the other, this year.

REFERRAL OF APPARENT VIOLATIONS (SEC. 308(a)(12))

I would now like to turn to the key enforcement provision of the act, section 308(a)(12) which provides that it shall be the duty of the supervisory officer: "To report apparent violations of law to the appropriate law enforcement authorities."

This subsection was the basis for all 565 referrals made by my office to the Department of Justice, which I noted earlier.

I submit for the record a press release issued by my office on March 30, 1973, which further describes these referrals.

Senator PELL. Without objection, so ordered.

[The press release referred to follows:]

PRESS RELEASE FROM THE OFFICE OF THE SECRETARY OF THE SENATE

MARCH 30, 1973.

Secretary of the Senate Francis R. Valeo, Supervisory Officer for Senate elections under the Federal Election Campaign Act, today announced the completion of the first phase of enforcement activity on financial disclosures relating to the 1972 elections, resulting in the referral of 565 cases to the Department of Justice.

The first phase involved identification of candidates or political committees who had either failed to submit reports or had done so after the dates of the deadlines prescribed by law.

A total of 19 candidates and three political committees were referred for failing to file reports notwithstanding confirmed receipt of official notifications from the Secretary advising them of their responsibilities under the Act. Referrals to the Department of Justice in this category began in July 1972. An additional referral was made on the basis of a citizen's complaint.

In the late category, a total of 173 candidates and 369 committees were referred for failing to file reports within the prescribed time limits.

All told there were 306 candidates for the Senate, including primary candidates and 1,169 registered political committees of which 195 were waived from reporting requirements.

In announcing the referrals, Mr. Valeo noted that the law left little room for discretion on the part of the Supervisory Officers with respect to referring violations for lateness or non-compliance. He noted that the late lists included many candidates and associated committees, who did not wage significant campaigns, or had missed only one periodic report deadline.

In an effort to identify more significant types of violations, Mr. Valeo stated that his office is undertaking a detailed audit of all reports submitted during the 1972 reporting cycle. The audit is expected to continue over a period of several months.

Mr. VALEO. I might say for the record, Mr. Chairman, that while the most significant of these referrals, namely those for outright failure or refusal to comply were made during 1972, many of the others, including the late lists, were referred after the conclusion of the 1972 annual reporting cycle.

Still more will be made later this year as we complete our audit of reports. I can state without reservation that the timing of the referrals was dictated strictly by administrative and procedural considerations during the first year of operations.

It would be my intention in subsequent years to make earlier referrals, particularly if we are able to confirm at an earlier date blatant or serious violations of the law.

As you will note, the press release included at this point in the proceedings, makes reference to inflexibility in the enforcement process.

The late lists did in fact include many candidates and associated committees, who did not wage significant campaigns, or who had

missed only one deadline for a periodic report, but who had thus incured a technical violation.

At the same time, however, there may still be, as yet unnoted, much more substantial violations involving, for example, anonymous contributions.

The problem is that it takes time to identify these more substantial violations and it is difficult to do so in the haste of processing large volumes of reports in an election year.

This is why we are proceeding in the relative calm of the off year to conduct a detailed audit.

The fact is that the enforcement of this act is going to be a continuing process, year in and year out. It would be helpful if the committee would consider the possibility of distinguishing between technical violations, such as lateness or incomplete identification and so forth from more substantive errors, and prescribing varying responses accordingly.

There is one other aspect of section 308(a)(12) which should be brought to the committee's attention.

In this instance, too, the provision is not quite explicit. It simply directs the supervisor to report apparent violations of law.

Does this mean we are responsible for spotting violations of this law, or of all laws pertaining to elections or of all laws in general?

Obviously, the more inclusive the term, the more staggering the responsibility.

I would suggest that the committee might consider elucidating section 308(a)(12) at least to the extent of making it clear that the supervisor is to look for certain kinds of violations, and in particular, those specified by other parts of the act.

It is notable, I think, that, while title I specifies limits on media expenditures, and while title II sets up very clear limitations on personal expenditures, there is nothing stated anywhere else in the act about who is to tabulate the totals and determine apparent violations.

We assume that is what section 308(a)(12) intends for us to do, but there might be some value in spelling it out.

In this connection, I might just note that there is a substantial ambiguity in title II. That is the question of whether the limitation on personal expenditure by a candidate applies to each election, including primaries and runoffs, or whether it just applies once in an election year.

On the basis of an informal advisory letter from the Department of Justice, the latter construction has been applied this year, namely that the limitation applies for an entire election campaign year. But it would be most helpful if the law would be clarified.

A related suggestion is that contributors be required to disclose, under section 304(b) a family relationship, if any, to the candidate, as specified by title II.

THE COMPLAINT MECHANISM (SEC. 308(d)(1))

I turn now to the other avenue of enforcement under the law, which, as distinct from direct referral by the supervisory officer of apparent violations, involves the complaint procedure specified by section 308(d)(1).

The clear intent of this provision seems to have been to provide a procedure whereby aggrieved candidates, citizens or groups may make formal complaint that could lead to judicial relief action.

I would note that there are several intermediary steps stipulated in the act which are rather puzzling in their complexity.

Section 308(d)(1) states, and I paraphrase in part, that after a complaint is filed alleging violation "of this Title," title III, the following things happen:

First, the Supervisory Officer makes a determination as to whether or not there is substantial reason to believe a violation has occurred.

Second, if his preliminary determination is affirmative, he then expeditiously makes an investigation, including examination of reports of complaining candidates.

Third, he then offers the opportunity for a hearing, with due notice.

Fourth, he then makes a judgment whether any person has or will engage in practice which will violate "this title", Title III.

Fifth, if the supervisor's judgment is affirmative, the Attorney General must institute a civil action for relief, which might include a permanent or temporary injunction, a restraining order or any other appropriate court order.

Aside from the fact that there is apparent redundancy in these steps, certain substantive questions emerge.

Why, for example, is the relief limited to violations "of this title?"

We had a glaring example of the effect of the limitation last fall when we received a substantial complaint 3 days before the general election alleging that a candidate in a major Senate race had overspent his personal expenditure limitation.

We checked the records and while there was some ambiguity in the reports, there did not appear to be any definite violation of the disclosure requirements of title III. So, technically, the complaint could have died at that point.

There did remain the possibility that the personal limitations of title II had been violated, however, so we referred the case to the Attorney General under our general referral authority in section 308(a)(12).

The other substantive question arises with respect to the real effect of any court action that might be taken.

The act specified "a civil action for relief" and a "permanent or temporary injunction, restraining order, or court order."

The question is, relief from what?

Or injunction to do what?

Since the whole procedure is limited to title III, there presumably could be no injunction, for example, to curtail media expenditures. Court action apparently would be limited to compelling disclosure as required by title III.

I raise these questions, Mr. Chairman, only in the hope that the committee will undertake to clarify the language. I do not suggest dilution of the complaint procedure which, as it now stands, was not widely used in 1972.

All told, we received only nine formal complaints. One of them, as I have already described, really involved title II.

Another involved a candidate who had already been referred under another provision of the act to the Department of Justice several months earlier because of his declared refusal to comply with the act.

The other seven cases were settled without referral to the Department of Justice when the parties against whom complaint had been made responded to due notice and supplied the information alleged to have been withheld.

RELATIONSHIP WITH STATE GOVERNMENTS (SEC. 308 (B) AND SEC. 309)

I now turn to the question of the relationship between the supervisory officers and the election officials of the several States as a consequence of two separate but related provisions of title III.

Section 308(b) directs the supervisory officer to—

> Encourage, and cooperate with, the election officials in the several States to develop procedures which will eliminate the necessity of multiple filings by permitting the filing of copies of Federal reports to satisfy the State requirements.

Section 309(a) requires that a copy of each report filed with the supervisory officer be filed also with the secretary of state of the State in which the candidate seeks election and part (b) directs the State official to make the reports available for inspection and copying and to compile "a current list of all statements," as noted earlier, and to preserve the documents.

Although section 309 places an administrative and financial strain on the States, it has become apparent that these filings have commanded as much, if not more, attention from the news media and the general public than those available here in Washington.

In retrospect, this should not be a surprising conclusion since the local media representatives have a more specialized knowledge of the participants and the developments which surround and influence their activities.

In order to identify and evaluate the problems involved in the State filings of the Federal reports, in late December of 1972 letters were sent by me to the 33 States involved this year with senatorial contests requesting comments and observations on the act. A copy is submitted for the record.

As of this printing, 17 replies have been received. I might note that members of my staff also have made personal visits to several of the States to get firsthand impressions.

Senator PELL. Without objection, the letter will be inserted at this point.

[The letter referred to follows:]

U.S. SENATE,
OFFICE OF THE SECRETARY,
Washington, D.C., December 7, 1972.

DEAR ————: I am writing to solicit your comments and recommendations with regard to the Federal Campaign Act on the basis of your experience in connection with the election for United States Senator in your State in 1972.

As you know, the Act assigns supervisory responsibility to this office with respect to Title III of the Act as it applies to Senate elections. Among the specific duties assigned to the Supervisory Offices by Sec. 308 is:

"(b) The supervisory officer shall encourage, and cooperate with, the election officials in the several States to develop procedures which will eliminate the necessity of multiple filings by permitting the filing of copies of Federal reports to satisfy the State requirements."

In this connection, it would be most helpful to have as part of your comments and recommendations any observation you might care to offer as to the compatibility of the Federal forms with your State's filing requirements. Our objective is to follow the statute's explicit directive to eliminate duplicate filings and thereby minimize the burden of reporting for candidates and their committees.

In addition, I solicit your specific comments as to Sec. 309 of the Act which provides:

"(a) A copy of each statement required to be filed with a supervisory officer by this title shall be filed with the Secretary of State (or, if there is no office of Secretary of State, the equivalent State officer) of the appropriate State. . . .

"(b) It shall be the duty of the Secretary of State, or the equivalent State officer, under subsection (a)—

"(1) to receive and maintain in an orderly manner all reports and statements required by this title to be filed with him;

"(2) to preserve such reports and statements for a period of ten years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only five years from the date of receipt;

"(3) to make the reports and statements filed with him available for public inspection and copying during regular office hours, commencing as soon as practicable but not later than the end of the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, requested by any person, at the expense of such person; and

"(4) to compile and maintain a current list of all statements or parts of statements pertaining to each candidate."

It would be most helpful to have any observations you would care to offer on the degree of compliance with this provision, on the nature of any problems resulting from its implementation and any suggestions you may have for clarifying the requirements.

This office is considering submission of your response and that of other Secretaries of States in summary form, along with my recommendations, to an appropriate committee of the Senate in the event any action is taken to revise the statute in the coming session of Congress. For this reason, I would request most respectfully that you submit a response by the 20th of January so that we may incorporate it into a comprehensive presentation.

Sincerely,

FRANCIS R. VALEO,
Secretary of the Senate.

Mr. VALEO. The most serious and significant problem, as delineated by State officials, was the quantity of reports and the considerable staff time required to receive, date, catalog, and file.

Colorado and Kansas, for example, found it necessary to hire additional personnel, while Maine, Nebraska, and Alabama observed that their responsibilities under the act imposed an added burden on their existing staff.

Inspection of these reports by the news media, citizen action groups, and the general public, required constant staff attention.

In some instances, the other operations of their offices were disrupted at a time when, for many, their own disclosure statements under State law were being received and processed.

Permanent storage of documents caused apprehension on the part of many responding to our inquiry. This requirement will take on added significance with the passage of each election.

The lack of equipment and space for filing these reports, combined with inadequate facilities for public viewing, hampered the accessibility of reports to the public, imposed additional burdens on State personnel, and caused confusion to all parties concerned.

Telephone queries from the press and public reached such proportions in some States that existing telephone lines proved inadequate.

Compliance with the provision requiring that copies of these reports be made available on the same day as received, appeared to present the greatest difficulty to Maine and Alabama, both of which have comprehensive State disclosure laws of their own.

It would appear that some States are not fully complying with this responsibility which is imposed on them under section 309. Nor are they meeting the requirement which requires them to compile and maintain a current list of statements or parts of statements pertaining to each candidate.

This situation, I am persuaded, results far more from inadequate staff and equipment rather than any willful or deliberate noncompliance.

Federal funding, as suggested by several States, would undoubtedly relieve the administrative burdens associated with section 309.

It is my intention to issue a separate report in more detail later this year on the problems of State compliance with section 309 and to suggest more specific remedies.

In the meantime, I urge that the committee give consideration to providing authorization for the supervisory officers to administer jointly a modest subsidy to the States to assist them in complying with this portion of the act.

There is one additional technical problem in connection with the State filing which merits consideration and it relates to my earlier comments about different kinds of committees fulfilling different roles.

This concerns the national, multicandidate type of committee—the Senate Campaign Committees, for example—which might send one or more contributions to a candidate during the course of a campaign, and which dutifully sends duplicate copies of its reports to the appropriate secretary of state.

The question is, when does this committee stop submitting such reports, particularly if the candidate and other single-candidate committees are continuing to file indefinitely in connection with retirement of debts.

Technically, as the act now stands, the national, multicandidate committee appears to have a continuing responsibility to file also, even though the reports are no longer relevant.

It is my suggestion that appropriate provision be added to section 306 to give the supervisor authority to waive such reports to the States by national, multicandidate committees.

CONTRIBUTIONS IN THE NAME OF ANOTHER (SEC. 310)

Finally, Mr. Chairman, I wish to call your attention to a problem which has arisen in connection with section 310 of the act which states:

> No person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another person.

Last October, we received a formal complaint from a national citizen's organization citing several cases of apparent earmarked contributions which, it was contended, violated section 310.

After a careful review of the cases cited, I dismissed the complaint on the grounds that evidence was lacking, in the cases cited, of the deliberate misrepresentation which appears to be the intended target of section 310.

My letter of dismissal to the organization then went on to state, and I quote:

> Nevertheless, it is recognized that earmarking can be used as a means of evading the spirit of the Act, and the matter is now under consideration by the staff of this office in collaboration with the staffs of the other two Supervisory Officers, with a view toward possible rule-making or referral to appropriate committees of the Congress for statutory revision.

Since that time, Mr. Chairman, the organization has seen fit to bring suit in this connection against the Secretary of the Senate.

I am hopeful that the matter can be resolved by the issuance of an appropriate regulation promulgated by the three supervisory officers in connection with an overall revision of their regulations on the basis of experience to date.

Since the matter is now in court, I will have nothing more to say on the merits of the case except to advise you that the various documents relating to this matter will, of course, be available to the committee staff in the event the committee believes a clarification by law rather than regulation is the preferred course.

Quite apart from the merits of the particular case, I might just observe that when groups purporting to represent the public interest resort to litigation in the courts, they sometimes do so to the detriment of the very objective they seek.

This is all the more unfortunate because we have been happy to consider their views fully in pursuing the objectives of the Federal Election Campaign Act.

In this instance, it seems to me, that there has been untimely and unwarranted harrassment which has resulted in an unjustifiable imposition on my office in terms of time, manpower, and needless public expenditures for legal defense.

This suit does a disservice to the hard-working people who are striving conscientiously to implement this highly complex act.

But most of all, by subjecting this matter to the tedious complexities of litigation, the suit has impeded the orderly implementation of the act. It is not the first instance of this kind nor do I expect it to be the last.

Nevertheless, it is a matter which should be brought to your attention at this time. As the incumbent Secretary of the Senate, with legal responsibilities which fall on me personally, I do not propose to be sidetracked from those responsibilities by pressure from outside the Senate any more than from within.

Mr. Chairman, that ends my testimony on the first year's experience under the Federal Election Campaign Act.

I thank you again for extending me this opportunity to appear here today.

Senator PELL. Thank you very much, indeed, Mr. Valeo.

I sympathize with you, in the problems you face.

I think you and your office and other administrators of the act have done your very best and have done a very good job.

Now, in connection with this point of the suit by a citizens' group, I think it might be interesting to put in the record their position, or their letter, or a copy of their allegation, a statement, and also your reply, if that could be inserted in the record.

Mr. VALEO. We will furnish the full correspondence on that situation.

Senator PELL. What is the name of the group?

Mr. VALEO. The organization was Common Cause in this instance.

[A letter, subsequently received by the subcommittee from Mr. Valeo, enclosing the material referred to above follows. The enclosures may be found in the confidential files of the subcommittee.]

U.S. SENATE,
OFFICE OF THE SECRETARY,
Washington, D.C., May 8, 1973.

Hon. CLAIBORNE PELL,
Chairman, Subcommittee on Privileges and Elections, Committee on Rules and Administration, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to your request during the course of the hearing into Federal election legislation on April 12, I am supplying herewith copies of certain correspondence between this office and Common Cause with respect to the alleged practices of earmarking of contributions. These letters have been submitted as exhibits in connection with Civil Action No. 2379–72, presently pending before the United States District Court for the District of Columbia. Although the letters were not submitted with my original statement for inclusion in the printed record of your hearing, I am supplying them herewith for the information and files of the Subcommittee.

Sincerely,

FRANCIS R. VALEO,
Secretary of the Senate.

Enclosures:

Common Cause to F. R. Valeo, Aug. 1, 1972.
F. R. Valeo to Common Cause, Aug. 11, 1972.
Common Cause to F. R. Valeo, Oct. 20, 1972.
F. R. Valeo to Common Cause, Oct. 20, 1972.
F. R. Valeo to Common Cause, Nov. 2, 1972.

Senator PELL. I have several specific questions here as we move along.

When will your first annual statistical report, the total, be released, be distributed?

Mr. VALEO. Probably not before the end of the summer.

Senator PELL. But the information is there if journalistic initiative is exercised?

Mr. VALEO. Yes, through the cross-indexing system, any of it would be available. It is instantaneously available.

Senator PELL. How should presently be handled the question of a candidate who receives in an envelope a $500 cash contribution with no return address?

Mr. VALEO. This is a very difficult question. I raise it and go into more detail in the statement.

I think we have had the situation arise, and we are unable to advise the people on this as the law is presently stated, other than to make clear the full circumstances surrounding it.

It may be the committee might want to consider here some question of limitation in terms of the amounts or to provide some other vehicle for handling this, but at this point I have no recommendation to make. You either insist on full disclosure or you do not. You might consider possibly putting the money into a general campaign fund for elections.

In fact, when people ask me this in the final analysis, we say, if you need to get rid of it, you better call a press conference and give it to the Red Cross or Community Fund.

Senator PELL. Second, another question, the matter of your referrals to the Attorney General for violations.

Are these available to the public?

Mr. VALEO. We do not make these available. We regard this as a matter in the hands of the Attorney General, and he has the right to make them public if he wishes.

Anybody who wishes to go back through the record can find out who is in violation by examining the returns.

Senator PELL. Should not this be also in the public domain, these referrals?

Mr. VALEO. We considered that as a possibility. Many of them are quite trivial, and we have no way, no authority at this point of distinguishing what is trivial and what is serious, and there is a very limited public interest in this type of referral.

They might possibly have missed a date, or come in 1 day late.

That was also realized. Joe Jones reported 2 days late, Joe Smith exceeded his expenditures by $83.22.

It may be that, on the other hand, if the referral is never seen, it should be, and this committee in its wisdom could move on that area.

Senator PELL. We would appreciate some guidance on that, and we have no problems in doing it.

Mr. VALEO. It would be rather easy to do.

Senator PELL. In connection with the simplicity, my own view both as a candidate and having personally observed these processes for some years, this bill has had a tremendously beneficial effect in the way that it has brought the hot spotlight of publicity to bear on all sorts of interests, contributions, where the obligations lie of candidates in that regard, and I think in a sense if you know where the obligations lie, that in itself acts as a bit of a governor on accepting too large contributions from one source or another, as long as everybody knows.

The problem with it is that it is such a complicated procedure to administer.

I know you have read your statement, but a couple of other thoughts occurred to me I did not see mentioned, the question whether you should really list all expenditures of $10 or more.

I question whether that is really of much value. I know when I figure out the added expenses, you have a considerable amount. You have to have an extra secretary, maybe two secretaries. The whole accounting, I would think, could be simplified if you only had to deal with amounts of $100 or more.

What would be your reaction to eliminating all reference to expenditures of less than $100?

Mr. VALEO. My reaction would be to concur. That figure was written some time ago, before the inflation had caught up with us.

Senator PELL. Inflation has moved very fast, but in 2 years, it has not moved that fast.

Mr. VALEO. I would think that would be a very sensible change to make. It would cut down greatly on the amount of paperwork.

Senator PELL. Would it cut down more, when you think of all of the total figures, than 60 or 70 percent of the total paperwork?

Mr. VALEO. Perhaps not that much, Mr. Chairman, but it would be a substantial saving.

Senator PELL. I am talking of both contributions and expenditures, because both have to be listed.

Mr. VALEO. Yes.

Senator PELL. Another question, in connection with how you arrive at conclusions, you have this sort of troika system now, and I still do not fully understand from your explanation how they arrive at a decision—I think for instance the rule should be the same in the House and the Senate for simplicity and for the sake of those trying to follow the procedure.

Do you think the three supervisors should be set up as a board with majority rule?

Mr. VALEO. That was my suggestion, as a possibility, if you wish to move in the direction of consolidation.

Now, much of our formal structure is the same, we design the forms in common, and after a good deal of hassling and a good deal of discussion, there was general agreement in the three offices on the basic forms and on the regulations.

There are some variances among the three branches, some of which grow out of the nature of different type of elections but some of which grew out of a difference of viewpoint on some issues, and I suggested, if you wish to explore the possibility of consolidation, that we move in the direction of what amounts to a board, in which the three of us, the three supervisor officers, would constitute the board, and a majority vote in that group would decide any questions of issues.

It is a step in the direction of a commission, but it still would be held at this point in the control of the three sources of campaign supervision.

Senator PELL. And maybe what could happen, the board could agree on one person as administrator, and then they could have periodic meetings and review actions.

Mr. VALEO. That is also a possibility. There is considerable difference in the cost of administering this as among the three branches, and I think we might explore fully the reasons of these differences, on the basis of first 2 years of experience, and it is conceivable we might bring about some reduction in the cost of operating the law.

Senator PELL. Well, the counsel of this committee will always be in close touch with you, and if any more thoughts come to you, as to simplification of the present system, and I personally will try to push this idea of less than $100 to try to make sure that the bill is a little simpler to enforce.

Mr. VALEO. May I say, Mr. Chairman, one of the things which we have done, and which is mentioned in the statement, but which I did not read here now, has been to stay in very close contact with the State election official, which usually is the Secretary of State, and at the conclusion of the last Senate elections, in the 33 States in which there were elections, we solicited the views of those officials on their problems with the law, because they do have very considerable problems.

The law places significant responsibilities on them for making copies of reports available to the public, and they do have significant experiences. I am sending some of our staff people out to talk to them, and to get their suggestions on the question of simplification.

The Federal law overlaps with State laws at this point, and there are problems there which I think may give us some insight on how we may possibly simplify the process, and we will give you a report in due course of our analysis of these experiences with the State officials.

Senator PELL. I question also whether your so-called category B committees who contribute to more than one candidate, whether you can really ask them, or the candidate that receives the money to report whether funds are earmarked or not, to my mind that would be difficult.

I think all you can hope and expect is a statement of the total amount from the class B committee, and by the same token a list of contributors to the class B committee.

What will happen, people will get around this, you cannot enforce this.

Mr. VALEO. This is the substance of the present suit with which I am trying to deal with.

Senator PELL. Do you have any view with regard to changing the election month from November to early October?

Mr. VALEO. I see no great problem with this, do you?

Mr. POTTER. No. You would have to adjust the periodical reporting dates.

Senator PELL. Do you have any views with regard to an upper limit for contributions?

Mr. VALEO. I think it is very desirable, Mr. Chairman, although I do think it has to be coupled, as I tried to point out in the statement, with some sort of centralized reporting system, otherwise it will be extremely difficult.

Senator PELL. Do you believe it is possible to enforce?

Mr. VALEO. Not as the law now stands.

Senator PELL. Thank you. Thank you very much indeed, and it is an excellent statement. I cannot imagine any other statement that will be examined with more care than yours because you have had the responsibility for administering it together with your succeeding witness, the Comptroller General, who we will be hearing in a moment.

Mr. VALEO. I want to say, Mr. Chairman, I owe a great deal here to Mr. Potter who is accompanying me today. He has done a great deal of the work in designing the administration of this law.

Senator PELL. As one who is familiar with Mr. Potter, I share your regard for him very much.

Mr. VALEO. Thank you, Mr. Chairman.

Senator PELL. Our next witness is Mr. Phillip Hughes, Director of the Office of the Federal Elections, General Accounting Office, accompanied by Mr. Fred Thompson and Mr. Robert Higgins.

STATEMENT OF PHILLIP S. HUGHES, DIRECTOR, OFFICE OF FEDERAL ELECTIONS, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY L. FRED THOMPSON, DEPUTY DIRECTOR, AND ROBERT L. HIGGINS, COUNSEL OF THE SAME

Senator PELL. I can assure you, if you care to summarize your statement, it will appear in full in the record, but proceed as you wish.

Mr. HUGHES. Mr. Chairman, I believe I would like to read the statement. It is fairly short, and we have tried to deal with general concepts and principles rather than with details, and I therefore suggest reading it if I may.

Mr. Chairman and members of the subcommittee: I am pleased to have this opportunity to present the views of the General Accounting Office on a number of topics having to do with the administration of campaign finance legislation and disclosure of contributions and expenditures relating to Federal elections. My testimony is based on our experience as one of three supervisory offices administering Public Law 92–225, the Federal Election Campaign Act of 1971. This milestone legislation significantly changed the ground rules for reporting Federal campaign contributions and expenditures and, in our judgment, markedly improved the opportunity for all citizens to know the sources of campaign contributions and the purposes for which they were spent.

On March 13, I testified before the Subcommittee on Communications of the Senate Committee on Commerce on S. 372, a bill to impose an overall limitation on all spending in Federal election campaigns in place of the present limitation on media spending alone. If the committee is agreeable, it might be appropriate to include a copy of my statement before that subcommittee in the hearing record. I will not repeat that statement, except to summarize our conclusions.

Senator PELL. Without objection, the statement will be inserted in the hearing record.

[The statement referred to appears as exhibit 4 in appendix I, on page 140.]

Mr. HUGHES. I stated there, Mr. Chairman, that I do not believe that the machinery of the Federal Election Campaign Act of 1971 provides adequate administrative and enforcement support for limiting total campaign expenditures. This opinion is based on the problems we have faced in administering the media limitation in the present law with this machinery and I pointed out that legal, constitutional, and administrative problems abound, particularly as we move beyond the radio and television industry.

I also suggested that the Communications Subcommittee consider whether an approach similar to that taken by Florida law might be appropriate in Federal election campaigns. We have not studied the actual operation of the Florida law but we plan to make some inquiries on that subject at an early date.

Finally, on S. 372 the Comptroller General provided the Senate Committee on Commerce with a letter dated April 6, 1973, more detailed than my testimony, pointing out serious problems with an overall limitation and suggesting amendments to title I of the Federal Election Campaign Act which we believe desirable even if the scope

of existing law limiting campaign spending is not increased. The Comptroller General has commented on S. 372 to this subcommittee by letter dated April 11.

Rather than attempt to address specifically each bill before you today, we have organized our comments relating to title III of the Federal Election Campaign Act in the following general categories:

1. Better enforcement tools.
2. Clearer definition of the coverage of the act.
3. Simplification of campaign finance structure and procedures.
4. Better identification of contributors.
5. Regularized reporting dates.
6. Stricter requirements regarding cash transactions.

BETTER ENFORCEMENT TOOLS

Our year's experience with the Federal Election Campaign Act of 1971 has convinced us of the need for more effective enforcement procedures, regardless of what agency is assigned the duty of administering the act. The threat of criminal prosecution, which is the only sanction available at present, should be retained and the criminal penalties should be increased to include both longer imprisonment terms and substantially heavier fines. But criminal sanctions alone are not enough and substantial civil penalties should be added. In this connection, we note that the Florida law referred to earlier expressly provides for disqualification, removal from office, or impeachment, as the case may be, for any candidate nominated or elected who has knowingly violated the act.

The supervisory officer or his equivalent should, as the Scott-Mathias-Stevenson bill (S. 1094) proposes, be given the power: (1) to require written reports and answers to questions; (2) to administer oaths; (3) to compel testimony and documents by subpena; and (4) to initiate court actions in its own name through its own attorneys to enforce the law and to defend against court actions brought by others.

In addition, the supervisory officer or his equivalent should be authorized to impose civil fines on candidates and political committees or others who violate the act in ways not appropriate for criminal prosecution, such as late filing of reports, failure to include relevant information, errors in reports, etc. In his discretion, the administrator should be able to impose a fine within statutory limits on the violator and to enforce it through distraint or through a court proceeding.

CLEARER DEFINITION OF COVERAGE OF THE ACT

The present language of the act is not as clear as it might be in identifying the committees subject to its registration and reporting requirements. It is also unclear which committees, active and reporting during the 1972 campaign, should continue to report between elections. We recommend that the Congress consider clarifying the criteria governing whether a committee is subject to the act as follows:

(a) All candidate committees—committees organized to support or to oppose Federal candidates—should be required to register, report, and to continue reporting as long as they are in existence without regard to the dollar amount of anticipated contributions or expendi-

tures. And they should be required to remain in existence as long as they have assets to be disposed of or debts to be liquidated.

(b) All national party committees should also be required to register, report, and to continue reporting without regard to the dollar amount of contributions or expenditures.

(c) All State party central committees should be required to register and report as a matter of course and continue to report between elections on the same basis as the national party committees are required to continue reporting. We recognize that some of these committees may take a limited part in some presidential campaigns, but it can hardly be denied that a State party committee's real purpose in being is to promote party interests in the State and this includes certainly the campaigns of party candidates for Federal office.

(d) All county and local party committees should be required to register, report, and continue reporting if they collect or spend $25,000 or more in a calendar year, any portion of which will be directly or indirectly used to influence Federal elections.

(e) The act should be broadened to expressly include organizations which solicit contributions on behalf of a candidate or candidates, even though such organizations do not themselves accept, receive, or spend contributions in their own name.

(f) Business, labor and other non-party committees attempting to influence Federal elections should be required to register and report continuously like candidate and State party committees.

SIMPLIFICATION OF CAMPAIGN FINANCE STRUCTURE AND PROCEDURES

During the recent election, Senator McGovern had over 750 committees and President Nixon over 250. With additional party, business, labor, and nonpartisan committees, a total of approximately 2,000 committees were actively reporting to the Office of Federal Elections at the height of the campaign. Many of these were in existence simply to take advantage of the Internal Revenue Service ruling with respect to the gift tax. A very large number, however, were active committees directly or indirectly supporting particular candidates.

Proposals for a single central candidate committee, with all other committees supporting the candidate to be authorized by that committee, are appealing from an administrative control standpoint. Furthermore, if either media spending limitations or overall limitations on campaign spending are to be imposed, central committee control is probably the only feasible way to make the limitations effective. Such centralized control over campaigning and campaign finance poses serious legal—and constitutional—problems, however, if the activities of unauthorized persons or committees are prohibited. Also, while centralized financial control tends to insure compliance with limitations, we found during the recent campaign that centralized campaign finance structures which included centralized reporting tended to be cumbersome and slower with consequent delays in disclosure.

However, centralized control need not imply that all funds must be funneled to a central committee nor that all reporting must be centralized. An alternative to a statutory requirement for complete cen-

tralization would be a requirement that each candidate designate a single campaign treasurer or comptroller—which could be the candidate himself—who would share the legal responsibility with the candidate and subordinate committee treasurers for full and accurate reporting by all committees authorized by the candidate.

Auhorized committees could and we believe should, in most cases, report directly to the supervisory officer rather than to the central committee to achieve timely disclosure. Other committees supporting a candidate but not expressly authorized by him should also be required to report directly to the supervisory officer and to state prominently in all literature or publicity that they are an unauthorized committee.

Present law requires the candidates themselves to report regularly whether they have handled campaign funds or not. Since, in our experience, most presidential candidates' reports have been completely negative, we think Congress' purpose could be served by permitting candidates not handling funds personally to certify that they have not and do not intend to accept or expend funds in support of their campaign and delegate this function to a central committee or treasurer. If circumstances change, it would be the candidate's responsibility to rescind the certification and file appropriate reports.

In a somewhat different context, Mr. Chairman, in our contacts with the secretaries of State over the country during the past year, we have heard many complaints that the provisions of section 309 of the present act impose a serious burden on their affairs. That section requires copies of all statements and reports under the act to be filed with the appropriate secretary of State. We have not had an opportunity to assess the seriousness of these problems but we recommend that the subcommittee reconsider the language in section 309 on the basis, perhaps, of testimony from representatives of the National Association of Secretaries of State.

BETTER IDENTIFICATION OF CONTRIBUTORS

It has proven difficult to obtain the information required by the present act to help identify contributors of over $100. In addition, even with this identifying information, it is difficult to aggregate contributions from a particular contributor because of differences in listing of names, addresses, etc. We, therefore, recommend the inclusion of the individual's social security number in the information on contributors of $100 or more as a simple, direct, and positive identifier. We concur with the provisions of S. 1094 which would change the level on which detailed reports are required from over $100 to $100 or more.

Further, we recommend that, with respect to such contributions, the law require the committee to return the contribution unless the identifying information, including occupation, principal place of business and social security number is provided. If the law should so provide, I believe it is reasonable for the Congress to prohibit the acceptance and retention of anonymous contributions because permitting such a practice creates an obvious loophole. The law should require that such contributions be turned over to the supervisory officer. They could be used to defray administrative expenses under the act.

REGULARIZED REPORTING DATES

We are in general agreement with the provisions of section 4 of S. 1094 regarding frequency of reporting. The periodic reports required by the present statute are not quite quarterly and we are aware of no reason for this. We recommend that these periodic reports be filed as of the end of the calendar quarters and that they be due 10 days after the end of the quarter.

With respect to Presidential campaigns, the required 5- and 15-day reports before primary and general elections have caused serious problems of multiple reporting for Presidential candidates and their committees and have been a source of great confusion to candidates and committees during the preconvention period. We believe that the provisions of section 4 of S. 1094 for a single 10-day preelection report or alternative monthly reports would, in this regard, be a simpler and better substitute.

STRICTER REQUIREMENTS REGARDING CASH TRANSACTIONS

We believe that the problems of accounting for, disclosing, and auditing contributions and expenditures in cash—currency as opposed to checks—are quite evident. I believe the best solution to these problems is to prohibit cash contributions and cash expenditures of $100 or more. If this approach is not acceptable, we believe that the Congress would be justified in requiring that any cash transaction of $100 or more be deposited in a bank within 24 hours. In the latter event, the law should require that such cash contributions be accompanied by a signed statement of the contributor containing his reason for making the contribution in cash or currency instead of by the usual business practice of writing a check for such outlays. Further, a contribution of more than $500 in cash at one time should be required to be reported specially to the supervisory officer by the recipient within 24 hours, the same as major contributions just before an election.

We are fully aware, Mr. Chairman, that several of our recommendations present legal, technical, administrative, or political problems. We recognize, also, that the adoption of all of the recommendations we have made would not guarantee achievement of the worthy objectives of the act. We do believe, however, that our recommendations will help consolidate the very substantial gains achieved by the enactment of the Federal Election Campaign Act and enable further advances.

Our experience over the past year convinces us that no single approach to campaign finance problems will enable us to achieve the objectives we all seek. Certainly, effective and prompt disclosure of private contributions and of campaign expenditures in the manner sought by the Federal Election Campaign Act of 1971 is one fundamental requirement. Overall spending limitations, or alternatively, limitations on the use of the media or on the use of broadcasting alone have appeal, but we have pointed out some of the problems we have experienced in making limitations workable. The more limited the scope of the limitations the more likely they can be made effective, we believe.

A third useful device, in our judgment, would be to limit individual contributions for the benefit of any individual Federal candidate. Such a limit probably will help to limit total spending as well. We believe a limitation as low as the $3,000 gift tax maximum is worth considering.

Finally, we note that other pending legislation proposes public financing of congressional election campaigns and that current law makes possible the financing of Presidential general election campaigns from public funds. These proposals present attractive alternatives, particularly after the nominees are named. They are not free of problems but we believe they are sound in principle and, therefore, merit the most careful consideration.

In conclusion, Mr. Chairman, let me simply say that we will be pleased to work with the subcommittee and its staff to achieve practical and effective improvements in the laws regulating campaign financing.

Senator PELL. Thank you very much.

We will be in continuous touch through the counsel of this committee, with you, and Mr. Valeo, because we are all trying to work together to simplify procedure.

I recognize the validity in the thought of the social security number, but to me there is something obnoxious about "Big Brother," and those numbers being fed into the impersonal computer, and recognizing there may be some slippage, it just would bother me to see a social security number used, but my colleagues may differ with me.

Mr. HUGHES. I certainly recognize the problem, Mr. Chairman.

I agree with Mr. Valeo, however, that if the intent of the law is to accumulate contributions, that number is necessary if it is to be done.

Senator PELL. Not necessarily, it might not make it 100 percent efficient, maybe only 99, there would be some that would be lost, but in general, I think it might come out to balance the "Big Brother" approach, and also, there might be some very rich old ladies, who might contribute to the political party of their choice who do not have social security numbers.

Mr. HUGHES. True.

Senator PELL. Do you have any views with regard to moving the date to October?

Mr. HUGHES. No; we really do not, Mr. Chairman.

This is out of our area.

Senator PELL. With regard to simplicity, what is your reaction to my thought, that we just eliminate any mention of any contributions, or any expenditures of anything under $100?

Mr. HUGHES. As the law now stands, Mr. Chairman, of course, those items are not reported to us individually, although records are required to be kept in the committee campaign offices. It is not a proposal that we would advocate.

We have considered advocating it, and rejected that, on the general theory that, until we have clearer evidence of how much use there is for those records in the audit process, we should stay with it.

There is one other aspect of the problem, which in oversimplified terms can be expressed as the multiple contributor problem.

We do not really know yet and won't know the extent to which people may have contributed individual amounts under $100 and not reported to us individually but nonetheless, cumulatively substantial.

I guess my general posture would be I would like to see some more audits and get a better feel for what is going on out there, before eliminating the requirement.

I do, however, recognize the validity of the concern over paperwork, and if the committee should choose to do this now I do not believe we would object, although I would be more comfortable with more experience.

Senator PELL. I know my own experience was that we had to hire a CPA, and a staff to go with him.

I do not think that was the original intent of the law. Theoretically we should be able to handle it ourselves, but we went dizzy, and it just did not work.

I imagine this experience must have been shared by just about every candidate.

Mr. HUGHES. Some of the comments candidates made to us would suggest that it was.

Senator PELL. I thank you very much indeed.

Mr. HUGHES. Could I comment just briefly on the matter of the Scott-Mathias-Stevenson proposal.

I did not comment in the prepared statement.

Senator PELL. We would also be interested in your comment on the Pastore bill even though it has not been reported to the Senate from the Commerce Committee.

Mr. HUGHES. With respect to the proposal for a commission in the Scott-Mathias-Stevenson bill, we have, of course, considered that. You may recall that the Comptroller General last year favored an independent commission in lieu of the arrangements ultimately adopted.

I guess it is fair to say he rather strenuously resisted becoming one of the supervisory officers.

In the light of experience over the past year and in the light of congressional action on the Federal Election Campaign Act, we would not reiterate that position of last year. We do not now propose a separate commission.

As a related matter, I listened carefully to Mr. Valeo's testimony suggesting a three-man board, and so on.

I have some reservations about that, and obviously the Comptroller General has not had a chance to consider it. Off the top of my head, however, I think there are distinct differences in the tasks which confront the three supervisory officers even though there are overlaps, and perhaps they should have some opportunity each to go his own way at the point where that might prove necessary.

If the Congress is to consider a single commission or an independent body to manage the campaign finance disclosures, we would prefer a structure somewhat along the lines that Congressman John Anderson proposed last year. His proposal was for a body with two members appointed by the Speaker of the House of two different parties, two similarly appointed by the President of the Senate, and two of different parties by the President of the United States with the Comptroller General a seventh member. The operation was to be housed in but essentially an independent operation in GAO. I emphasize again that we are not proposing such an arrangement but would prefer it if a change is to be made.

We have found our relationship with the other two supervisory officers to be cooperative, mutually helpful, and beneficial, and we are not proposing any change in the present arrangements.

You asked our position regarding the Pastore bill, S. 372. I think the most concise comment that we could make with respect to that bill is that we think an overall limitation of the sort that it proposes on all spending is not administratively feasible within the administrative framework that the act proposes.

We have had serious difficulties even with the media limitation, particularly in the newspaper field, and as the number of potential suppliers becomes greater, the problem is more acute.

The act depends on a certification process, and a particular supplier, a typewriter company, for example, may not know there is such a certification requirement. Nonetheless, there is an automatic violation of the act if a typewriter is sold to a political committee for campaign purposes without certification, so we come back to the need for central candidate control, committee control, or a central treasurer if limitations are to be effectively enforced, particularly limitations as broad as the Pastore bill would propose.

Senator PELL. Personally, I am very sympathetic to it, looking at the expenses of my own past campaign, I would like to see that approach, or a similar approach followed.

I recognize the problems here.

Thank you very much indeed, and we will be in frequent touch in the next few weeks.

Mr. HUGHES. Thank you. We will be pleased to help in every way we can.

Senator PELL. Our next witness is Mr. Russell D. Hemenway, national director of the National Committee for an Effective Congress.

I have long admired and had a wonderful relationship with you for many, many years, and a beneficial relationship.

STATEMENT OF RUSSELL D. HEMENWAY, NATIONAL DIRECTOR, NATIONAL COMMITTEE FOR AN EFFECTIVE CONGRESS

Senator PELL. You have a relatively short statement. Proceed as you wish.

Mr. HEMENWAY. Thank you very much, Senator Pell, and Mr. Duffy.

It is with pleasure that the National Committee for an Effective Congress comes before this subcommittee again today to comment on a wide range of election and campaign finance reform measures.

Our committee, as you know, has been deeply interested and involved in this issue for a long time now.

We have worked with you in the past and we are well aware that without the dedication and commitment of you and your staff, we would not have the Nation's first real reform bill in half a century—the Federal Elections Campaign Act which took effect just this time a year ago.

Senator PELL. I cannot take credit for that.

That was really Senator Pastore.

Mr. HEMENWAY. What is most encouraging to the NCEC is that reform efforts did not stop with that bill.

This legislation has stimulated a broad examination of our entire electoral process.

The large number of reform bills already introduced this session is evidence of the new interest and attention, and is, we think, a healthy sign.

As you know, several days of hearings on election reform were held last month by the Commerce Subcommittee on Communications.

Our testimony there dealt with two bills which are before you today, and several others which, while not before this committee, are equally important.

For this reason, I would like to ask if the NCEC's March statement might be made part of this hearing record.

I think this will help to more fully explain our position in depth without taking your time with duplicate testimony.

Senator PELL. Without objection, the statement will be inserted in the hearing record.

[The statement referred to appears as exhibit 5 in appendix I of these hearings on p. 144.]

Mr. HEMENWAY. Before commenting on the specific bills before you, I think there is a general point which should be made.

It is all too easy for us to say that controlling the lengthy, wearying campaign period, the gimmicky TV-spot ad, the outrageous amount of campaign money spent will end the apathy, even disdain, of the public for political involvement and participation.

These problems are important; yes. But we must not overlook the larger issue, that too many Americans have lost faith in Government and its officials.

Some take no interest in politics or public affairs, even though their lives may be dramatically affected, because they believe their voice has no impact, makes no difference.

Others simply don't trust politics or politicians, to them it is a profession without integrity or purpose other than self-preservation or self-aggrandizement.

This is an attitude which is all too prevalent these days, and one which only the public official and others like us actively engaged in politics can change.

We agree, happily, with the authors of a recent Harvard Legislative Journal article that much of the problem can be solved by practical legislation, by opening up and democratizing the electoral system.

For that reason, the NCEC has strongly endorsed three particular measures which are not under discussion today but do go very much to this problem.

First, S. 397, the Mathias-Stevenson proposal for full public disclosure of assets and liabilities of Members of Congress and high-level staff.

As you know, the State of Maryland recently adopted such a measure, but only under the cloud of scandal.

The NCEC hopes it won't take a scandal to convince Congress that financial disclosure is a necessary first step toward rebuilding public confidence in elected officials.

Second, S. 352, the Federal post card registration bill, which was recently reported by the Senate Post Office Committee, but is now blocked on the Senate floor by threat of a filibuster.

I, for one, would not like to try to justify this to the millions of citizens who are effectively discouraged from political participation by a plethora of outdated, often deliberately burdensome registration requirements.

Surely in this era of mass communication and computer technology, where social security registration, auto registration, and income tax filings are accomplished by mail, qualifying to vote can and should be facilitated in this manner as well.

And third, S. 1103, Senator Hart's bill to provide an optional system of public subsidy for congressional candidates.

The charge is continually made that too much money is spent in campaigns. The greater problem, it seems to us, is that it is spent by too few people—usually the rich and the friends of the rich. Those would-be candidates who are unwilling or unable to raise adequate funds from private sources, with all the strings attached, are effectively excluded from the political arena. Our long experience in political campaigns has convinced us that to encourage our most talented people to seek office, to relieve them from dependence on large special interest givers, and to reduce the disproportionate influence of the rich on the process, some form of public subsidy is the only answer.

We concede that we may be some time away from a direct elections subsidy, optional or mandatory. Yet we hope that this bill, which is well thought out and is pending before your committee, can at least serve as a departure for discussion.

As to the bills under consideration today, let me begin with Senator Pastore's proposal, S. 372. This is treated at some length in the NCEC's earlier testimony which has been made available to you. Let me say briefly that while we support the provision for "equal time" repeal, we still have some reservations about establishing overall candidate spending limits.

Despite public preoccupation with the lavish campaign budget, we are troubled by the ticklish problem of enforcement, the practical difficulty of monitoring all these expenditures to make sure that limits are really observed.

Second, there is always the danger that limits will work strongly to the incumbent's advantage.

And, finally, as I mentioned before, the problem of spending too much may be less serious than not having enough to spend, and, therefore, even to run.

If such a ceiling is adopted, however, we believe the cents-per-eligible-voter formula of S. 372 is a reasonable way to proceed, so long as an adequate minimum, perhaps $200,000 for Senate races and $75,000 for House races, is built into the bill.

Extreme caution must be exercised in setting both the ceiling and the floor of the limits.

Such legislation could turn out to be not a remedy but an outright disaster if the limits prevented the unknown challengers from waging an adequate, effective campaign.

On S. 1094, Senator Scott's proposal to create a Federal Elections Commission with strong investigative and enforcement powers, the NCEC would again urge prompt action.

As one of the original supporters of an independent commission, we were dismayed when this was dropped from last year's bill.

The current tripartrite mechanism for administering the reporting law, no matter how well handled, and it was well done this year, remains an illogical and awkward system.

At the very least, reporting should be centralized in the GAO to facilitate the integration of information and its flow to press and public.

I would add here that, if overall spending limits are adopted and if, as some suggest, individual contribution limits are also imposed, it is all the more imperative that one single agency, with full investigative, subpena, and litigative powers be created to oversee and enforce the law.

Senator Robert Byrd has proposed, with S. 343, that the date for holding Federal elections be changed to the first Tuesday after the first Monday in October.

The hope, obviously, is that campaign expenditures would be reduced by the shorter campaign period, and voter interest and participation heightened both by the more concentrated campaign and by less inclement October weather.

There is no experience or data, that we have been able to find, to suggest such a change would guarantee the desired results.

Nonetheless, we see no great danger in such an experiment.

We would suggest, however, that some thought be given the effect it might have on the conduct of lame-duck members, and on the election situation in those States which have late August and September primaries.

S. 23, introduced by Senator Harry Byrd, Jr., would set a limit of $25,000 on the total amount any individual could contribute to a candidate for Federal office.

Several things are unclear from the bill as drafted: Whether this would be one limit or two (applying to the primary and general together or separately, how additional gifts from members of the contributor's immediate family would be treated, and what, if any), enforcement mechanism would be provided.

Unless the last two points in particular are spelled out further, it is unlikely that such a bill would provide effective, meaningful limits on campaign contributions.

The measure introduced by Senator Weicker, S. 1189, is basically directed at curtailing the period over which campaign funds can be raised and expended, and offers some novel suggestions.

However, it does not deal with or leaves unresolved a number of important questions.

We are concerned, for example, about the obvious conflicts with the first amendment rights of both individuals and groups, the extreme difficulties of enforcement, and, perhaps most important, the practical problems involved.

By our reading of the bill the two national parties, for example, would be prohibited from raising money in nonelection years.

And not only would the Democratic and Republican National Committees be prohibited from making any expenditure on behalf of any of their candidates unless it went directly through each candidate's central committee, even this might be illegal since transfers between committees would not be permitted.

And what of the candidate who goes on the air 3 days before election, with time booked and paid for well in advance of the 2-week preelection deadline and attacks his opponent with a sensational, but phony scandal?

Is the opponent not permitted to purchase additional air time to reply?

It is obvious that a great deal of time and thought has gone into this effort to gain new avenues of approach.

We would suggest, however, that these and other problems raised by the bill would have to be resolved before it offers a realistic, workable system.

The NCEC commends this committee, Mr. Chairman, for your continuing effort to pursue meaningful reforms which will assure an open, democratic, competitive electoral process.

We thank you for the invitation to appear today, and would be glad to answer any questions you may have.

Senator PELL. Thank you very much, indeed.

First, the Mathias-Stevenson proposal actually is before the Government Operations Committee.

Mr. HEMENWAY. I see. I thought it was coming here.

Senator PELL. As I read the press, I can see why the State of Maryland wants to move in this direction.

Mr. HEMENWAY. Not only the State of Maryland is troubled with these problems, Senator.

Senator PELL. With respect to these disclosure bills, there are differences, as you know. There is a difference between the Cannon bill which only calls for disclosure by the Congress, and the other bills which call for disclosure by all people in Government.

I am sorry. The Cannon bill is disclosure by all people of Government, and the others only by Congress.

We have discussed this privately. I did not realize before, but I would like to draw out a couple of thoughts, here.

First, if we did do this, I think we would be the only Congress in the world, the only Parliament, that would require this disclosure of its members.

Is there any other that does?

Mr. HEMENWAY. The State of Maryland. There may be other parliaments.

Senator PELL. I think actually there is one Central American country that does, but I am not sure how well enforced it is.

Another question, in disclosure, which I find personally distasteful, but in disclosure, I went ahead and did it in this last campaign, probably due to the heat of the election, and there was an accountant's fee of $1,500 involved.

Who should pay that, the Government, the individual, or the campaign committee?

Mr. HEMENWAY. I think very few legislators in the world would have a $1,500 campaign accountant's fee.

Senator PELL. Well, $500 or whatever. You cannot do it yourself.

Mr. HEMENWAY. The information called for in the Mathias-Stevenson bill could be delineated by the incumbent very easily.

I don't know why you would have to purchase outside accounting devices.

Senator PELL. I had to have one myself, but it can be complicated.

Mr. HEMENWAY. We did not consider that as being a major factor in the drafting of that bill.

Senator PELL. We are going to hold hearings, we intend to hold hearings on that pretty soon.

Why do you feel it is wrong if we do move in this direction for total disclosure?

Mr. HEMENWAY. The Cannon bill includes literally thousands of persons employed in the military and judicial system.

The NCEC's responsibility as you know, Senator, is with the Congress of the United States, and we feel very strongly that if the Congress is going to demand certain standards of the executive branch or the judicial branch, they ought to start with their own problems.

There have been sufficient questions raised by Members' own activities in this body and the House of Representatives over the years to indicate this is a reasonable way to start.

We think the most important thrust of this bill is the re-creation of public confidence in the Congress, and also we feel if the public is going to understand that Congressmen must be paid commensurate with their responsibilities, they must understand the job of being a Congressman in the United States is a full-time job. Obviously the main concern is that some Members of the Congress are so occupied in outside activities that we think it is impossible for them not to have certain conflicts with legislation before the Senate or the House.

Before you can ask the executive branch or any other branch of government to correct themselves, you ought to solve any problems like this that exist in the Congress.

Senator PELL. Actually, as you know, the present law requiring disclosure by Federal officials side is never public disclosure.

It is always extremely private, and even as a member of the examining committee, you have to ask to see a statement of assets of an appointee. Only the chairman as a normal rule sees them.

I think the recent episodes in connection with the Watergate would indicate the advisability of such disclosure, perhaps by the executive branch as well as ours. But you are so right, the basic point you are making with regard to the public's opinion of the Congress is low.

We are thought of as rascals, and the public opinion of us is very much in that regard.

I think also the public has very low expectations of their representatives.

As you know, we have elected Members to Congress when their residence was jail, and I think the public should have a higher demand than what they expect from other people.

Senator Weicker made a wonderful statement here yesterday. Politics should be an honorable word. Politics is basically an occupation, so I am in 100 percent agreement to make it a profession in higher regard. Candidates should not go into it to better themselves financially or socially, but go into it because it is a highly honorable profession.

You may well be right, we may move in this direction of disclosure. I have a very open mind on it, if we could only figure out some way of not going into the private life of an individual, but handling disclosure a little more generally. I am impressed with a statement made by Mayor Lindsay, when we were in the distasteful Bobby Baker

investigation, a highly disagreeable 2½ years, and he made the statement that perhaps the best thing, if we could only do it, is what is done in the Parliament in Britain, where if there is the slightest wave of a scandal, the person is out. If we would move in that direction, you wouldn't have to worry about disclosure and all of these other procedures.

But in order to move in that direction, you have to have a higher standard on the part of the general public, and also I think for the general public to get this higher standard, I guess it is a question of which comes first, the chicken or the egg, we could follow your procedure and earn the respect of the public, or we could incur the respect of the public by not doing; I am not sure.

Mr. HEMENWAY. Senator, of the things that threaten our system, the lack of confidence of the public in politics and politicians may be the most serious.

Senator PELL. I would say that the hearings will be held on public confidence and disclosure at some point in the future.

I cannot guarantee when or if, but this is our intention.

Now, in connection with election reform, do you think that the pending voter registration bill will help a good deal?

Mr. HEMENWAY. We feel very strongly about that, and have testified several times on this bill.

It seems to us again a very serious problem when so few of our people participate in the political process.

We are not sure that easing registration alone will solve that problem, will get the high participation that the system demands. But it is certainly a step in the right direction. When we make it as difficult as possible to exercise our franchise, obviously this is not the intent of the system.

Senator PELL. Ninety percent of those who are registered vote, but only 45 percent of the American public bothered to register and vote, so if we get them through that first hurdle, registration, the incentive is there to get them through the second hurdle, voting.

Mr. HEMENWAY. And like everything else, once they begin to vote, we think the participation in all forms of the democratic process will increase.

Senator PELL. Do you feel the present law focusing the hot spotlight of publicity on contributions has served the very purpose itself?

I think all of the benefits that have come out of this bill now could be increased, so that if a particular interest, or if the Mafia, or oil interests, labor organizations, or anybody else gave money, an inordinate amount of money—I am not equating them all, or I will never be reelected—gave an inordinate amount of money, then the fact that they have done so would mean that such donors would be exposed to adverse publicity, and adverse votes from the public, and this would act as a governor on contributions.

Mr. HEMENWAY. Certainly. We think that at the very least the public has the right to know.

That is why we fought so hard for the disclosure aspects of this bill.

As we said before, we never expected to get as comprehensive and as important a bill as was passed last year.

The first thing is disclosure, and if the public knows the source of campaign money and how it is going to be spent, we think they will make the proper judgment about the candidate.

The suggestions about amending the bill that were made here today, and on other occasions, many of them have been very good.

After a year's experience with the bill, we see areas where the bill should be changed, made more workable, more easily administered.

I thought Mr. Hughes' and Mr. Valeo's testimonies were excellent. We agree with much of what they said.

The most important thing is that we ought to have a central supervisory system.

We fought very hard for a Federal election commission which was passed by the Senate, as you know, by an overwhelming vote, and then dropped out of the House version of the bill.

We also feel strongly that there ought to be a single central reporting committee for each candidate.

It is pretty obvious after a year of working with this bill, that unless one committee of each candidate is assigned the responsibility for reporting all income and expenditures of money, it becomes hopelessly difficult to administer.

We also feel the reporting dates can be changed to make reporting more simple.

If the last quarterly date fell in October, than you could eliminate one of the preelection reporting dates.

We feel that you could change the 15- and 5-day date to perhaps one report 10 days before the election.

Any late contributions of say $1,000 or more, certainly a minimum no higher than that, that came in at the last, after that last reporting date, should be reported within 24 hours to the supervisory officer.

Some people have recommended only larger amounts, but we think everything over $1,000 should be reported.

We think that all violations of the law should be published.

You questioned Mr. Valeo on that point. I think it is a very important point.

I think the reports of violations made by the Secretary to the Department of Justice should be made public. We think also, as Mr. Hughes testified, that the amounts of contributions, those for which we should know the full name and address of the contributor should be $100 and over," and not "over $100."

A hundred dollars is a very important cutoff point in political contributions. These changes would strengthen the bill, and I hope that legislation proposed by this committee would include these.

Senator PELL. What do you think of my idea of knocking out all reporting of figures below $100 for the sake of paperwork?

Mr. HEMENWAY. I think we would oppose that.

I think the names and addresses of all contributors at least should be kept.

Right now, we only report to the supervisory office of contributors over $100, but they should be kept.

Too few of us contribute anything to politics, Senator. The number of Americans that contribute on any level in any amount is very, very small, and we see no reason why that should be changed in the law.

Senator PELL. Even if it would reduce the paperwork? As one of the witnesses said, it would reduce the work by half.

Mr. HEMENWAY. Well, there is a great deal said about paperwork.

In the last election, 1972, the National Committee for an Effective Congress endorsed and supported 17 candidates for the Senate.

Senator PELL. I am glad I was one.

Mr. HEMENWAY. And over 60 candidates for the House of Representatives, so our responsibilities for reporting were multiplied manifold beyond that of individual candidates.

All of this reporting, and both the Secretary and the Clerk have congratulated us on the comprehensiveness of our reports, even with all of this responsibility in reporting in almost 50 States to the secretary of State, all of this work was done by one person on our staff who also had other responsibilties beyond that.

Senator PELL. I know you told me that, and I was mystified because we tried to do it the same way in the beginning, but it simply did not work, and we had to have an accountant and a secretary.

In this connection, too, you have to keep on file in the committee, all of the expenditures, even those which are not reported to the supervisory officer.

If you spend $12 for carbon paper, you have to make a separate notation.

These are the types of expenditures I think could be perhaps knocked out, but I recognize your views in this regard.

Mr. HEMENWAY. I urge you to use caution in your amending of the bill, because some of these minor details can end up weakening it very seriously, and our object is not to weaken the bill, but to make it more strong, to make it as easy as possible for the candidate to comply.

Senator PELL. The object of the bill is to make sure that rascals have a harder time to get around it, but at the same time, not to impose too much of a burden upon others.

Mr. HEMENWAY. The objective of the bill is that the public has a right to know where the money comes from and how it is spent.

Senator PELL. What would be your judgment as to how much contributions to candidates would be reduced by the fact that they had this complete disclosure? My own estimate would be about 20 percent.

Mr. HEMENWAY. I think that is a rough figure to arrive at, even in your campaign.

You were very successful in raising money in this campaign.

You conducted, I think, an excellent campaign, obviously a successful one.

You drew contributions from a very broad range of support both in Rhode Island, and outside, supporters who were aware of your work in many areas of education, arts, and humanities, foreign affairs, but you conducted a campaign within a budget which was set very early. You managed to meet that budget, did most of the things that were necessary to win.

I don't think the campaign bill inhibited you, or too many candidates, in raising honest money.

Some people might have been inhibited who formerly gave money, not as a contribution, but as an investment in politics.

Senator PELL. I don't know. I would say that the people don't like to give if their contributions will be recorded. I have no knowledge

here as compared with your experience. Your view, then, is that the amount that was contributed to individual candidates was not greatly changed by the passage of this bill?

Mr. HEMENWAY. That is our experience, but, of course, the candidates with whom we are involved have normally raised money from a broader base than some of those candidates with whom we are not involved.

Senator PELL. In connection with the proposal of Mr. Valeo, that with respect to the committees that raise money from a lot of people, and then spread it around to several candidates, that you have a responsibility to track that money from the time you get it until it goes to the candidate, would that present any problem to you?

Mr. HEMENWAY. You mean to us?

Senator PELL. To you as a committee.

Mr. HEMENWAY. Yes, of course. It presents problems.

Senator PELL. I don't see how it could be carried out myself.

I was wondering what your view is.

Mr. HEMENWAY. He was talking about earmarked contributions.

If anyone wanted to earmark a contribution through the National Committee for an Effective Congress, we would refuse the contribution.

We would consider that as a violation of the law.

We report all of our assets, and all of our expenditures in great detail.

The Secretary of the Senate sent us a letter some time ago saying there was nobody that reported in detail as the National Committee for an Effective Congress did.

Earmarking is one way, as was pointed out by other witnesses before this committee, of evading the spirit and the intent of the law.

Senator PELL. It is certainly, if they receive a letter containing a $100 contribution, and ask, "Please will you give this to Candidate Jones?" usually that committee will give to Candidate Jones?

Mr. HEMENWAY. Yes, usually.

Senator PELL. You feel this is a responsibility of the committee to track down and report that Mr. Smith's $100 went to Congressman Jones?

Mr. HEMENWAY. Yes, I think so.

Senator PELL. You would think so.

Mr. HEMENWAY. Yes, I think so, absolutely.

Senator PELL. You believe that could be enforced?

Mr. HEMENWAY. I think it would be extremely difficult, as pointed out by Mr. Hughes and Mr. Valeo.

Senator PELL. Another point I think should be brought to the public's attention is the disgraceful manner in which the Government has handled the dollar tax check-off provision.

When you try to make out your income tax, you don't find it, and, again, in my own personal experience as chairman of this subcommittee, when my accountant prepared my return, he had not even taken the trouble to do it.

I am wondering how many other people do not do it because the executive branch made a decision that this program will fail, and made it as hard to do as possible.

Mr. HEMENWAY. As you say, the lack of public education by the Government as to this very important innovation to finance presidential campaigns has been shocking.

There has been very, very little. And as you know, the present forms you receive from the Internal Revenue Service require very careful reading to find the form which is required to check off a $1 contribution to presidential campaigns.

We have also found and learned in our investigation of this problem that companies like H. & R. Block, who assist taxpayers in filing many, many hundreds of thousands of tax returns, are charging 50 cents extra to fill out that form.

We have also discovered, that is, the information which I have about the early returns filed to date show that there is very, very minimum compliance by Americans, and I think this is a shocking thing.

Senator PELL. I guess you would support Senator Mondale's bill that insists it be on page 1 of the tax return.

Mr. HEMENWAY. Absolutely. It should be on the short form, and there should be widespread public education as to this bill and how it would change the financing of presidential politics.

Senator PELL. I thank you very much, and I congratulate your organization on what they have done to bring the spotlight of publicity and the right to know to our people, and I wish you well.

Mr. HEMENWAY. Thank you very much, Senator.

Senator PELL. Our final witness today is Mr. Fred Wertheimer, director of legislative activities for Common Cause, and he is accompanied by Mr. Kenneth J. Guido, Jr., who is the director of litigation.

Mr. Wertheimer.

STATEMENT OF FRED WERTHEIMER, DIRECTOR OF LEGISLATIVE ACTIVITIES FOR COMMON CAUSE, ACCOMPANIED BY KENNETH J. GUIDO, JR., DIRECTOR OF LITIGATION AND ASSOCIATE GENERAL COUNSEL TO THE SAME

Mr. WERTHEIMER. Mr. Chairman, I would like to read the entire statement into the hearing record.

Senator PELL. Proceed as you wish, Mr. Wertheimer.

Mr. WERTHEIMER. Mr. Chairman, I would like to thank you and the other members of the committee for providing Common Cause with the oportunity to testify this morning.

My name is Fred Wertheimer and I am the director of legislative activities for Common Cause.

With me today is Kenneth J. Guido, Jr., director of litigation and associate general counsel to Common Cause.

In 1971, this committee, under the leadership of Senator Howard Cannon, joined with the Senate Commerce Committee to play a critical role in enacting the Federal Election Campaign Act of 1971.

The passage of this historic legislation was the result of a true bipartisan effort in Congress.

Republicans and Democrats in both the House and Senate played key roles in bringing about its enactment.

In response to this legislation, Common Cause undertook a national effort in 1972 to monitor the financing of politcial campaigns.

Our monitoring program had two major goals: First, to help insure compliance with the new law; we wanted to help overcome the fact that no previous Federal campaign finance legislation had ever been enforced by the Government.

Second, to help insure public access during the course of the elections to the information being filed by candidates.

On March 7, 1973, John Gardner, chairman of Common Cause, summarized our experiences from the monitoring project in the course of testimony on S. 372 before the Communications Subcommittee of the Senate Commerce Committee.

I would like to submit his testimony to this committee for the record and to briefly review the Common Cause position he set forth on S. 372 now pending before this committee.

Senator PELL. Without objection, the testimony referred to will be inserted in the hearing record.

[The statement referred to above appears as exhibit 6 in appendix I of these hearings, on p. 149.]

Mr. WERTHEIMER. Mr. Gardner's schedule has kept him out of town. He regrets the fact that he cannot be here, and he sends you his regrets, Senator Pell.

Senator PELL. Thank you.

Mr. WERTHEIMER. Common Cause believes that with one national election now completed under the new law there are grounds for two fundamental conclusions.

First, we believe that the 1972 national experience has shown the unquestionable importance of the new law in making available information about campaign finances.

In that sense, we certainly agree with your statements today, Senator, that the act has been successful in placing the spotlight on the subject.

Second, we believe it has also demonstrated the need to move far beyond that law if the root evils of campaign financing are to be successfully eliminated.

Common Cause supports the concept of public financing of Federal elections.

Majority Leader Mansfield recently said:

> * * * I can think of no better application of public funds than, as necessary, to use them for the financing of elections so that public office will remain open to all, on an unfettered and impartial basis, for the better service of the Nation.

We agree completely with his statement.

Preliminary analysis of the campaign finance data we gathered reveals that incumbents in both the House and Senate were able to raise an average of twice as much as their major party challengers, during the 1972 elections.

We hope to have final figures on every race in the country sometime in the near future.

These preliminary figures illustrate the present disparity in funding which distorts the political process.

Mr. Gardner, in his testimony, outlined a number of basic ingredients for a public financing program, which included overall expenditure limits for each race, strict limits on individual contributions, such as $100 for House races, $250 for Senate races, and $500 for Presidential elections, and an end to all organized committee giving and all forms of pooling contributions, with the exception of political parties.

This committee presently has pending before it legislation introduced by Senator Philip Hart to provide for public financing of congressional elections.

The committee, in our view, could provide a great service by scheduling hearings on this legislation, thereby providing a much needed national forum for consideration of this subject.

Common Cause supports the concept of an overall limit on expenditures in a given race set forth in S. 372.

We believe, however, that expenditure ceilings should be imposed within the context of a program to provide for the public financing of elections.

We also believe that the limits in S. 372 need revision. The limits are presently so high as to not really make much difference in the immediate future for Senate races in the largest States.

For example, under S. 372, a candidate for Senate in New York could spend $3.2 million in the primary, and the same amount in the general election for a total of $6.4 million.

In Ohio it would be $1.8 million in the primary and again the general for a total of $3.6 million, and in Texas it would be $1.9 million in the primary and general each for a total of $3.8 million.

Additionally, we agree with the point raised during the Commerce Committee hearings, that the overall limits are too low for Senate races in the least populous States and that a bottom floor on the limits might be needed.

Common Cause also endorsed in the March hearing the repeal of the equal-time provision both for presidential and for congressional elections, a recommendation made in part by S. 372 and in full by S. 1094 now pending before this committee.

This committee now has pending before it a number of proposed amendments to the 1971 campaign finance law.

In our opinion, without doubt, the single most important change needed is the creation of an independent Federal elections commission with its own powers of subpena and enforcement.

It is our belief that nothing less than the ultimate success or failure of the 1971 law hinges on whether Congress acts to establish an independent oversight and enforcement body.

We strongly support the commission proposal sponsored by Senator Hugh Scott, and Senators Mathias and Stevenson, and urge that this committee report it favorably for Senate consideration.

We also favor the proposal of Congressman John Anderson, referred to earlier by Mr. Hughes, dealing with the question of how the commission members will be chosen.

This is an area where the Congress and the executive branch each have their own stake in the jurisdiction of the commission and it seems to make a lot of sense to consider having executive branch appointment, and congressional appointment and GAO appointment to the makeup of the commission.

Under present circumstances, jurisdiction to oversee and enforce campaign finance legislation is split among three different supervisory officers and the Justice Department.

In the case of the supervisory officers, not only is this an inefficient, confusing, and burdensome method of doing business, it has also been obvious from the outset that the Clerk of the House and Secretary of the Senate were faced with inherent and impossible conflicting pressures in trying to oversee the activities of their own employers.

No better evidence of this can be cited than the amazing procedures established by the House in 1972 to prevent the Clerk from carrying out his statutory enforcement responsibilities.

The 1971 act mandates the three supervisory officers to investigate complaints and to report apparent violations of law to the appropriate law enforcement authorities.

It provides no role in this enforcement process for Members of the House or the Senate, for very obvious reasons.

Yet in an incredible maneuver which went completely unnoted the House last year established a procedure which required the Clerk to obtain prior approval from a special House committee for violations he wanted to forward to the Justice Department.

Thus, by means of the special committee to investigate campaign expenditures, the House itself has assumed absolute control over an enforcement process which the new law vested solely in the Clerk of the House.

While the committee authorized the Clerk to automatically forward all violations dealing with late filings or nonfilings, complaints dealing with other kinds of violations had to be submitted to the House committee for approval.

Creation of the screening process, which prevents complaints from being sent directly from the Clerk of the House to the Justice Department for action, it is not provided for in the law, causes undue delay, and, most regrettably, it gives control of the enforcement process to a handful of persons who themselves are subject to the act.

Regardless of the integrity and fairmindedness of the Congressmen serving on the special committee, the inherent conflict and the natural suspicion that they will be less than zealous in their enforcement duties can only undercut the effectiveness of the act.

Moreover, when, as during this past year, the committee recommends that the Clerk refer to the Justice Department only 1 of 30 complaints it has received from the Clerk or other sources, further questions as to the fairness and thoroughness of the committee's work are inevitable.

On the Senate side the Secretary of the Senate limited his enforcement prior to March 30, 1973, to violations of filing dates and deadlines.

It was not until 2 weeks ago, almost 5 months after the election, that the Secretary's office undertook to identify more significant types of violations.

We realize the difficulties involved in implementing a new law at the outset, and we found the three supervisory officers extremely cooperative with us during our 1972 campaign monitoring project. Nevertheless, it is clear as can be that there is no legitimate justification either for this tripartite arrangement, or for the Clerk or the Secretary being involved in the supervisory process.

The Justice Department, to put it simply, did nothing to enforce the new law and there is absolutely no reason to believe this will change at any time in the future.

In this sense, the present Department is no different than past Departments of Justice, none of whom have ever enforced campaign finance laws.

We find it unfair to those people who do comply with the law to be faced with the fact that the people not complying with the act are not subjected to public exposure of their finances and in no way suffer any consequences for failure to comply.

This creates an unfair situation for people meeting their obligations.

Senator PELL. You feel that disclosure should apply to both the executive branch and to Congress?

Mr. WERTHEIMER. I was making the point, that when somebody files his report on time and makes his information available, and then another individual does not file his report on time, and nothing is done about it, the nonfiler gets a free ride, while the individual who has obeyed the law carries the burden of complying with it.

During 1972, the Clerk of the House alone forwarded 4,900 complaints to the Justice Department regarding improper filing of records.

The Department chose to act on only three of them. With respect to the rest, no word has ever reached the public from either the Clerk or the Department of Justice as to who acted improperly, and what steps were taken, if any, to remedy it.

We would urge this committee to call upon the Justice Department for a comprehensive report as to the status and disposition of the remaining cases.

It should be clear furthermore, that this is not a case where filing criminal suits was the only alternative available to the Justice Department to bring about compliance.

The 1971 law clearly provides the Department with civil enforcement powers regarding the disclosure provisions thereby allowing them to use this less stringent remedy as a means of achieving compliance.

As far as we know, however, the Justice Department made no practical use of this alternative remedy.

When the campaign finance law originally passed the Senate in 1971, it contained a provision sponsored by Senator Pearson, to create an independent elections commission to oversee the new law.

This provision, adopted by an 89–2 vote in the Senate, was rejected by the House, and eventually killed in conference.

Last Friday, the new law celebrated the first anniversary of its effective date with the sorry history of Government nonenforcement left virtually intact.

Should this record continue in the future, we believe it is fair to expect that the historic 1971 act will go the same route as the 1925 Corrupt Practices Act, and become nothing more than a charade.

During 1972 Common Cause undertook a number of efforts designed to make candidates aware that someone was concerned about whether they were complying with the new law.

We filed hundreds of complaints with the Clerk of the House last spring and summer regarding late filing and no filing violations—to this day we have never heard a word from the Clerk about any of them.

We made public numerous instances of improper filings and other violations of the law.

We filed lawsuits designed to achieve compliance with key provisions of the new law.

We believe our efforts were helpful in creating some semblance of enforcement. We intend to continue these efforts for as long as the appropriate Government authorities fail to carry out their clearly delegated responsibilities.

But we are well aware that what is desperately needed today is a Government body that has the power, the ability, and the commitment to enforce this legislation.

We believe it is critical, therefore, that any new commission have the powers to investigate, to subpena, and to go to court to enforce violations; powers that are set forth in the Scott proposal.

While we agree, furthermore, with the Scott proposal's provision authorizing and encouraging the use of GAO personnel to help carry out the commission's mandate, we would strongly urge that the same authorization for Justice Department involvement be deleted from the proposal.

In the light of the past history of total Justice Department failure in this field, under Democratic and Republican administrations alike, we think it would be a terrible mistake to give the Department any significant role to play in an independent elections commission.

The enforcement of election laws must be removed from the influences of partisanship.

Establishing a system which inherently contains even the possibility of collusion between those who enforce the laws and those who must comply with them is enough to undermine the effectiveness of the laws and to provide an already skeptical public with further reasons for skepticism.

Regarding the enforcement issue, we would also recommend that the penalty provisions of the act be broadened to allow for much greater use of civil remedies.

This should include, as an available alternative to criminal penalties, the ability to impose heavy civil fines up to $100,000 for violations of the act, and the right to impose these fines jointly on both candidates and the committee established to support them.

It should also include specific authority to bring civil injunctive actions regarding violations of any of the provisions of the 1971 act.

In addition, we believe that an important deterrent to undisclosed campaign finance activities can be established by making cash transactions during the course of political campaigns illegal exempting transactions of $100 or less.

There is simply no justification in our opinion for permitting cash to be used in political campaigns.

Substantial cash gifts have been used to circumvent campaign finance laws, to hide public association of donors with their chosen candidates, and to conceal the true purposes for which expenditures have been made.

We recognize that a bar to cash transactions will not stop every instance of cash being used as a means to evade public knowledge of the financing of political campaigns.

We believe, however, that making such cash transactions in and of themselves a crime will significantly help to bring these sordid practices under control.

As I have mentioned before, Common Cause also supports strict limits on the amounts that individuals can contribute to campaigns,

and an end to organized committee giving and other fund pooling arrangements.

We believe such steps are necessary to eliminate the enormous access and influence that moneyed groups and individuals are presently able to obtain as a result of campaign contributions.

Individual limits, furthermore, should specifically encompass gifts to a candidate plus all of his supporting committees, and should cover the entire period of candidacy, including primary, special, and general elections.

The effectiveness of the disclosure provisions of title 2 could be greatly improved we believe, by adopting the requirement of a single reporting committee for each candidate, a recommendation set forth in S. 1094.

The use of multiple committees by a candidate under the present law makes it extremely difficult and sometimes almost impossible to get a true picture of the candidate's financial activities during the course of the election.

During our monitoring project, literally thousands of hours were spent combining the reports of candidates and their various committees, factoring out transfers, and cross-checking contributions and expenditures, in order to be able to determine what the actual financial picture was for each candidate.

A single reporting committee would not require the elimination of all other committees but would rather establish a central bookkeeping committee for purposes of filing reports and making a clear comprehensive disclosure to the public.

It would also substantially reduce the paperwork in terms of the number of reports required to be filed under the act by candidate finance committees.

We believe that the requirement for periodic quarterly disclosure reports is an important and necessary provision and should be continued if the financial information involved is to reach the public in any meaningful manner during the course of an election.

We agree with the Scott bill that moving the reporting dates back 1 month to April, July, and October 10 would be beneficial, particularly in light of the extremely heavy campaign finance activities which occur in September and October.

While we also agree with those who believe that 15- and 5-day preprimary reports may be too burdensome, we believe it would be a serious mistake to establish one 10-day preelection report as a substitute.

Our experience during the 1972 elections, particularly during the November general election, showed that a 10-day preelection filing requirement simply will not provide enough time for analysis and dissemination of the disclosures on a systematic basis for candidates.

We therefore would suggest that if only one preelection report is to be required, it be due 15 days before the election and that it be balanced by requiring telegram notification within 24 hours to the supervisory officer of all individual contributions or expenditures of $1,000 or more during the last days of the election.

We also believe that in order to assure that these critical reports are received on time, the law should be amended to specifically require all reports to be postmarked by registered airmail no later than

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5 days before their due date, and that the reports cover the period ending 2 days prior to the mailing.

One of the most important provisions of the 1972 act was the requirement to list occupation and principal place of business for each contributor giving more than $100.

This provision adds a vital dimension to the law which is invaluable in making public disclosure legislation a meaningful concept.

A major purpose of campaign finance disclosure laws is to inform the voting public about who the financial backers are for each candidate.

The occupation requirement provides information essential to carrying out this goal.

The record of compliance with this provision in 1972 was mixed. In many cases the information was partially or totally absent from the reports.

But in other cases, practically complete information on occupation and principal place of business was recorded by candidates on their disclosure reports.

What is quite clear from the 1972 experience is that this important provision can be complied with by someone motivated to do so.

We believe that those who do supply this vital information in their reports should not be penalized for complying with the law by allowing their opponents to avoid filing the same information.

We recommend, therefore, that the law be amended to provide that any contribution over $100 received by a candidate or political committee must be returned within 5 days unless it is accompanied by the donor's organization and principal place of business.

The definition of "political committee" in the act apparently has caused some confusion regarding its application in off-year elections.

We believe it is important to make clear that the original contributors of funds must be identified in periodic committee reports in any case where funds are being raised by a committee for eventual use in an election, or in any case where funds raised for nonelection purposes are eventually transferred to a committee for the purpose of being used in an election.

Unless this kind of position is maintained, the possibility exists that we will face the 1974 elections with the same type of prefiling disclosure problem that resulted in 1972 when substantial sums were raised by many candidates prior to April 7 and their actual backers were then never publicly identified.

We believe that the requirement to file duplicate copies of Federal reports at State capitols has been extremely valuable to the public dissemination of campaign finance information.

It was our experience that substantial use of these reports in 1972 was made by State and local media representatives, and local citizens and groups who otherwise would have lacked direct access to this information about their hometown representatives.

In the case of our monitoring project, Common Cause members throughout the country dealt directly with their local secretaries of state in obtaining the reports for analysis and dissemination.

We would urge the committee not only to support continuation of this key provision, but also to consider providing financial assistance

to the secretaries of state to assist them in carrying out the time-consuming but important responsibilities delegated to them.

It is our view that the decision in the 1971 act to permit banks to make loans to candidates and their political committees was a serious mistake which should be corrected.

The enormous resources available to banks provide them with unique opportunities to play an undue influence in political campaigns.

There is no escaping the fact, furthermore, that loans have the effect of building up even greater obligations on the part of candidate recipients than direct contributions.

Not only does a candidate wind up politically in debt in the case of loans, he winds up legally in debt, as well.

In the 1972 election, furthermore, the First National Bank of Boston made substantial loans to finance committees of both major party candidates in the 12th Congressional District of Massachusetts.

Gerry Studds, the eventual Democratic winner, received loans totaling $15,000 from First National, while William Weeks, his Republican opponent, received $49,000 in loans from the same bank.

We would urge that banks be specifically prohibited from making loans for political purposes.

We believe that a number of simple improvements could be made in the implementation of the law by conducting a full public review of the regulations which have been promulgated.

For example, with a full year's experience now, we think that the forms originally adopted might be significantly simplified thereby benefiting both those who have to fill them out, and those who want to examine them.

In addition, the establishment of more uniform methods for identifying contributors could help deal with the problems caused by contributors being identified in different ways on different reports.

We would recommend that such a full-scale review of the regulations be encouraged by this committee.

In conclusion, we believe that the Federal Election Campaign Act has provided the voting public with vital information never before attainable, that the act's continued success directly depends on the establishment of an independent elections commission, and that what is really needed to eliminate the evils of campaign financing is a system for public financing of Federal elections.

We have listed a group of proposals, Senator, and I would like to touch on some of them at this point.

We, like Mr. Hughes, would favor a broadening of remedies under the law to allow civil penalties, with fines up to as much as $100,000 per violation, in addition to criminal penalties, to provide broader flexibility for enforcement.

We would urge, along with the others today, that a single reporting committee be established as a means of expediting and making the information more available to the public and simplifying the filing process with respect to Congress.

We would urge that a requirement be enacted which provides all contributions over $100 received by a candidate or committee be returned within 5 days unless accompanied by the donor's original and principal place of business and donor's occupation.

This we believe is a very important provision in the act.

Compliance with it was mixed. Many people partially complied or did not comply at all while others were able to comply very well.

We think if the motivation is there, compliance can be achieved and again this is a case where somebody who does supply the information is put in an unfair position if the people who do not comply are not forced to meet the same requirement.

We feel very strongly that cash transactions during the course of political campaigns should be made illegal, exempting transactions of $100 or less, for the same reasons that Mr. Hughes has pointed out.

We support the continuation of State filings with the Secretary of State.

We consider this a very important provision. Our experience was that great use of this provision was made by local citizens and groups, and local media. It provided them with information they never would have had access to otherwise, and we would urge this committee to consider recommendation for some financial assistance to the secretaries to carry out these time-consuming responsibilities.

Finally, we would urge that whatever efforts are necessary be made to make clear that regarding the definition of political committees, original contributors must be identified if funds are being raised for eventual campaign use. What we are referring to here is the problem of the operation of political committees in off year elections.

If funds are going to be raised in off year elections, which eventually become political campaign funds, we believe that it must be made clear that the original individual contributors have to be identified. Otherwise you will be faced with the same problems we were faced with in 1972 when the law went into effect on April 7 and pre-April 7 contributors were not disclosed to the public.

Let me just refer in closing to some comments the Secretary of the Senate made.

First of all, he seemed to make the statement that there was little public interest in the information about nonfilings, or late filings being made available to the public.

We think there is great public interest in that information and that its public disclosure is very necessary to achieve compliance with the law. Again we have the same issue of unfairness to those who have complied.

The Secretary of the Senate also raised the question of the earmarking lawsuit that we have pending in the courts right now, and as he mentioned, we are not in a position to discuss the merits of that case since it is before the court.

I would point out, though, that we first initiated our concern and raised questions about the problems of earmarking with the supervisory offices on August 1, 1972.

We did not take any legal action until December 1972, some 5 months later after no action had been forthcoming.

It is now April, some 9 months later and there has still been no action forthcoming to deal with what we consider a very serious problem.

Under those circumstances, we do not feel we have acted hastily. No one has yet come to talk to us about proposing a specific regulation which would actually deal with the problem. We are ready in terms of our lawsuit and always have been to discuss this kind of question. Nobody has approached us.

In conclusion, let me add, that as everyone in the room knows, this committee has played a vital role in recent years, in the area of campaign finance legislation.

We look forward to a continuation of that role by the committee and to the opportunity to work with you, Senator Pell, and with the rest of the members of the committee in the continuation of the remarkable steps that have been initiated so far.

Thank you.

Senator PELL. Thank you very much.

As you know, I believe my dues are up to date. I am a member of your organization and it has great potential for good.

I believe you should be evenhanded in your approach to the executive branch, as well as to the legislative, and in my own experience, in my own campaign, Common Cause was not as evenhanded as it might have been in its views.

Mr. WERTHEIMER. We are aware of your views on this matter, Senator.

Senator PELL. Nevertheless, I think on a national basis, your organization is very much an organization in the public weal. What is your view in regard to moving election day from the beginning of November to the beginning of October?

Mr. WERTHEIMER. We haven't taken a position one way or the other on that.

We do think that it is a complicated question that does not deal with just the questions of campaign financing.

We don't think it is particularly clear that moving the election to October will cut down on the costs of elections, if the whole process just moves back 1 or 1½ months.

Senator PELL. You don't feel Labor Day is a natural takeoff date?

Mr. WERTHEIMER. That might not be. It may not happen. People may rather decide that they better get started 2 months before an election, whether it is September for November 3 or August for an early October election. It may be concluded that it is politically necessary to put in that amount of time, in which case you will not have dealt with the basic question of reducing the cost of campaign financing.

Senator PELL. What is your view in regard to the advisability, before moving into new fields or new territories, of trying to make this law as simple and as responsive to the public and to groups like yours and to see if the hot light of publicity might not act as a control over the amounts of funds that are given?

Mr. WERTHEIMER. Senator, first of all, we do agree that this law should be made as effective as possible, and I have tried to give some recommendations with respect to this law which we think would help do it.

Second of all, we recognize that the area of public financing of elections is a complex area. No one claims it is an easy or a simple question.

We believe, however, it is an issue which Congress should begin exploring now.

Our own experience during the past year has been that while the public disclosure laws did make the process of campaign financing a little more painful and brought more attention to it, disclosure has not as a general proposition cut down on the kinds of large sums

going to candidates and the extent to which groups and individual contributors put extremely large amounts into a campaign.

We seriously question whether public disclosure itself will ever cut down on the amount of money involved; which is not in any way to say that the public disclosure laws have not been very effective and important.

Senator PELL. My own view would differ a little bit on that, because I recall potential contributors who would have been delighted to contribute, if they did not appear on the list, no reason of immorality at all, but they just did not want to be listed, and I think this has had the effect of reducing the total number of contributions.

Mr. WERTHEIMER. I am sure that may be true in individual cases.

I think as a general proposition, however, it probably will not significantly cut down the amounts of money; it certainly has not prevented large groups from putting extremely large amounts of money into the political process.

Senator PELL. You then believe that this referral by the enforcement groups to the Justice Department, enforcing officers, should be made a matter of public record?

Mr. WERTHEIMER. Either the referrals should be made a part of the public record, or the Justice Department actions should be made a matter of public record.

You are faced with this situation today, Senator. The Secretary of the Senate has said that he sent over a number of apparent violations to the Department of Justice, which the Secretary has decided not to make public, because he feels it is a decision of the Justice Department whether or not they should be made public.

The Justice Department on the other hand has not made the information public, and therefore nobody will make this information available. There is really no way to know who violated the law and what remedies, if any, were taken.

We know that no court action was taken by the Justice Department. But what other steps were taken and who the violators were is a secret from the public.

The information is buried away.

Senator PELL. Maybe we should insist that the Justice Department move expeditiously on the different cases sent to them—either take action or dismiss them as being insignificant.

Mr. WERTHEIMER. I really think it would be appropriate for this committee to call upon the Justice Department, to explain its procedures, the steps it has taken in the past year and what it plans to do now.

As I say, no one has been able to find out what the process is, or what has happened to these complaints.

In the case of the Clerk of the House, the Clerk of the House has sent 4,900 complaints over there.

Senator PELL. I think that is a very good suggestion, and I would ask the counsel of the committee if he would be kind enough to do his best to ascertain from the Justice Department what the procedure is, and put it in writing, if they won't respond verbally. We may get no response. So far the executive branch has not been terribly responsive to the Congress. We would hope this would be one of those exceptions where they would comply.

All right.

I thank you very much indeed.

The record will remain open for receipt of any additional statements for at least 1 week.

I must express my regret that neither the Attorney General nor the chairman of either of the major political parties have seen fit to come up here and testify on this matter.

We hope we will have a statement from the Attorney General, but, we have had no specific indications from either of the national chairmen.

We would hope to have one.

The subcommittee will stand adjourned, subject to the call of the Chair.

[Whereupon at 10 a.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX I

(Hearings Before the Subcommittee on Privileges and Elections)

The texts of the bills S. 23, S. 343, S. 372, S. 1094, S. 1189, S. 1303, and S. 1355, relating to Federal election reform and the subject of these hearings are as follows:

EXHIBIT 1A

93D CONGRESS
1ST SESSION

S. 23

IN THE SENATE OF THE UNITED STATES

JANUARY 4, 1973

Mr. HARRY F. BYRD, JR., introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

A BILL

To limit the amount of personal funds an individual may contribute to candidates for Federal office in connection with the campaigns of those candidates.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 608 of title 18, United States Code, is amended by—

(1) redesignating subsections (a), (b), and (c) as (b), (c), and (d), respectively, and

(2) inserting after the title of the section the following new subsection (a):

"(a) No person shall make contributions in excess of $25,000 from his personal funds to, or for the benefit of, any candidate in connection with that candidate's campaign for nomination for election, or election, to Federal office."

EXHIBIT 1B

93D CONGRESS
1ST SESSION

S. 343

IN THE SENATE OF THE UNITED STATES

JANUARY 12, 1973

Mr. ROBERT C. BYRD introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

A BILL

To designate the Tuesday next after the first Monday in October as the day for Federal elections.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 25 of the Revised Statutes, as amended (2 U.S.C. 7), is amended to read as follows:

"SEC. 25. The Tuesday next after the first Monday in October of every even-numbered year is established as the day for the election of Representatives to the Congress commencing on the 3d day of January next thereafter. This section shall not apply to any State that has not changed its day of election of State officers, and whose constitution must be amended in order to effect a change in the day of the election of State officers in that State.".

(b) The text of section 1 of title 3, United States Code, is amended to read as follows:

"The electors of the President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in October in every fourth year succeeding every election of a President and Vice President.".

EXHIBIT 1C

93D CONGRESS
1ST SESSION

S. 372

IN THE SENATE OF THE UNITED STATES

JANUARY 16, 1973

Mr. PASTORE introduced the following bill; which was read twice and referred to the Committee on Commerce

JANUARY 23, 1973

Referred to the Committees on Commerce and Rules and Administration, jointly, with instructions

A BILL

To amend the Communications Act of 1934 to relieve broadcasters of the equal time requirement of section 315 with respect to presidential and vice presidential candidates and to amend the Campaign Communications Reform Act to provide a further limitation on expenditures in election campaigns for Federal elective office.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Election Campaign Act of 1973".

SEC. 2. Section 315(a) of the Communications Act of 1934 (47 U.S.C. 315(a)) is amended by inserting after "public office" in the first sentence thereof the following: ", other than the office of President or Vice President,".

II—O

SEC. 3. (a) Section 102 (1) of the Campaign Communications Reform Act is amended to read as follows:

"(1) The term 'expenditure' means—

"(A) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a National or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, or those who volunteer to work on behalf of a candidate), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(B) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(C) a transfer of funds between political committees."

(b) Section 102 (5) of the Campaign Communications

Reform Act is amended by inserting the following before the period: ", as determined by the Bureau of the Census as of the 1st day of June of the year preceding the year of the election".

SEC. 4. Section 104 of the Campaign Communications Reform Act is amended to read as follows:

"LIMITATION ON EXPENDITURES

"SEC. 104. (a) No candidate (other than a candidate for presidential nomination) may make expenditures in connection with his campaign for nomination for election, or election, to a Federal office in excess of 25 cents multiplied by the voting age population (as certified under subsection (e)) of the geographical area in which the election for such office is held. The limitation on expenditures imposed by this subsection shall apply separately to each primary, primary runoff, general, and special election campaign in which a candidate participates.

"(b) No candidate for presidential nomination may make expenditures in any State in connection with his campaign for such nomination in excess of the amount which a candidate for nomination for election as United States Senator from that State (or for election as Delegate or Resident Commissioner in the case of the District of Columbia or the Commonwealth of Puerto Rico, respectively) might expend within the State in connection with his campaign for that

nomination. For purposes of this subsection, an individual is a candidate for presidential nomination if he makes (or any other person makes on his behalf) an expenditure on behalf of his candidacy for any political party's nomination for election to the office of President. He shall be considered to be such a candidate during the period—

"(1) beginning on the date on which he (or such other person) first makes an expenditure (or, if later, on January 1 of the year in which the election for the office of President is held), and

"(2) ending on the date on which such political party nominates a candidate for the office of President. For purposes of this title and of section 315 of the Communications Act of 1934, a candidate for presidential nomination (as determined under the preceding sentence) shall be considered a legally qualified candidate for public office.

"(c) Expenditures made on behalf of any candidate shall, for the purpose of this section, be deemed to have been expended by such candidate. Expenditures made on behalf of any candidate for the office of Vice President of the United States shall, for the purpose of this section, be deemed to have been made by the candidate for the office of President of the United States with whom he is running.

"(d) (1) For purposes of paragraph (2):

"(A) The term 'price index' means the average

over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics.

"(B) The term 'base period' means the calendar year 1970.

"(2) At the beginning of each calendar year (commencing in 1974), as there becomes available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Attorney General and publish in the Federal Register the per centum difference between the price index for the twelve months preceding the beginning of such calendar year and the price index for the base period. Each amount determined under subsection (a) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

"(e) Within sixty days after the date of enactment of this subsection, and during the first week of January 1974, and every subsequent year, the Secretary of Commerce shall certify to the Comptroller General and publish in the Federal Register an estimate of the voting age population of each State and congressional district as of the 1st day of June next preceding the date of certification.

"(f) No person shall make any charge for services or products furnished to, or for the benefit of, any candidate in

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connection with his campaign for nomination for election, or election, in an amount in excess of $100 unless the candidate (or a person specifically authorized by the candidate in writing to do so) certifies in writing to the person making the charge that the payment of that charge will not exceed the expenditure limitations set forth in this section.

"(g) The Comptroller General shall prescribe regulations under which any expenditure by a candidate for presidential nomination for the use in two or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the number of persons in such State who can reasonably be expected to be reached by such expenditure."

SEC. 5. Section 105 of the Campaign Communications Reform Act is amended to read as follows:

"REGULATIONS

"SEC. 105. The Comptroller General shall prescribe such regulations as may be necessary or appropriate to carry out sections 102, 103 (b), and 104 of this Act."

SEC. 6. Section 106 of the Campaign Communications Reform Act is amended to read as follows:

"PENALTIES

"SEC. 106. Whoever willfully and knowingly violates any provision of section 103 (b) or 104 or any regulation under section 105 shall be punished by a fine of not more

than $5,000 or by imprisonment of not more than five years, or both."

SEC. 7. Subsections (c), (d), (e), and (f) of section 315 of the Communications Act of 1934 are repealed and subsection (g) of such section is redesignated as subsection (c).

EXHIBIT 1D

93D CONGRESS
1ST SESSION

S. 1094

IN THE SENATE OF THE UNITED STATES

MARCH 6, 1973

Mr. SCOTT of Pennsylvania (for himself, Mr. MATHIAS, and Mr. STEVENSON) introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

A BILL

To improve the regulation of Federal election campaign activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Federal Election Campaign Act Amendments of 1973".

(b) Except as otherwise expressly provided, whenever in this Act a reference is made (by way of amendment, repeal, or otherwise) to a section, title, or other provision, the reference shall be considered to be made to a section, title, or other provision of the Federal Election Campaign Act of 1971.

ESTABLISHMENT OF A COMMISSION; CENTRAL CAMPAIGN COMMITTEES

SEC. 2. (a) Title III (relating to disclosure of Federal campaign funds) is amended by redesignating sections 308 through 311 as sections 311 through 314, respectively, and by inserting after section 307 the following new sections:

"ESTABLISHMENT OF COMMISSION

"SEC. 308. (a) There is hereby established, as an independent establishment of the executive branch of the Government of the United States, a commission to be known as the Federal Elections Commission, which shall be composed of six members, not more than three of whom shall be members of the same political party, who shall be chosen from among persons who, by reason of maturity, experience, and public service have attained a nationwide reputation for integrity, impartiality, and good judgment, are qualified to carry out the functions of the Commission and shall be appointed by the President, by and with the advice and consent of the Senate. Two of the original members shall be appointed for terms of two years, two for terms of four years, and two for terms of six years, beginning from the date of enactment of this Act, but their successors shall be appointed for terms of six years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member

whom he shall succeed. The President shall designate one member to serve as Chairman of the Commission and one member to serve as Vice Chairman. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office.

"(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and four members thereof shall constitute a quorum.

"(c) The Commission shall have an official seal which shall be judicially noticed.

"(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the money it has disbursed; and shall make such further reports on the matters within its jurisdiction and such recommendations for further legislation as may appear desirable.

"(e) Members of the Commission shall, while serving on the business of the Commission, be entitled to receive compensation at a rate fixed by the Director of the Office of Management and Budget but not in excess of $125 per day, including traveltime; and while so serving away from their homes or regular places of business they

may be allowed travel expenses, included per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code.

"(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place.

"(g) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

"(h) The Commission shall appoint an Executive Director without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, to serve at the pleasure of the Commission. The Executive Director shall be responsible for the administrative operations of the Commission and shall perform such other duties as may be delegated or assigned to him from time to time by regulations or orders of the Commission. However, the Commission shall not delegate the making of regulations regarding elections to the Executive Director.

"(i) The Chairman of the Commission shall appoint and fix the compensation of such personnel as it is deemed necessary to fulfill the duties of the Commission in accordance with the provisions of title 5, United States Code.

"(j) The Commission may obtain the services of experts and consultants in accordance with section 3109 of title 5, United States Code.

"(k) In carrying out its responsibilities under this title, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities, of the General Accounting Office and the Department of Justice. The Comptroller General and the Attorney General are authorized to make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

"POWERS OF COMMISSION

"SEC. 309. (a) The Commission shall have the power—

"(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine;

"(2) to administer oaths;

"(3) to require by subpena the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

"(4) in any proceeding or investigation to order testimony to be taken by deposition before any person

who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

"(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

"(6) to accept gifts and voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes (31 U.S.C. 665 (b));

"(7) to initiate, prosecute, defend, or appeal any court action in the name of the Commission for the purpose of enforcing the provisions of this title through its own legal representative; and

"(8) to delegate any of its functions or powers, other than the power to issue subpenas under paragraph (3), to any officer or employee of the Commission.

"(b) Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission, in case of refusal to obey a subpena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance therewith; and

any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(c) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

"(d) (1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

"(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

"CENTRAL CAMPAIGN COMMITTEES

"SEC. 310. (a) Each candidate shall designate one political committee as his central campaign committee. The central campaign committee shall receive all reports made by any other political committee accepting contributions or

making expenditures for the purpose of influencing the nomination for election, or election, of the candidate who designated it as his central campaign committee. No political committee may be designated as the central campaign committee of more than one candidate.

"(b) Notwithstanding any other provision of this title, each statement or report that a political committee is required to file with or furnish to the Commission under this title shall, if that political committee is not a central campaign committee, be furnished instead to the central campaign committee for the candidates on whose behalf that political committee is, or is established for the purpose of, accepting contributions or making expenditures.

"(c) Each political committee which is a central campaign committee shall receive all reports and statements filed with or furnished to it by other political committees, consolidate, and furnish the reports and statements to the Commission, together with its own reports and statements, in accordance with the provisions of this title and regulations prescribed by the Commission."

(b) Section 5316 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(132) Executive Director, Federal Elections Commission."

(c) Upon the appointment of all the members of the Commission, the Comptroller General, the Secretary of the Senate, and the Clerk of the House of Representatives shall meet with the Commission and arrange for the transfer, within thirty days after the date on which all such members are appointed, of all records, documents, memorandums, and other papers associated with carrying out their responsibilities under title III as it existed on the day before the date of enactment of this Act.

(d) Title III is amended by—

(1) amending section 301 (g) (relating to definitions) to read as follows:

"(g) 'Commission' means the Federal Elections Commission;";

(2) striking out "supervisory officer" in section 302 (d) and inserting "Commission";

(3) amending section 302 (f) (relating to organization of political committees) by—

(A) striking out "appropriate supervisory officer" in the quoted matter appearing in paragraph 1 and inserting "Federal Elections Commission";

(B) striking out "supervisory officer" in subparagraphs (A) and (B) of paragraph (2) and inserting "Commission";

(C) striking out "which has filed a report with

him" in paragraph (2) (A) and inserting "which has filed, or for which a report has been filed by a central campaign committee, with it";

(4) amending section 303 (relating to registration of political committees; statements by—

(A) striking out "supervisory officer" each time it appears therein and inserting "Commission";

(B) striking out "he" in the second sentence of subsection (a) of such section and inserting "it"; and

(C) by adding at the end thereof the following new subsection:

"(e) In the case of a political committee which is not a central campaign committee, reports and notifications required under this section to be filed with the Commission shall instead be filed with the appropriate central campaign committee, in accordance with regulations prescribed by the Commission under section 310.";

(5) amending section 304 (relating to reports by political committees and candidates) by—

(A) striking out "appropriate supervisory officer" and "him" in the first sentence thereof and inserting "Commission" and "it", respectively;

(B) striking out "supervisory officer" where it appears in the second sentence of subsection (a) and in paragraph (13) of subsection (b), and inserting "Commission"; and

(C) adding at the end of subsection (a) the following new sentence: "Each treasurer of a political committee other than a central campaign committee shall file the reports required under this section with the appropriate central campaign committee, in accordance with regulations prescribed by the Commission under section 310.";

(6) striking out "supervisory officer" each place it appears in section 305 (relating to reports by others than political committees) and section 306 (relating to formal requirements respecting reports and statements) and inserting "Commission";

(7) striking out "Comptroller General of the United States" and "him" in section 307 (relating to reports on convention financing) and inserting "Federal Elections Commission" and "it", respectively;

(8) striking out "SUPERVISORY OFFICER" in the caption of section 311 (as redesignated by subsection (a) of this section) (relating to duties of the supervisory officer) and inserting "COMMISSION";

(9) striking out "supervisory officer" in section 311 (a) (as redesignated by subsection (a) of this section the first time it appears and inserting "Commission";

(10) amending section 311 (a) (as redesignated by subsection (a) of this section) by—

(A) striking out "him" in paragraph (1) and inserting "it or a central campaign committee";

(B) striking out "him" in paragraph (4) and inserting "it"; and

(C) striking out "he" each place it appears in paragraphs (7) and (9) and inserting "it";

(11) amending subsection (c) of section 311 (as redesignated by subsection (a) of this section) by—

(A) striking out "Comptroller General" each place it appears therein and inserting "Commission", and striking "his" in the second sentence of such subsection and inserting "its"; and

(B) striking out the last sentence thereof;

(12) amending subsection (d) (1) of section 311 (as redesignated by subsection (a) of this section) by—

(A) striking out "supervisory officer" each place it appears therein and inserting "Commission";

(B) striking out "he" the first place it appears

in the second sentence of such section and inserting "it"; and

(C) striking out "The Attorney General on behalf of the United States" and inserting "The Commission or the Attorney General on behalf of the United States"; and

(13) striking out "a supervisory officer" in section 312(a) (as redesignated by subsection (a) of this section) (relating to statements filed with State officers) and inserting "the Commission".

(e) The Campaign Communications Reform Act is amended by striking out "Comptroller General" where it appears in paragraphs (3)(C), (4)(B), and (5) of section 104(a), and in section 105, and inserting in lieu thereof "Federal Elections Commission".

AMOUNTS TO BE REPORTED

SEC. 3. (a) Section 302 (relating to organization of political committees) is amended by—

(1) striking out "in excess of $100 in amount" in subsection (d) and inserting "of $100 or more"; and

(2) inserting "equals or" before "exceeds" in subsection (d).

(b) Section 304 (relating to reports by political committees and candidates) is amended by—

(1) striking out "$5,000" in subsection (a) and inserting "$2,500"; and

(2) striking out "in excess of $100" each place it appears in subsection (b) and inserting "of $100 or more".

(c) Section 305 (relating to reports by others than political committees) is amended by striking out " in excess of $100" and inserting "of $100 or more".

(d) Section 311(a)(7) (as redesignated by section 2(a) of this Act) is amended by striking out "in excess of $100" and inserting "$100 or more".

TIME OF REPORTING

SEC. 4. (a) Section 302(f)(2) (relating to publication of annual reports) is amended by striking out "March 10" and inserting "April 10".

(b) Section 304(a) (relating to time of reports) is amended by—

(1) inserting "(1)" immediately after "SEC. 304. (a)";

(2) amending the second sentence thereof to read as follows: "Such reports shall be filed on the tenth day of April, July, and October in each year, and on the tenth day next preceding the date on which an election is held, and also by the thirty-first day of January.";

(3) striking "forty-eight hours" in the third sen-

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tence thereof and inserting "twenty-four hours"; and

(4) adding at the end thereof the following new paragraph:

"(2) Upon a request made by a presidential candidate or a political committee which operates in more than one State, or upon its own motion, the Commission may waive the reporting dates (other than January 31) set forth in the second sentence of paragraph (1), and require instead that such a candidate or political committee file reports not less frequently than monthly. The Commission may not require a presidential candidate or a political committee operating in more than one State to file more than 11 reports (not counting any report to be filed on January 31) under the provisions of this paragraph during any calendar year. If the Commission acts on its own motion under this paragraph with respect to a candidate or a political committee, that candidate or committee may obtain judicial review in accordance with the provisions of chapter 7 of title 5, United States Code."

REPORTING OF COMPROMISED CAMPAIGN DEBTS

SEC. 5. Section 304(b)(12) (relating to reports by political committees and candidates) is amended to read as follows:

"(12) the amount and nature of debts and obligations owed by or to the committee, in such form as the

Commission may prescribe, including (notwithstanding the provisions of subsection (a) with respect to filing dates) continuous reporting of such debts after the election at such intervals as the Commission may require until such debts are extinguished, together with a statement as to the consideration for which any such debt is extinguished or a statement as to the circumstances and conditions under which any such debt is canceled;".

REPORTS BY CERTAIN MEMBERSHIP ORGANIZATIONS

SEC. 6. Section 304(b) (relating to reports by political committees and candidates) is amended by redesignating paragraph (13) as (14) and by inserting after paragraph (12) the following new paragraph:

"(13) in the case of an organization whose principal activity is an activity other than attempting to influence the nomination for election, or election, of a candidate, the name and address (occupation and principal place of business, if any) of each member or partner, if the organization is a membership organization or a partnership, or of each director and officer, if the organization is a corporation; and".

AUTHORIZATION OF APPROPRIATIONS

SEC. 7. Title III (relating to disclosure of Federal campaign funds) is amended by adding at the end thereof the following new section:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 315. There are authorized to be appropriated to the Commission such sums as may be necessary for it to carry out its duties under this title."

EXHIBIT 1E

93D CONGRESS
1ST SESSION

S. 1189

IN THE SENATE OF THE UNITED STATES

MARCH 13, 1973

Mr. WEICKER introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

A BILL

To promote fair, understandable, and enforceable regulations for nomination and election to Federal office, by limiting the collection and expenditure of funds, and by simplifying reporting regulations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Election Campaign Reform Act".

LIMITATIONS ON CONTRIBUTIONS AND EXPENDITURES

SEC. 2. Section 608 of title 18, United States Code, is amended to read as follows:

"§ 608. Limitations on contributions and expenditures

"(a) No candidate or political committee in a campaign for nomination or in a campaign for election to Federal elec-

tive office may, directly or indirectly, in any way whatsoever—

"(1) accept or arrange for any contribution, or expend or contract for any obligation, prior to the beginning of the calendar year in which the election is scheduled; or

"(2) accept any contribution, or contract for any obligation, after a date two weeks prior to the scheduled election date; or

"(3) make expenditures or contributions in excess of $5,000 from his personal funds, or the personal funds of his immediate family, or from such funds being contributed or expended through the use of a third party."

SEC. 3. Title 18, United States Code, is amended by adding the following sections:

"§ 614. Contributions by political committees

"Political committees shall not make any contribution to any candidate, political committee, or other campaign for Federal elective office: *Provided,* That such committees may administer or solicit contributions, so long as such contributions are given directly by the initial contributor to a candidate or political committee.

"§ 615. No more than one political committee

"A candidate may establish no more than one political committee, in such candidate's own name: *Provided,* That

the name of the committee, as well as the name of its chairman and treasurer, shall be filed with the Comptroller General immediately upon its formation; and should such a committee be established, all contributions received or expenditures made in connection with the campaign for nomination or election to Federal elective office shall be received or made by such committee and not by the candidate."

REPORTS

SEC. 4. Section 434 of title 2, United States Code, is amended to read as follows:

"§ 434. Reports by political committees or candidates

"(a) Each treasurer of a political committee supporting a candidate or candidates for Federal elective office—or each candidate, should such candidate not establish a political committee in his own name shall file a report with the Comptroller General two weeks prior to a scheduled primary election date and two weeks prior to a scheduled election date for such candidate or candidates."

"Contents of Reports

"(b) Each report shall be cumulative, shall report with respect to any activity in connection with the candidacy, and shall disclose—

"(1) the full name, social security number, and mailing address of each person who has contributed an

aggregate amount or value in excess of $100, together with the amount of such contributions.

"(2) the full name and mailing address of each person to whom a debt or obligation is owed in excess of $100.

"(3) the full name and mailing address of each person to whom an aggregate amount or value of expenditures have been made, including amounts or values expended to affiliates or subsidiaries, in excess of $1,000.

"(4) the total sum of all contributions received.

"(5) the total sum of all expenditures.

"(6) the total sum of all debts and obligations."

PENALTIES

SEC. 5. (a) Section 441 of title 2, United States Code, is amended to read as follows:

"§ 441. Penalties for violations

"Any person who violates any of the provisions of this subchapter shall be fined in an amount at least equal to three times the amount of any monetary violation, or, in the case of nonmonetary violations, such amount as will satisfy the provisions of this subsection. The moneys collected from the fine shall be spent by the violator for general publication or transmission, to the widest possible extent in the geographical area in which the campaign or election was held, of at least the content of the Comptroller General's

findings. The means of such transmission or publication shall be determined by the Comptroller General, and shall require the complete expenditure of the fine, unless the Comptroller General determines that a lesser amount, determined by him, will achieve complete publication and transmission of the nature of the violation. An additional fine may be levied if the Comptroller General shall determine that, due to the nature of the violation, an additional amount is needed to properly publish the violation."

(b) Title 18, United States Code, is amended by adding the following section:

"§ 615. Penalties for violations

"Any person who violates any of the provisions of this subchapter shall be fined, in an amount at least equal to three times the amount of any monetary violation, or, in the case of nonmonetary violations, such amount as will satisfy the provisions of this subsection. The moneys collected from the fine shall be spent by the violator for general publication or transmission, to the widest possible extent in the geographical area in which the campaign or election was held, of at least the content of the Comptroller General's findings. The means of such transmission or publication shall be determined by the Comptroller General, and shall require the complete expenditure of the fine, unless the Comptroller General determines that a lesser amount, determined by him, will

achieve complete publication and transmission of the nature of the violation. An additional fine may be levied if the Comptroller General shall determine that, due to the nature of the violation, an additional amount is needed to properly publish the violation."

COMPTROLLER GENERAL

SEC. 6. The Federal Election Campaign Act of 1971 is amended by inserting the words "Comptroller General" wherever the words "supervisory officer" appear.

DEFINITIONS

SEC. 7. Section 591 (b) of title 18, United States Code, and section 431 (b) of title 2, United States Code, are amended by adding after subsection (2) of each section the following: "or (3) has publicly announced his candidacy for such office, or has knowledge or information that any other person or political committee has received contributions or made expenditures for the purpose of bringing about his nomination for election, or election, to such an office."

SEC. 8. Section 102 (4) of the Campaign Communications Reform Act and section 315 (f) (2) of the Communications Act of 1934 are amended by—

(1) striking "and", and

(2) inserting before the period the following: ", and (c) has publicly announced his candidacy for such

office, or has knowledge or information that any other person or political committee has received contributions or made expenditures for the purpose of bringing about his nomination for election, or election, to such office."

EFFECT ON STATE LAW

SEC. 9. (a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of, or extend or limit, a provision of this Act.

(b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in section 301 (f) of this Act) which he could lawfully make under this Act.

PARTIAL INVALIDITY

SEC. 10. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 11. The provisions of this Act shall become effective on December 31, 1973, or sixty days after the date of enactment of this Act, whichever is later.

EXHIBIT 1F

93D CONGRESS
1ST SESSION

S. 1303

IN THE SENATE OF THE UNITED STATES

MARCH 20, 1973

Mr. PELL introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

A BILL

To designate the first Saturday in November as the day for Federal elections.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 25 of the Revised Statutes, as amended (2 U.S.C. 7), is amended to read as follows:

"SEC. 25. The first Saturday in November of every even-numbered year is established as the day for the election of Representatives to the Congress commencing on the 3d day of January next thereafter. This section shall not apply to any State that has not changed its day of election of State officers, and whose constitution must be amended in order to

effect a change in the day of the election of State officers in that State."

(b) The text of section 1 of title 3, United States Code, is amended to read as follows: "The electors of the President and Vice President shall be appointed, in each State, on the first Saturday in November in every fourth year succeeding every election of a President and Vice President.".

EXHIBIT 1G

93D CONGRESS
1ST SESSION

S. 1355

IN THE SENATE OF THE UNITED STATES

MARCH 22, 1973

Mr. PELL introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

A BILL

To designate the first Sunday in November as the day for Federal elections.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 25 of the Revised Statutes, as amended (2 U.S.C. 7), is amended to read as follows:

"SEC. 25. The first Sunday in November of every even-numbered year is established as the day for the election of Representatives to the Congress commencing on the 3d day of January next thereafter. This section shall not apply to any State that has not changed its day of election of State officers, and whose constitution must be amended in order to

effect a change in the day of the election of State officers in that State."

(b) The text of section 1 of title 3, United States Code, is amended to read as follows: "The electors of the President and Vice President shall be appointed, in each State, on the first Sunday in November in every fourth year succeeding every election of a President and Vice President."

EXHIBIT 2

U.S. SENATE,
DEMOCRATIC POLICY COMMITTEE,
February 21, 1973.

Hon. HOWARD W. CANNON,
Chairman, Committee on Rules and Administration,
U.S. Senate, Washington, D.C.

DEAR HOWARD: I simply wish you to know that the Policy Committee yesterday adopted a resolution concerning the establishment of an overall limitation on campaign costs and expenditures in connection with Federal elections. Enclosed is a copy of that resolution. It is noted that it contains certain recommendations that affect the jurisdiction of the Senate Committee on Rules and Administration.

With warm personal regards, I am
Sincerely yours,

MIKE MANSFIELD.

RESOLUTION ON CAMPAIGN EXPENDITURES CEILING

Whereas, on January 3, 1973, the Senate Democratic Conference endorsed the premise that there is a danger to the integrity of the federal electoral process in skyrocketing campaign costs and excessive dependence on personal wealth and concentrated contributions for financing campaigns; and

Whereas, The Presidential campaign of 1972 involved the raising and expenditures of more than fifty million dollars by the two major parties, and campaigns for other federal offices added millions more to the total; and

Whereas, Exorbitant and rising electioneering costs often tend to limit accessibility to federal elective office to persons of personal wealth or those otherwise dependent upon concentrated sources of financing; and

Whereas, Legal limitations on media expenditures under P. L. 225, 92d Congress have not prevented the skyrocketing of overall campaign costs in connection with federal elections;

The Majority Policy Committee of the Senate urges:

1. That the appropriate committees of the Senate undertake an immediate inquiry into the adequacy of the present legal limitations on expenditures in regard to federal election campaigns;

2. That the appropriate Senate committees consider and recommend, during the 93rd Congress, reasonable overall limitations on contributions and expenditures for all federal elective campaigns;

The Majority Leader is directed to inform the Democratic Conference of the adoption of this resolution and to communicate its text to the Chairmen of the Committees on Commerce and Rules and Administration.

EXHIBIT 3

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., April 11, 1973.

B–103018.
B–130961.
Hon. CLAIBORNE PELL,
Chairman, Subcommittee on Privileges and Elections, Committee on Rules and Administration, U.S. Senate.

DEAR MR. CHAIRMAN: In our response to your request for our comments on S. 372, 93d Congress, 1st Session, this letter will supplement the position of the General Accounting Office on S. 372, as expressed in the testimony of Phillip S. Hughes, Director, Office of Federal Elections, before the Subcommittee on Communications on March 13, 1973.

The basic issue posed by the bill is the desirability of imposing a statutory limitation on overall campaign spending with private financing and inherent administrative complexities. We recognize that this issue involves an important matter of legislative policy and we hope that our views based on experience in administering the present media spending limitations contained in title I of the Federal Election Campaign Act of 1971 (Public Law 92–225) will be helpful.

In his testimony, Mr. Hughes indicated the difficulties the Office of Federal Elections has had in enforcing the limitation on campaign spending for use of mass communications media. Since enforcing the certification and limitation provisions with respect to the relatively few suppliers of media time and space has proved difficult, we believe it would be virtually impossible to enforce the same kind of limitations involving the thousands of suppliers of the many types of goods and services used in an election campaign with the prescribed administrative machinery. In our opinion, therefore, the proposed overall limitation on campaign spending is inadvisable because, as a practical matter, it would be unenforceable with private financing and inherent administrative complexities.

In place of spending limitations, we believe the emphasis should be on full disclosure of campaign financing, perhaps coupled with an enforceable limitation on individual contributions. In addition to the difficulty of effective enforcement of spending limitations, an important factor in arriving at this opinion is the existence of what many lawyers and legal scholars believe to be enormous and troublesome constitutional problems involving the freedom of speech guarantees provided in the First Amendment. Some of these questions are before the courts now arising from the media spending limitations of the 1971 Act and it may take years for the issues, present and potential, to be finally resolved. Whether or not the constitutional questions may ultimately be eliminated by court decision, full and timely disclosure regarding a candidate's financing and spending can provide vital information to the voter and the candidate's opposition prior to the election.

If the Committee and the Congress believe that there should be some kind of limitation, we would recommend a limitation on broadcasting expenditures only. Television and radio advertising constitute the major reason why campaign spending has risen so sharply in recent years. The unlimited use of television and radio also causes the widespread concern about a spending "blitz." The means of enforcement is readily at hand through the Federal Communications Commission's regulation of broadcasting stations. Moreover, the constitutional problems appear to be less severe with respect to restricting spending for broadcasting than they are with respect to newspapers and magazines and other printed matter, particularly insofar as independent persons or organizations are concerned.

We recognize that this approach has encountered obstacles, but we feel it should be given reconsideration if an attempt is to be made to limit spending.

If the Committee decides to impose an overall spending limitation on campaigns for Federal office, we recommend that certain changes be made in the methods proposed.

Under the present Act, the certification procedure places the primary burden of enforcement on the supplier of goods and services and not on the candidate, his authorized agents, or others spending funds on behalf of the candidate, where it properly belongs. To correct this, we suggest a system such as prescribed by Florida law whereby expenditures for a campaign could only be authorized by a campaign treasurer designated by the candidate and could only be paid out of a designated campaign depository. In the case of a presidential candidate, subtreasurers and subdepositories could be designated in each state. The candidate himself could act as his own campaign treasurer if he wished.

No person would be permitted to make expenditures to further the candidacy of a Federal candidate without written authorization from the campaign treasurer. However, a supplier would violate the Act only if he knew that the goods furnished or services performed were intended by the purchaser to be in furtherance of such candidacy. This would eliminate the supplier's problem with a purchaser who does not inform the supplier that he is making an expenditure on behalf of a Federal candidate (for example, for airline tickets, hotel rooms, office space, etc.).

We believe enforcement would also be facilitated by providing additional statutory penalties in the form of substantial fines on any person who knowingly violates the limitation. We also bring to your attention the fact that the possibility of disqualification, removal from office, or impeachment, as the case may be, for any persons elected to office who knowingly violate the limitation is present in the Florida law.

Moreover, if a limitation is to be effective, there should be a statutory prohibition on spending before a campaign treasurer is designated. Otherwise, a candidate could stockpile supplies and equipment or could pre-pay expenses without regard to the limitation.

If the present media limitation provisions are retained, we recommend the following changes in addition to the administrative changes and additional penalties referred to above:

TIME COVERED

In the case of broadcast or other media spending, a definite time period should be established for congressional and senatorial elections during which the limitation would apply. For example, the period might cover use of the media within 60 days before a primary election or a nominating or caucus and for the entire period between the primary election or convention and the general or special election. The present statute does define the period of candidacy for Presidential and Vice Presidential candidates as beginning on January 1 of the election year or the date of his first campaign media expenditure, whichever is later.

UNAUTHORIZED AND DEROGATORY SPENDING

Also with regard to media advertising, if any limitation is to be effective, spending in support of a candidate by any person, whether authorized or not, should be subject to the limitation and no such advertising should be permitted without the candidate's authorization. Present law (Section 104(a)(6)) charges the limitation with any media expenditure "on behalf of" the candidate, and we have, in effect, interpreted this in our regulations (11 CFR 4.4) to cover media expenditures by anyone in support of a candidate, whether authorized by the candidate or not. The legislative history clearly shows that this was the intent of Congress and, in our opinion, any other interpretation would render the limitation ineffective. We are suggesting amendatory language to clarify this point although our regulations making that interpretation will stand unless Congress legislates to the contrary.

Also to make the limitation more effective, the Act should further specify that advertising opposing a candidate may not be accepted without authorization from another candidate for the same office.

TELEPHONES

We believe present law should be amended to exclude from the limitation the cost of telephones used by a candidate to communicate with potential voters. The reporting of telephone costs which are subject to the spending limitation has varied widely among candidates, and widespread confusion exists as to which telephone costs are included and which are excluded. Moreover, no certification or prior authorization procedure is possible for covered telephone use because the telephone company cannot reasonably be expected to know the use which may be made of the telephones it installs. Thus, no effective means of monitoring these costs exists.

LIMITATION OF CANDIDATES FOR PRESIDENTIAL NOMINATION

We recommend that any limitation on spending by or for candidates for presidential nomination be a single national limitation rather than state-by-state during the pre-convention period, as present law prescribes. In almost all cases, presidential candidates organize their campaigns on a national level and then establish affiliated committees in the various states, with extensive transfers of funds back and forth. Many times a candidate's efforts in one state are supported financially by his committee in another state. We have found that the reports filed by candidates and their committees in 1972 usually did not break down media spending by state and, in many cases, we recognize that it would have been difficult or impossible to do so.

The state-by-state provision also creates the problem of attempting to allocate media spending which crosses state lines, as required in the present statute. We do not believe that this can be done realistically in areas served by media on a regional or interstate basis. There are many such areas in the United States.

CHARGES AGAINST MEDIA LIMITATION

If the present media limitation is retained, the provision of the Act [104(a)(7)(A)] should be clarified to specifically include or exclude amounts expended for production costs, agents' commissions, etc.

* * * * * * *

We have developed draft language to make a number of technical amendments to S. 372 which we believe to be desirable. We have made this language available to the Committee staff and will be pleased to work further with the Committee and its staff to assist in any way we can.

Sincerely,

ELMER B. STAATS,
Comptroller General of the United States.

EXHIBIT 4

STATEMENT OF PHILLIP S. HUGHES, DIRECTOR, OFFICE OF FEDERAL ELECTIONS, GENERAL ACCOUNTING OFFICE, BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE SENATE COMMITTEE ON COMMERCE ON S. 372, MARCH 13, 1973

Mr. Chairman and members of the subcommittee: I am pleased to have this opportunity to present the views of the General Accounting Office on S. 372, a bill to repeal the equal opportunities requirements for presidential campaigns and to amend the Campaign Communications Reform Act to impose an overall limitation on all spending in Federal election campaigns.

We have no substantive comment on the provision of the bill which would repeal the equal opportunities requirements of section 315(a) of the Communications Act of 1934 with respect to presidential campaigns since this provision is outside our jurisdiction. We note, however, that such a repeal would allow substantial amounts of free broadcast time to be given to presidential candidates, in effect, increasing their spending limitation, while no such benefit would be available to candidates for the Senate and House of Representatives.

S. 372 would remove the present limitation in title I of the Federal Election Campaign Act on campaign spending for the use of the communications media (television, radio, newspapers, magazines, outdoor advertising and telephones) and replace it with an overall limitation on campaign spending for any purpose. The existing Act allows each Federal candidate to spend a maximum of 10¢ times the voting age population of the area in which the election is held for communications media, of which not more than 60 percent of that maximum may be for broadcasting. Under S. 372, each Federal candidate would be allowed to spend up to 25¢ times the voting age population of the area for all purposes, without any separate limitation on communications media generally or broadcasting specifically. Under the bill, the definition of expenditures subject to the 25¢ limitation would include virtually every conceivable loan, gift or expense which is "made for the purpose of influencing" the election of a Federal candidate, from the leasing of a neighborhood storefront office to the procurement of office supplies for use by campaign employees or volunteers. Bank loans made in the ordinary course of business and volunteer services are specifically excepted.

The bill does not amend title III of the Act under which Federal candidates and political committees are required to report all receipts and expenditures to the appropriate supervisory officer: the Secretary of the Senate for Senate candidates and committees; the Clerk of the House of Representatives for House candidates and committees; and the Comptroller General for presidential and vice presidential candidates and committees.

Mr. Chairman, we applaud your statement in introducing S. 372 calling for a wide range of views and recommendations during the hearings. We offer the following remarks in the spirit of that statement because we do not pretend to have final answers to the problems of campaign financing.

First of all, while we recognize and share in the general concern over the increasingly high cost of campaigning for public office; the suspicion caused by the need to raise huge sums from private sources; and the deterrent effect of high costs on the candidate or potential candidate who is not wealthy or does not have wealthy backers, we also recognize that the wisdom and feasibility of the Government limiting overall campaign spending in our society can be debated. It has been pointed out, for example, that campaign costs as a percent of overall Government costs, remain small—about one tenth of one percent. Furthermore, an overall limitation on spending cannot cure some of these concerns—for example, the problem of the very large contributor.

It is not my purpose, however, to debate the merits of an overall limitation. Rather I would like to focus on certain problem areas as we see them, in the administration of spending limitations. This is the area in which we have gained some experience in administering the Federal Election Campaign Act of 1971.

CERTIFICATION REQUEST

The mechanism in S. 372 for insuring that campaign expenditures are counted against the limitation is the same as the present law's title I requirement that the supplier have a certification in writing from the candidate or from a person specifically authorized in writing by the candidate that the expenditure is within the limit set by law. However, since the bill limits overall expenditures, this requirement would apply not only to communications media suppliers but to all

suppliers of goods and services in excess of $100 for the benefit of any candidate in connection with his campaign. Any person furnishing goods or services for the benefit of the campaign in an amount exceeding $100 would be obligated, subject to criminal penalties, to demand a written certification from the candidate or authorized representative that payment for the goods or services would not exceed the applicable limitation. This presupposes that a vendor can readily determine when his services or products are being obtained "for the benefit of" a Federal candidate's campaign. How can the vendor know this in all cases? Also, how does the vendor respond to the purchaser who disclaims intent to benefit a Federal candidate but who nevertheless may be doing so?

For example, a county committee of the Democratic Party seeks to order direct mail materials advocating the election of the entire Democratic ticket in a Federal election year. Another example is the issue-oriented group that is sharply critical of one candidate's position on a major issue in the election campaign and by its opposition necessarily benefits another candidate. We point out that the penalties in the bill run against the vendor, not the purchaser.

Our experience in applying the existing certification requirement to broadcasters, newspapers, magazines, and outdoor advertising firms is relevant here. The telephone uses covered by title I do not require a certification since the telephone company is not in a position to determine what the telephone is being used for—to communicate with potential voters, which is covered, or for other purposes, which are not covered.

There has been little use of magazines for campaign advertising and outdoor advertising was not a serious problem in the recent presidential campaign.

With respect to newspapers, the situation was both difficult and complex. Despite the widespread publicity given the Act, we have found many instances where newspapers have simply failed to require a candidate's certification before publishing campaign advertising. The General Accounting Office worked closely with the American Newspaper Publishers Association and the National Newspaper Association and both diligently advised their members about the Act and regulations. In September, we mailed a letter to all U.S. newspapers summarizing the legal requirements applicable during the 1972 campaign. Nevertheless, there are over 8,000 daily and weekly newspapers in the U.S. and, clearly, not everyone got the word.

The large number, wide geographic spread and independent management of newspapers make the administration and enforcement of a certification requirement extremely difficult. The legal and constitutional problems which we would like to discuss later make it even more so. Finally, the effect of the certification process is to place vital enforcement responsibility on a reluctant and perhaps uninformed third party with separate, conflicting interests of his own. In these circumstances, enforcement by third parties decreases in effectiveness as their number increases.

MAINTAINING CONTROL OVER "UNAUTHORIZED" EXPENDITURES

S. 372 also follows the Federal Election Campaign Act in providing that "expenditures made on behalf of any candidate shall . . . be deemed to have been expended by such candidates." In drafting regulations on this subject, the Comptroller General followed the instructions of the Conference Report on the Federal Election Campaign Act:

"Under this provision, the expenditure limitations of the bill apply to all communications media expenditures on behalf of the candidate, whether made by the candidate, a political committee, an individual, or otherwise, and whether or not the person making the expenditure is authorized by the candidate to do so."

The Conference Report tied the quoted statement to the certification requirement. Since the candidate was to be charged with expenditures made by unauthorized persons, he would be allowed to control such expenditures and the certification device was intended to enable the candidate to do this.

The Comptroller General's regulations (§ 4.4) therefore provide that any expenditure for the use of communications media "by candidate, a political committee, or any other person, whether or not the person making the expenditure is authorized by the candidate to do so . . ." is to be charged against the candidate's limitation. We believe it preferable to specifically include "unauthorized" persons under the limitation by statutory language, rather than by regulation.

CONSTITUTIONAL QUESTIONS

I would also like to discuss briefly the constitutional problems under the present Act which would be magnified by extension of the limitation to cover all campaign expenses as S. 372 proposes. I am aware that this committee has concluded that title I of the Act is constitutional. It may well be constitutional, but the matter is presently pending before the Courts in several suits and more may arise.

American Civil Liberties Union v. *Jennings* is a civil action, filed in the U.S. District Court for the District of Columbia, against the Clerk of the House, and the Comptroller General and myself, contending that both title I and title III of the Act are unconstitutional. The case arose when the *New York Times* refused to carry an ACLU ad which criticized President Nixon for his position on busing and named 108 House members (many of whom were candidates for re-election) as deserving of "support in their resistance to the Nixon Administration bill." The *Times* refused this ad because the ACLU did not furnish either a certification from each of the House members who were candidates for Federal office or a statement that no Federal candidate had authorized or consented to the expenditure incident to publication of the advertisement.

We took the position that the *Times* was incorrect in its interpretation of the law and regulations as requiring certifications. In our view, the ad did not advocate any candidate's election and hence the *Times* could have published the ad if it had obtained a statement from the ACLU that no Federal candidate had authorized or consented to the ad.

A special three-judge court issued an order allowing the advertisement to be published but reserving decision on the merits of the case. The case is still pending and both plaintiffs and defendants have filed motions for summary judgment.

A civil suit brought by the Department of Justice on GAO's behalf under title III of the Act is relevant because it involves the definition of campaign expenditure in title III of the current law which is adopted in S. 372.

In May 1972, the "National Committee for Impeachment" placed a newspaper advertisement in the *New York Times* that urged President Nixon's impeachment on the grounds of his Viet Nam war policies. The advertisement also endorsed several House candidates by name and pledged financial support to them and to any other candidates who declared themselves in favor of the Committee's objectives. After several complaints were submitted, we determined that payment for the advertisement was an "expenditure" for the purpose of influencing the election of presidential candidates under title III and, therefore, that the National Committee for Impeachment was a "political Committee" subject to the registration and reporting requirements of title III. The Clerk of the House made the same determination for congressional candidates.

When the committee failed to register, we referred the matter to the Department of Justice for civil proceedings under section 308 of the Act. The District Court, Southern District of New York, granted a preliminary injunction enjoining the National Committee for Impeachment from operating as a political committee. However, the U.S. Court of Appeals for the Second Circuit reversed, holding that the statutory definition of expenditure means "an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents." The court also construed title III to apply "only to committees . . . making expenditures the major purpose of which is the nomination or election of candidates."

This narrow construction of the coverage of title III may prove to be an invitation to develop new theories of avoiding disclosure of campaign financing. If S. 372 incorporates the definition of "expenditure" from title III, then similar issues of interpretation can be anticipated. We have recommended to the Department of Justice that it seek to have the Supreme Court review these issues. The Solicitor General will decide this month whether or not to file a petition for *certiorari* with the Supreme Court.

The constitutional issues would be compounded under S. 372 because a Federal candidate would have a veto power not only over media advertising, but also over any campaign spending for his benefit, including such traditional free speech categories as handbills, posters, buttons, etc.

ALTERNATIVE METHODS OF CONTROL

One alternative method of controlling expenditures is set forth in the Florida Election Code. In addition to prescribing limitations on both contributions and expenditures, the Florida law requires that *all* contributions, expenditures, or obligations which are "made, received, or incurred, directly or indirectly, in furtherance of the candidacy of any candidate for public office, . . ." must pass through "the duly appointed campaign treasurer or deputy campaign treasurer of the candidate." As a condition precedent to qualifying as a candidate, an individual must appoint one campaign treasurer and designate a campaign depository.

Deputy treasurers may be appointed as needed and a limited number of additional campaign depositories may be designated. The campaign treasurer retains ultimate responsibility for the accounts of all appointed deputy treasurers.

Candidates who are elected may be subject to suspension and removal from office if convicted of a violation and the making of any false certificate, statement, or report carries the penalties of perjury. In summary, the civil and criminal liabilities for non-compliance with the Florida Election Code attach mainly to the candidates or campaign officials who are in the best position to have control of the entire campaign financing operation. The supplier of goods and services may face a criminal penalty if he knowingly violates the Act, but, otherwise, he would face only the unpleasant prospect of not being paid or the possible revocation of his license.

CONCLUSION

In summary and conclusion, Mr. Chairman, I do not believe the machinery of the Federal Election Campaign Act provides adequate administrative and enforcement support for limiting total campaign expenditures. We have tried to indicate the difficulty of administering even the present law with this machinery. Legal, constitutional and administrative problems abound even under present law, once we move beyond the radio and television industry.

Some of our comments on S. 372 reflect our judgment that amendments to title I of the Federal Campaign Act are desirable even if the scope of the existing law limiting campaign spending is not increased. We intend to set forth these amendments in written comments to the committee at an early date.

Meanwhile, the following are brief general comments regarding the most important of these amendments, applicable to S. 372 as well as to the existing law.

1. We recommend that the Committee consider whether the approach taken by the Florida law is appropriate in connection with the Federal election campaigns. We have not yet had an opportunity to study the actual operation of the Florida law.

2. We recommend that the Committee consider other sanctions in addition to the criminal penalties set forth in the Act. Civil penalties involving substantial fines might be extremely helpful in some circumstances.

3. We recommend that the supervisory officers be given the authority to issue subpoenas and to initiate court action. The Presidential Election Campaign Fund Act, Public Law 97–178, gives the Comptroller General such authority in connection with his responsibilities under that Act.

Again, Mr. Chairman, we appreciate the opportunity to be here and express our views on this important legislation and we will be pleased to work with the Committee or its staff in any way we can to improve the processes by which the campaigns are financed and by which such financing is controlled in the public interest.

EXHIBIT 5

STATEMENT OF RUSSELL D. HEMENWAY, NATIONAL DIRECTOR, NATIONAL COMMITTEE FOR AN EFFECTIVE CONGRESS, BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE SENATE COMMITTEE ON COMMERCE, MARCH 8, 1973

MR. CHAIRMAN: It is a pleasure for the National Committee for an Effective Congress to be invited once again to appear before your Subcommittee regarding campaign finance reform measures. This is coming to be something of an annual event . . . like the rites of spring for the NCEC. First, we were working for the proposed Campaign Broadcast Act, which President Nixon vetoed just before the 1970 elections, and then on the more comprehensive Federal Elections Campaign Act of 1971, which was approved and went into effect in April of last year.

It is largely due to your unflagging efforts, Mr. Chairman, and those of other dedicated members of this Committee, that we do now have a law limiting media expenditures and requiring full public disclosure of campaign financing. If it had not been for your dedication and persistence, Senator Pastore, I dare say there would have been no such legislation. While we all agree that this measure is not perfect, nor the final solution to all our political problems, it *is* a tremendous improvement over the earlier ineffective and unenforced Corrupt Practices Act.

The NCEC is proud of its long involvement in the fight for the new law and pleased to have made at least some small contribution to your Committee's work on that bill.

Election and campaign finance reform remains a tremendously complex issue, too dreary for some, too controversial for others. The temptation, with one success recently on the books, is to put it aside for a time. Yet the examination of the electoral process and the impact money has on it must continue, for what Congress does or does not do in this area now will determine the shape of our political system in the future. We commend you, Mr. Chairman, for once again taking the lead in introducing your own proposals and in reopening public discussion.

As this Subcommittee knows only too well, the 1971 Federal Elections Campaign Act was the first major revision of our campaign finance laws in half a century. Almost as important as the bill itself was the lengthy debate which attended its passage, giving rise to serious, and, we think, constructive examination of the nature of the American electoral process as it now operates, what needs to be corrected, and how we might best achieve those ends.

I think most students of American politics agree on what our general goals are: an open, competitive electoral process which informs the public and encourages citizen participation. Within this broad frame, we probably agree further, Mr. Chairman, that campaign spending in general has gotten out of hand, that candidates who are unable or unwilling to compete at this current price level are increasingly excluded from the political arena, and that the very wealthy contributor by definition now exerts undue and unfair influence on the electoral process.

It is in deciding how to address these problems that men and women of good will begin to disagree. After 25 years' experience in Congressional campaigns, the NCEC has come to believe that the only real solution lies in some form of public election subsidy which allows candidates to compete on the basis of merit rather than pocketbook, free from corroding dependence on personal or family fortune or the gifts of large, special interest backers. This would provide not only the means to control exorbitant spending, but would also promote greater equality of competition among candidates and reduce the advantage the rich contributor has over all other voters in influencing the election of the peoples' representatives.

Our Committee is the first to recognize that changes as fundamental as this do not occur overnight. Several years of concentrated effort were required to pass the disclosure requirements and media spending limits of the 1971 reform bill, and there is already talk in some quarters of attempting to repeal or seriously weaken even this modest bill. Fifteen years passed before Congress moved to broaden the base of political givers by allowing citizens, for the first time, a modest tax credit or deduction for small political contributions. The one dollar income tax check-off for Presidential elections, which gave an initial nod to the concept of public subsidy for campaigns, was at the time of its adoption, and still remains, a hotly controversial issue with an uncertain future.

Given the complexity of campaign financing, the traditional reluctance of Congress to alter the rules of a game at which its members have been successful, and the partisan friction which inevitably develops, few expect that a major overhaul of the electoral process can ever be accomplished in one fell swoop. More likely, it will proceed gradually, one step at a time. This should not inhibit our exploration, however, of what can and should come eventually.

We are encouraged by the long range prospects for reform. As a direct result of the new disclosure law, we now have a key element which was sorely lacking before: a growing base of factual information about how much is spent in campaigns, by whom, and for what. With a rapidly developing expertise in evaluating this information, and the public interest and momentum which has been generated along the way, I think it is safe to say that the country will not have to wait another fifty years for the next major election reform bill.

A number of important proposals have already been introduced this year, including the bill offered by Chairman Pastore, S. 372. While not all of these bills are before this Subcommittee, I would like to comment on several of them today—first, because this Subcommittee and its Chairman have in the past taken the initiative and provided important leadership in the entire area, and second, because these specific measures can be viewed as representing the distinctly different stages by which Congress can approach the question of additional election and campaign finance reform.

I will confine my comments to the package of bills introduced by Senators Scott and Mathias earlier this week (S. 1094, S. 1097), which would refine and to some degree extend current law; the Pastore Bill (S. 372), to repeal Sec. 315 and set limits on candidates' total spending, which many view as the logical next step beyond the 1971 Act; and finally, the bill introduced by Senator Hart on Tuesday (S. 1103), which is perhaps the most comprehensive and thoughtful approach to federal campaign subsidies yet developed.

SCOTT-MATHIAS BILLS (S. 1094, S. 1097)

This package of four bills, each referred to a different Committee, are essentially intended as improvements on or extensions of the Federal Elections Campaign Act of 1971. The NCEC publicly supported 3 of these proposals, with minor modifications, at the time the earlier legislation was under consideration. The first three, the NCEC believes, represent the base line of further reform, the minimum of what Congress can and should do immediately.

1. *Establish an Independent Federal Elections Commission* to administer the 1971 Act, to serve as the single central repository for all campaign reports, and to investigate and prosecute violations. (S. 1094). This would correct the two major weaknesses of the new system: the illogical, tripartite system of reporting which resulted from the House's rejection of the Senate provision for just such an independent commission, and the apparent unwillingness of the Justice Department to accept its responsibilities for enforcement of the law. In addition, the bill would require candidates to establish one central reporting committee, and would make minor changes in reporting dates and the information required. The NCEC strongly supports this measure as essential to full and complete public disclosure of campaign funds.

2. *Repeal the broadcast "equal time" requirements for all candidates for federal office* (S. 1095). The NCEC has long supported repeal of Sec. 315 for Presidential and Vice-Presidential candidates, to enable broadcasters to give major candidates free air time without being obligated to provide an equal amount of time to the strictly fringe or frivolous candidates. We also believe that Congressional candidates should be assured at least some access to the public airwaves at little or no cost. You will recall, Mr. Chairman, that the NCEC's initial effort in this area was a proposal to provide all qualified Congressional candidates a certain amount of air time at significantly reduced rates.

Nonetheless, we have reservations, which I think you share, about extending 315 repeal to the Congressional level without some safeguards to protect candidates from arbitrary or unfair treatment by individual broadcasters. The risks here are substantially greater, and the opportunity for proper and timely redress much more chancey, than at the much more highly visible Presidential level.

In thus endorsing the 315 provision of your bill, Mr. Chairman, and reserving judgment on the Scott-Mathias bill, we would also ask the Committee's view on this. What adequate safeguards, if any, do you think might possibly be written into the broader proposal which would allow Congress to confidently vest broad-

casters with this tremendous power and responsibility of deciding who of some 1,000 Senate and House candidates would get air time and how much?

3. *Allow candidates for federal office two political mailings at reduced postage rates* comparable to those available to non-profit organizations (S. 1096). The NCEC has long urged that federal candidates be provided a specific number of free mailings in both the primary and general election. While this is a more limited version of the indirect postal subsidy we have advocated, it has the same laudatory goals: to reduce both the cost of running for office and the tremendous advantage the incumbent has in the use of the frank, and at the same time to assure each household some exposure to all the candidates and campaigns in their state and Congressional district.

4. *Exempt political contributions of money from federal gift tax provisions* (S. 1097). The NCEC agrees with the basic objective of Senators Scott and Mathias: to overturn the ridiculous Internal Revenue Service ruling of last summer which permits large contributors to a single candidate to avoid paying the gift tax by spreading contributions of $3,000 or less among dozens, even hundreds of phony committees. It is an outrage to common sense and is contrary to an entire body of tax law.

As you know, the IRS is now reviewing the gift tax matter and other aspects of the tax law as they apply—or don't apply—to political contributions. It may ultimately fall to Congress to legislate in this area if fair and equitable solutions cannot be reached by agency regulation.

There are several approaches which are better than the current situation. One would be to exempt all political contributions from the gift tax, as S. 1097 would do. Another would be to require the payment of gift tax on all contributions over the specified $3,000 limit, whether the gift ultimately benefits one candidate or many. If Congress believes the proper answer falls somewhere in between, and decides to allow specific exemptions, logic dictates that contributions to a group, organization or party supporting multiple candidacies should qualify for an exemption rather than multiple gifts by one individual to a single candidate. The reverse, contrary to all reason, is true today.

PASTORE BILL (S. 372)

First, this bill would repeal the Sec. 315 equal time requirements for Presidential and Vice-Presidential candidates. The NCEC strongly supports you in this effort, Mr. Chairman, as we stated earlier.

Secondly, S. 372 would set firm limits on the total amount of money which candidates for President, the Senate and House could spend in both the primary and the general election.

To many political observers, this overall spending ceiling is the most appealing and logical follow-up to the media spending limits imposed by the 1971 Act. I expect there is already considerable popular support for such a bill, because voters have come to view massive campaign expenditures as a major public disgrace as they have watched the political price tag spiral ever upward.

In the Chairman's own home state of Rhode Island, for example, the combined expenditures of the 1972 Senate candidates was well over a million dollars—approximately $2.00 per eligible voter, even without a primary contest in either of the major parties. This is one good example of how campaign spending takes on its own internal dynamics, regardless of whether or not an effective campaign might be waged by either or both candidates for less money. And there are worse examples, I can assure you.

The NCEC's principal reservation about overall spending limits in the past has been that it presents incumbents a tremendous temptation to seal themselves in office by unfairly limiting the exposure and activities a challenger needs to become known. The Pastore bill obviously recognizes this problem and represents an effort to arrive at a limit which is both low enough to curb exorbitant expenditures and, at the same time, high enough to allow the unknown challenger to effectively reach the voters.

The proposed formula of 25¢ times the number of eligible voters in the constituency appears on first examination to be quite reasonable. In any case, we are less concerned about the actual cents per vote figure, which can be adjusted up or down as need be, than we are that Congress not lose sight of the need to achieve that delicate balance which will assure an open system.

To avoid a major pitfall of the old Corrupt Practices Act, which also had spending limits, this measure provides an automatic escalator which will raise spending limits to reflect actual cost of living increases or decreases . . . should we ever see one again.

We would suggest further that the key to effective limits is enforcement, and the key to enforcement is full disclosure. The NCEC recommends that the necessary companion to any ceiling legislation is the creation of an independent Federal Elections Commission, which we discussed earlier. Such Commission, rather than the GAO or the Justice Department, would then be responsible not only for the administration and enforcement of the disclosure laws, but the spending limits as well.

HART BILL (S. 1103)

The bill recently introduced by Senator Hart takes a very significant step beyond all the measures we have thus far discussed. It is concerned with the other side of the campaign spending coin: while experience demonstrates that money alone does not necessarily win elections, it is obvious that the absense of adequate funding can certainly assure defeat. Worse than that, inability or unwillingness to rely on private money sources can and does discourage many an able candidate from even entering a race for public office.

While there may be some truth to the argument of subsidy opponents that the ability to raise money is an important test of a candidate's viability, there are very definitely limits to how far that premise can be stretched. Unless we are willing to allow politics to become the sole preserve of the rich or the handmaidens of the rich, we must begin to move toward at least minimum public subsidy for federal candidates.

The Hart bill does that, and more. We were privileged to work with the Senator and his staff in the development of this legislation, and we have been tremendously impressed by the amount of time, energy and effort which went into it. As Senator Hart himself has stated, it is not a perfect bill, nor perhaps even as good as it may yet be. Nonetheless, this measure represents the most careful effort to achieve a reasonable balance between complex, competing interests, and to find workable solutions to heretofore unanswerable problems, that the NCEC has seen to date.

The objective of the Hart bill is simple: to provide an adequate public subsidy for serious Congressional candidates who wish to run without dependence on private contributions.

The bill does not apply to the Presidency, primarily because there is agreement that the tax check-off should be given a fair and realistic chance to work. Nor is the Congressional subsidy mandatory for all candidates. Those who choose to take the public subsidy must meet certain requirements and are bound by strict regulations, including a spending ceiling, while those who elect private financing proceed just as they now do. The bill would not alter the disclosure requirements or media limits of the 1971 Campaign Act, nor the political tax credit/tax deduction provisions of the 1971 Revenue Act.

While we hope that members of Congress and other interested persons will look over the bill carefully, I would like to touch on some of the major provisions. No one is firmly wedded to each and every one of these points. Nonetheless, I would stress again that every effort has been made to deal with some very knotty problems. The result is a rather unique product which seeks to strike a balance which will assure serious candidates an adequate subsidy, protect the rights and opportunities of minor and new parties without giving the frivolous candidate a free ride, protect the public against waste or fraud, while at the same time, limit candidate spending and reduce the influence of and dependence on large private contributors. At the very least, this bill offers Congress an excellent point from which to consider the question of public campaign subsidies. We commend it to you for study.

1. Under this bill, candidates who choose public funding would be eligible for a federal subsidy in both the primary and general election. Mixing of private and public methods would not be permitted: if a candidate elects the public route in the primary, he could not go to private funding in the general, and vice versa.

2. The amount of the subsidy would be determined by a cents per eligible voter formula. The initial figures suggested, for major party Senate candidates is 10¢ per eligible voter in the primary and 15¢ in the general. Minor and new party candidates (determined by previous election record) would be eligible for a smaller percentage of the amount allowed major party candidates.

In addition, candidates would be allowed to raise a small amount of private funds in individual contributions of no more than $250. Minor party and new party candidates would be allowed to raise proportionately more private funds in order to bring them up to the total amount allowed major party candidates.

3. In each case, a spending ceiling would apply to all public subsidized candidates equal to the amount of the subsidy received plus the amount of private money they are permitted to raise. Neither the spending ceiling nor the individual contribution limit of $250 would apply to candidates choosing the private financing route.

4. A seven member, bi-partisan Board would be created within the Treasury Department to administer the subsidy, to dispense candidate funds on a periodic basis, and to audit and review the central bank accounts which candidates would be required to establish.

5. To qualify for the public subsidy, a candidate would have to fulfill state election requirements, agree to comply with the Act and supply certain required information, and file with the Board a security deposit equal to one-fifth of the subsidy he is eligible to receive. This security deposit would be forfeited if the candidate failed to win 10 percent of the vote. The entire subsidy would have to be repayed if the candidate failed to win 5 percent of the vote. Fines and criminal penalties are also provided for violation or failure to comply.

The bond requirement to deter frivolous candidacies and the treatment of minor party candidates are at once the most sensitive and most difficult aspects of the subsidy issue. We would stress here again that it is not the specific numbers we are concerned with, but rather the method of approaching the problem. The percentages and dollar amounts obviously are subject to change if the concept is sound.

6. A candidate would be permitted to raise his bond or security deposit in private contributions of up to $250. The funds raised from individuals for this purpose would not be counted against the candidate's total spending limit. If the candidate succeeds in winning over 10 percent of the vote, the deposit would be returned by the Board to the individual contributors.

7. Independent political activity by individuals or organizations on behalf of a subsidized candidate would be permitted, would not be included in the candidate's spending ceiling, but would be limited to expenditures of no more than $250 per candidate.

Objections will undoubtedly be raised that the machinery of this legislation is too complicated to understand, much less to work. I expect that this argument has been used against every major piece of legislation ever offered. I would point out that it was a major bone of contention regarding the 1971 disclosure legislation, and we think it is obvious that that machinery has worked, better perhaps than we ever hoped it might.

It is impossible to estimate at this time what such a subsidy would cost, for we have no idea how many candidates would choose to apply for it. Nonetheless, I think even the most extreme estimates would fall within the price we now pay for many of our weapons systems, battleships and aircraft. Certainly the integrity of the electoral process is of equal importance.

In urging the Committee will give this measure serious consideration, we again thank you for this opportunity to present our views on an issue which the NCEC ranks on the list of national priorities.

EXHIBIT 6

STATEMENT OF JOHN W. GARDNER, CHAIRMAN, COMMON CAUSE, BEFORE THE COMMUNICATIONS SUBCOMMITTEE OF THE SENATE COMMERCE COMMITTEE, MARCH 7, 1973

Mr. Chairman, I would like to thank you and the other members of this Committee for providing the opportunity for Common Cause to testify this morning. Recalling my days as Secretary of Health, Education and Welfare, I reflect with pleasure and gratitude on the many occasions when you, Senator Pastore, came to the rescue of critically important legislation.

This Committee has before it once again the issue of campaign finances, an issue of paramount importance to the well-being of our nation. There is nothing in our political system today that creates more mischief, more corruption, and more alienation and distrust on the part of the public than does our system of financing elections. It allows individuals and groups which seek preferential treatment from government to give unlimited sums of money to public officials who can provide such treatment. It not only allows but often forces some of the nation's most powerful public decision-makers to solicit money from people and groups who will be personally affected by their decisions.

Many citizens contribute to political campaigns out of conviction and with no thought of personal gain. And the best of our elected officials do not permit campaign contributions to affect their decision-making. But unfortunately all too many contributions are made with the intent to influence political outcomes.

The link that so often exists between campaign contributions and preferential treatment by politicians was summed up by Edward Garmatz, former Maryland Congressman who had served as chairman of the Merchant Marine Committee. When questioned recently about the heavy political contributions he received from the maritime industry, he said "Who in the hell did they expect me to get it from—the post office people, the bankers? You get it from the people you work with, who you helped in some way or another. It's only natural." Congressman Chet Holifield expressed it another way, in speaking of lobbyists. He asserted (as quoted in the *Los Angeles Times*) that if they didn't help fill campaign purses "the power of lobbyists would be practically nil."

Growing national concern over the scandal of campaign finances brought enactment of the Federal Election Campaign Act of 1971, the first major revision of federal campaign spending laws in nearly a half century. This Committee, under the leadership of Chairman Pastore, played a critical role in passage of that legislation. The effort was truly bi-partisan, with Republicans and Democrats in both bodies of Congress playing key roles to achieve the final result.

One national election has now been carried through under the new Act, and there are grounds for two fundamental conclusions. First, the 1972 experience has shown the unquestionable importance of the new law in making available information about campaign finances; second, it has demonstrated the need to move far beyond that law if the root evils of campaign financing are to be successfully eliminated.

In this regard, Senator Pastore, we support your efforts to repeal the equal time provision for presidential elections. Such a step will surely help to raise the level of discourse and provide for a more meaningful exchange of ideas. We would go further however and urge the repeal of the equal time provision for all federal candidates, as has been proposed in legislation offered yesterday by Senator Hugh Scott and Senators Mathias and Stevenson. We also support your concept of an overall limit on expenditures in a given race, and applaud your statement supporting a ceiling on individual contributions. Despite public disclosure, individual contributions continued to provide huge sums for candidates. According to available public information, President Nixon's top ten contributors gave more than $4 million, and the top 100 gave $14 million. Senator McGovern also received major individual contributions and found in October, 1972 the need to specifically solicit these large contributions. He said at that time "We've reached a period now where we have to get large amounts of money fast."

We believe, however, that expenditure ceilings must be imposed in the context of a broader program that will provide for public financing of federal elections. The concept is, of course, not new to federal law. Last year Congress enacted the $1 tax check-off provision for presidential elections—an action in which Senator Pastore again played a leading role.

We are aware of the early reports that limited taxpayer use of the check-off is taking place. We are also aware that this is going to be used as a means of arguing that the public does not want public financing. But the truth is that the check-off has not yet received a fair test. Yesterday, Common Cause filed suit in federal district court against the IRS for failing to place the dollar check-off on the 1040 and 1040A forms as intended by Congress and for failing to make appropriate efforts to inform taxpayers about the check-off. We believe that these IRS failures were a major factor in reducing the use of the check-off; and have sued so that these failures may be corrected as quickly as possible. (In some measure, federal financing of elections is already a fact—not duly legislated federal subsidy but furtive subsidy courtesy of the IRS. Many donors contribute in the form of appreciated stock, and the IRS permits the candidate to sell the stock without paying the capital gains tax. This extraordinary complaisance of the IRS in matters of campaign financing is also mainfested in its winking at those who evade the gift tax by fragmented gifts to multiple committees.)

The basic ingredients of public financing legislation should, in our opinion, include the following:

1. the provision of ample federal funds for the conduct of election campaigns by qualified candidates.
2. a very limited role for private contributions including a strict limitation on individual gifts, such as $100 for House races, $250 for Senate races and $500 for a Presidential race.
3. an overall limit on expenditures for a given race.
4. an end to organized committee giving, and to all forms of pooling contributions.
5. a bar to the transfer of cash in political campaigns.
6. a role for the political parties in the financing of general elections.
7. the creation of a hardnosed oversight and enforcement agency to ensure compliance.

Yesterday Senator Philip Hart introduced a Congressional public financing bill which addresses these fundamental points. We applaud Senator Hart for his leadership in this area and believe that this legislation should become the subject of national debate and Congressional review and consideration. We do not necessarily agree with every one of the positions set forth in the Hart bill. We believe, for example, that his measure should apply equally to Presidential elections, and not be limited to Congress. And we would eliminate the present system of financing altogether, not leaving it as an alternative for those who don't want to go the federal financing route. Despite these differences, we believe the Hart bill sets forth an equitable and feasible program, and provides a vitally important framework for consideration of this subject.

We agree completely with the Majority Leader of this body, Senator Mansfield, who recently said ". . . I can think of no better application of public funds . . . than . . . to use them for the financing of elections so that public office will remain open to all, on an unfettered and impartial basis, for the better service of the nation". The fact of the matter is that you could finance the entire costs of two national Presidential and Congressional elections for approximately the same costs as we presently pay for one Trident submarine.

Among the critics of the present system of financing are many elected public officials *and* many donors. In conversations we have had with Congressmen and Senators, they have told us over and over again that political fundraising is the most distasteful and degrading part of their jobs. Similarly, numerous business executives, labor union officials, and major individual givers receive pressures from so many directions that they feel they are being shaken down.

In short, under the present system of campaign financing both candidates and givers (willingly or not) are prisoners of a system which exposes them to suspicion and pressure, and legitimizes the exchange of money for political favors.

Last fall Common Cause members throughout the country polled Congressional candidates to get their views on public financing of campaigns. Of the 227 winning House candidates who answered our members, 129 favored the idea of public financing, 73 opposed it and 25 were undecided. This hardly fits the widely expressed view that federal financing of campaigns is not politically feasible at this time.

One can rarely nail down a causal relationship between campaign gifts and later political acts. But the patterns of political giving create a cloud of suspicion that can only deepen the cynicism of the average citizen. Consider some examples:

An analysis of legislation sponsored by the dairy industry and now pending in Congress, shows that of 43 House sponsors, 29 received a total of more than $110,000 from the dairy industry in the 1972 elections. On the Senate side, of the seven co-sponsors who ran in 1972 either for reelection or for president, five received a total of $51,700 from the dairy industry. Of the total received by House and Senate candidates, $33,500 came after the election had occurred. (For the donor, post-election giving has the advantage that the money can be given to a known winner.)

An analysis regarding the AMA sponsored medicredit bill shows that of some 140 co-sponsors in the House, 68 received $226,000 from the AMA during the previous election, including 5 who are members of the key Ways and Means Committee. On the Senate side, of the 7 cosponsors who ran for Senate in 1972, 5 received some $27,500 from the AMA.

Similarly the national health insurance bill sponsored primarily by the labor movement shows 48 co-sponsors in the House, with 47 of them having received $110,000 during the 1972 elections from COPE committees of the AFL–CIO or the UAW. On the Senate side, the 8 co-sponsors who ran in 1972 for Senate received $100,000 from the same groups.

The Seafarers International Union's political fund gave $100,000 to the Nixon campaign just before election day (so that it didn't appear in published reports until January 31) shortly after the Justice Department decided against appealing the dismissal of an indictment against the union for illegal contributions. Moreover, despite the law's prohibition against direct giving by unions, the $100,000 was obtained through a bank loan to the fund and not from voluntary contributions by union members.

One major presidential fundraiser along with a major contributor received one of the speediest bank charters granted in the last five years.

Robert Vesco, the donor of a recently revealed $200,000 cash contribution to the Nixon campaign, also makes clear what campaign contributions are all about. In a deposition from a Nixon campaign leader in New Jersey, Harry Sears, Vesco is quoted by Sears as stating that two earlier checks to the campaign for $10,000 and $5,000 were "his way of thank you for the favor that I had done." The so-called favor—arranging a phone call on Vesco's behalf by then Attorney General John Mitchell. As for the $200,000 contribution, if it came in after April 7 (as appears to be the case) the Committee to Re-elect the President should have reported it under the new law—and if it came in *before* April 7, as the Committee claims, it should have been reported under the old law. Mr. Vesco, incidentally, is presently the subject of a major SEC suit.

The effort by Common Cause to bring about a more rational approach to campaign financing has extended over more than two years. In 1971 Common Cause sued the major political parties to enjoin further violations of the $5,000 maximum limitation of individual campaign contributions. Unfortunately, and not by coincidence, our efforts to have this key restriction enforced were mooted by Congressional repeal (in the new law) of precisely those sections of the law which we were trying to have enforced. Nevertheless an important precedent was set. For the first time in history, a Federal Court had acknowledged the right of a citizen and a citizen's group to seek legal redress in matters relating to campaign finance laws, where those laws were not being properly enforced by responsible authorities.

When the Federal Election Campaign Act of 1971 became law, the question remained open as to whether it would be enforced. No previous campaign finance legislation had ever been enforced. Common Cause decided that a lively citizen interest in enforcement might make the difference.

So during the political campaign of 1972, Common Cause undertook a major compliance effort designed to create an atmosphere in which all interested parties would realize that the long tradition of noncompliance had ended. I think we succeeded. We made public numerous instances of improper filings and other violations of the new law, and filed hundreds of complaints with the supervisory officers regarding late filings and no filing violations.

We sued TRW, Inc., a major defense contractor, to obtain enforcement of Section 611, a key provision of the new law which prohibits contributions by government contractors to political office seekers. Our case against TRW was settled when the company agreed to terminate its political fund-giving committee and to return the money to the employees who had contributed to it. But our successful effort to activate Section 611 was met once again by efforts in Congress to repeal the section of the law under which we had brought suit. The repeal provision was reported out of Committee in the House and rushed to the floor, where it was approved. But a similar attempt to sneak it through the Senate was blocked by a number of concerned Senators.

We sued the Finance Committee to Re-elect the President for violating the *old law* by failing to make public its pre-April 7 contributions. As a result of our suit, the Committee released, prior to the election, the names of all contributors of $100 or more to President Nixon from January 1, 1971 to March 9, 1972. The question of making public the contributions from March 10 to April 6 remains in litigation.

Common Cause has also attacked the practice of earmarking or "laundering" funds, whereby contributions are channeled through conduit committees thus separating the original contributors from direct association with the recipient candidates. We are presently in court against the Clerk of the House and Secretary of the Senate for failing to enforce the law against earmarking. Between September 1 and October 26 the National Committee for the Re-election of a Democratic Congress received and transmitted some $415,000 in earmarked funds through the Democratic Congressional Campaign Committee and the Senatorial Campaign Committee. The actual contributors do not show up in the reports of the candidates who received the funds.

Helping to insure public access to the information being filed by candidates was a major Common Cause goal during 1972. The new law made no provision for systematic dissemination of the information, and it was apparent that the media would not have the resources or time to do the job by themselves. So Common Cause undertook to help act as a compiler, analyst and distributor of the information.

These activities involved more than 1,000 Common Cause volunteers. Summary reports and lists of significant individual and group donors were prepared on a nonpartisan basis for each major party candidate in a given race. In addition, major surveys were done concerning campaign finance activities of various business and labor groups.

As a result of our work, Common Cause now has comprehensive data on campaign financing for the 1972 elections. This includes copies of every report filed by candidates and committees with the Clerk of the House and Secretary of the Senate—both of whose offices, incidentally, were extremely cooperative with us throughout the year; lists of all itemized presidential donors for the period April 7 through October 23; and preliminary summaries for most House and Senate races and for most interest groups that make heavy campaign contributions.

We are now in the process of preparing complete and final reports, including the information filed on January 31, 1973, for every House and Senate candidate in the country and for each interest group committee. We will make this information public, including summaries and significant contributors for each candidate and interest committee, as soon as possible.

An example of the kind of information now available is the relative financial support of incumbents and challengers.

In a survey covering 275 House candidates and their major party challengers, where both had all their reports in up to October 26, we have found that the average of contributions raised by an incumbent was approximately $54,600, while the average raised by a major party challenger was approximately $27,900. Similarly, on the Senate side in a survey covering 25 Senate incumbents and their major party opponents, where both have filed reports through October 26, we found the average amount raised by an incumbent was $403,000 and the average raised by a challenger was $195,000. In both cases, incumbents raised roughly twice as much as challengers. (The above data are offered only as an example. They are incomplete in that they do not include the January 31, 1973, reports, have not been completely rechecked, and leave out races in which complete information was not filed.)

We expect that the final record of 1972 will amply demonstrate what many have long believed—that obtaining sufficient political financial support in our present system does not relate to whether you are a Democrat or a Republican, but rather to whether you are an incumbent or a challenger.

We believe that the record of 1972 makes clear the need to end the present system of financing elections. We also recognize that this is an issue that will be hard fought from beginning to end. In the interim, the Federal Election Campaign Act of 1971 remains an extremely important piece of legislation. We have urged that a full-scale Congressional review of this Act be conducted based on the experiences of 1972.

Certainly no campaign finance legislation should be considered on the floor of the House or Senate until such a broad review has occurred. We have not addressed ourselves here to specific amendments to the 1971 Act such as proposals to improve and strengthen the reporting requirements and we will save our comments on that subject until general hearings have been scheduled by the Senate Rules Committee. We would note, however, our belief that the single greatest need is for the creation of an independent elections commission with powers of enforcement and subpoena. In this regard we strongly endorse the efforts on behalf of such a commission initiated yesterday by Senators Hugh Scott, Charles Mathias, and Adlai Stevenson III, with the introduction of their legislation.

95-018—73——11

HEARINGS

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 372

TO AMEND THE COMMUNICATIONS ACT OF 1934 TO RELIEVE BROADCASTERS OF THE EQUAL TIME REQUIREMENT OF SECTION 315 WITH RESPECT TO PRESIDENTIAL AND VICE PRESIDENTIAL CANDIDATES AND TO AMEND THE CAMPAIGN COMMUNICATIONS REFORM ACT TO PROVIDE A FURTHER LIMITATION ON EXPENDITURES IN ELECTION CAMPAIGNS FOR FEDERAL ELECTIVE OFFICE

AND

S.J. Res. 110

TO ESTABLISH A NONPARTISAN COMMISSION ON FEDERAL ELECTION REFORM

JUNE 6 AND 7, 1973

FEDERAL ELECTION REFORM, 1973

WEDNESDAY, JUNE 6, 1973

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m. in room 301, Russell Office Building, Senator Claiborne Pell [chairman of the Subcommittee on Privileges and Elections] presiding.

Present: Senators Pell, Cannon [chairman of the full committee], Cook, Scott of Pennsylvania, and Hatfield.

Also present: Senators Kennedy, Bayh, Stevenson, Mathias, Biden, and Abourezk.

Full committee staff present: William McWhorter Cochrane, staff director; Hugh Q. Alexander, chief counsel; Joseph E. O'Leary, professional staff member [minority]; John P. Coder, professional staff member; Denver Dickerson, professional staff member; Livingston L. Biddle, Jr., professional staff member; Hildreth S. Ludewig, assistant chief clerk; Peggy Parrish, staff assistant; Kay Ballard Chain, secretarial assistant; Gretchen Doss, secretarial assistant [minority]; and Jack Sapp, editorial assistant.

Subcommittee on Privileges and Elections staff present: James H. Duffy, chief counsel; James S. Medill, minority counsel; and Mary G. Daly, secretary.

OPENING STATEMENT OF HON. CLAIBORNE PELL, CHAIRMAN OF THE SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

Senator PELL. The Committee on Rules and Administration will come to order.

This morning the committee opens hearings on S. 372, a bill amending the Campaign Reform Act, and on Senate Joint Resolution 110, to establish a Commission on Federal Elections to study and recommend improvements in our election and campaign system and on various other election reforms.

These hearings are being conducted at a time of great public concern over the integrity and fairness of our elective and campaign systems for Federal Government offices because of the complex series of events that have become known as the Watergate affair.

At the outset, therefore, and without unduly delaying the testimony of our witnesses, I think some observations on the context of these hearings are in order.

For 12 years I have served on the Senate Committee on Rules and Administration and, since the beginning of this Congress, I have been the chairman of its Subcommittee on Privileges and Elections.

It is this committee which is charged by the rules of the Senate with comprehensive jurisdiction over elections and election laws.

This committee, therefore, has a particular responsibility to respond legislatively to the events that have become known as the Watergate affair.

The Watergate tragedy has multiplied to include an incredible and seemingly endless array of misdeeds, ranging from simple bad judgement on one hand, to official lies, conspiracies, betrayals of public trust, and outright criminal acts on the other hand.

Clearly, it is too early to reach final conclusions about the root causes of this affair. Our Senate select investigating committee, headed by the senior Senator from North Carolina, is in the midst of public hearings; grand juries are still in session; a special prosecutor is engaged in his work; and with new revelations coming almost daily, the full dimensions of the tragedy still cannot be clearly seen.

It is not too early, however, to make some observations about the disclosures to date as they relate to the responsibilities of the Subcommittee on Privileges and Elections.

It is tempting and natural, when confronted with a major problem of Government, to seek solutions in new legislation; to seek new laws that will make a repetition of such a disaster impossible.

The Subcommittee on Privileges and Elections will indeed seek ways of improving our system of elections, to assure every American that our elections will be fair, honest, open to participation by all, and free from corrupting influences.

Some legislation already is before the subcommittee, and additional proposals have been suggested. Undoubtedly there will be more suggestions and more legislation introduced.

Each of these ideas and proposals will be given full and careful consideration by the subcommittee. Personally, I shall not prejudge any of these proposals. Because of the current intense public concern over our elections processes, I believe there is an unprecedented opportunity for meaningful election and campaign law improvement, and I will give my best efforts to see that this job is done, this challenge is met.

It would be wrong, however, and a grievous mistake, to assume on the evidence available that the basic cause of the Watergate affair was a lack of adequate laws. It would be just as wrong to conclude that new laws to improve our elections and campaign system can preclude another scandal in the future.

Indeed, it was only last year that the Congress enacted, and the President signed into law, the first comprehensive revision of our Federal elections and campaign laws in 47 years. The Federal Election Campaign Act of 1971 was widely hailed by reform organizations and citizen groups as a major and significant improvement in our campaign practices.

The principal objective of that act was to require the fullest public disclosure of all campaign contributions and campaign expenditures for all primaries and elections for Federal office.

The act, unfortunately, did not become effective until April 7, 1972, and accordingly it was determined that campaign contributions prior to that date need not be reported except as "cash on hand."

It appears that this decision, which was an attempt to reach a reasonable solution to a difficult problem, was taken by many as a license to raise millions of dollars prior to April 7 with the intention of concealing the source of funds. Such a procedure, while not technically unlawful, was in my opinion contrary to the spirit and purpose of the new law.

In my own campaign, I made a voluntary public disclosure of all pre-April 7 contributions of more than $100 and urged my opponent to do the same. Sad to say, he did not follow suit.

If violations of the spirit of the law were regrettable, the Watergate disclosures to date indicate absolutely appalling direct violations of the Federal Election Campaign Act. We hear reports of huge sums of money, unreported, stashed away in hideaways and apparently used for wrongful acts both during and after the 1972 campaign.

In addition to violations of that act, news of burglaries, political espionage, forgeries, fraudulent documents, cables, and other papers, improper use of campaign moneys for illegal or unethical purposes, and other apparently criminal acts, runs across our newspapers and television screens daily.

The appropriate response to these revelations to date is not that there ought to be a law against it, but the law must be followed and must be enforced.

What I am suggesting, of course, is that while our laws can and must be improved, new laws alone are not the answer. Citizens and public officials must abide by the laws—both the letter and the spirit—and those who willfuly and deliberately violate laws should be prosecuted.

One of the subjects of these hearings is Senate Joint Resolution 110, the President's recent proposal to the Congress establishing a Commission on Federal Elections to study and recommend improvements in our election and campaign system.

I believe the suggestion should be given careful consideration by the Congress.

I think it is noteworthy that, in his message to the Congress proposing establishment of the commission, the President made only passing mention of the Watergate affair.

I hope that reflects recognition on his part that possible lack of adequate law was not the root cause of the Watergate scandal in his administration. Otherwise, I fear the President may be offering a faulty diagnosis, and an ineffective treatment for a critical illness.

As Chairman of the Subcommittee on Privileges and Elections, I intend to follow closely the investigation being conducted by the Ervin committee for any helpful suggestions and recommendations that might emerge on improvement of our election laws. And, as I have said, careful consideration will be given to every proposal for reform and improvement.

I hope that we can make improvements in our election system, but let us not delude ourselves by thinking that election law reform, by itself, can stop the arrogant abuse of power by men whose ends seem to justify any means.

In the final analysis, the best guarantee of good government is the American people's insistence on the highest standards of integrity among public officials.

In election legislation it is the task of the Congress to make certain that the people's demand for integrity can be made effectively through a fair and honest election system.

It is toward that goal that I shall work. And I would emphasize the point that what we are seeking to do at the present time is make the present laws effective and easy to operate, before we move into the area of deciding what new laws are necessary.

Without objection, I submit for the hearing record copies of S. 372, as reported by the Committee on Commerce, and Senate Joint Resolution 110.

[The texts of the bills referred to appear as exhibits 1–A and 1–B in appendix II of these hearings, pp. 289, and 311 respectively.]

Senator Cannon, who is chairman of the full committee, has been gracious enough to ask me to chair these hearings in my capacity as chairman of the subcommittee.

Senator Cannon?

STATEMENT OF HON. HOWARD W. CANNON, CHAIRMAN OF THE COMMITTEE ON RULES AND ADMINISTRATION

Senator CANNON. These bills come to us at quite an appropriate time. S. 372 has been under consideration by the Commerce Committee for matters within its jurisdiction. That committee has acted and the bill now comes to us for consideration of matters under the jurisdiction of this committee.

After almost 50 years of functioning under the very slim provisions of the Federal Corrupt Practices Act of 1925, the Federal Election Campaign Act of 1971 was adopted, effective April 7, 1972, covering every phase of the elective process with respect to campaign contributions, expenditures and the use of the media.

The principle of the Campaign Act was prompt, complete, and accurate public disclosure. An informed electorate should be the judge of large contributions, excessive expenditures and the integrity of the elective process.

In general, candidates for nomination or election to Federal office and political committees supporting them compiled to an admirable degree with the intent and the provisions of the law.

Unfortunately, as Senator Pell has pointed out, there were some who tried in every way to evade the law or who, apparently, ignored it.

Now, this does not reflect adversely upon the act we adopted. Rather, it reflects upon those who are charged with the enforcement of the act.

When the Federal Election Campaign Act was passed by the Senate it contained a provision to create a separate agency, a Federal Elections Commission, to oversee and carry out the various requirements of the law.

That section of the act was not agreed to by the House of Representatives in conference and was deleted. The supervisory officers who were given responsibility have done their best since the act became effective.

But it appears that they did not have the power to enforce or prosecute, a vitally needed authority.

It is clear to most informed citizens that public disclosure is of no value unless honored by all who are called upon to disclose receipts and expenditures in a timely and honest manner.

The committee is now charged with the responsibility of reexamining the law to determine what is necessary to correct deficiencies and give teeth to the disclosure provisions. There are other questions to be resolved, too.

Should limitations be placed upon the amount that an individual may contribute to candidates? If so, would such a limitation be constitutional?

Should the use of cash in campaigns be prohibited, and, if so, is there a reasonable expectation that such a bar can be enforced?

These are only a couple of difficult issues to be determined by the committee and by the Senate in adopting an amended law.

Many legislative proposals have been offered this year and we hope that the witnesses appearing before the committee will help to resolve the problems confronting us so that we will be able to report to the Senate an amended law which will meet all of the necessary criteria—disclosure, control, enforcement, and civil and criminal prosecution for violations in the interest of restoring the public confidence in the Government and the elective process.

In order to speed the proceedings, I have asked Senator Pell, the chairman of the subcommittee, to conduct these hearings on behalf of the full committee so that we will be better able to report out a bill much more expeditiously.

Senator PELL. Thank you, Senator Cannon.

Senator COOK. I will yield to Senator Scott.

STATEMENT OF HON. HUGH SCOTT, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SCOTT. Mr. Chairman, I thank you. I understand that we will be considering proposals to improve the campaign spending law.

And among those, as you have noted, is Senator Pastore's bill to set an overall limit on campaign spending for Federal office and my own joint resolution to create a 17-member study commission on election reform. I have already introduced my own bill to create an independent Federal Election Commission of a permanent nature, similar to the one recommended in the Pastore bill, to monitor and enforce the campaign spending law.

We need immediate action on the joint resolution to establish a 17-member study commission in order to get prompt Senate and House action.

I would note that these hearings are not due to the Watergate, as I am sure the committee is aware, but due to the failure to enact sufficiently effective legislation, not only to correct the faults that occurred there, but the wrongdoing which occurred in connection with the raising of campaign funds in previous elections.

I agree with what the chairman has said concerning the fact that this provision of mine, creating a Federal Election Commission, which was passed by the Senate with only two dissenting votes—was nevertheless stricken out in conference after a long debate at the insistence of the House conferees.

And I see from the papers that some of those House conferees are again indicating that they do not want such a Commission. I hope that public opinion will take over in this regard, because we cannot get

into a situation, as highly honorable as the enforcement officials are—and I have for them the highest respect—with a fox-and-chicken-coop arrangement where we put the foxes to watch the chickens.

In other words, we put our own employees here under that law to watch us. That isn't right and it is too unfair a burden. They have done the best they could with it and they have acted honorably. It just isn't going to work.

Had that Federal Election Commission been in operation prior to the 1972 election, it is my judgment that that Commission would have had supervision over the affairs resulting from the Watergate wrongdoing and could very well have acted forcibly and effectively to reassure the public that our laws are being observed and enforced.

It is not possible under the law we enacted.

Had that Federal Election Commission been in effect at the time this committee looked into the affairs of Bobby Baker—the enormous sums of money raised by him for the election of candidates for public office and unaccounted for, a situation involving a man whose worth when he entered the Senate as an employee was $15,000, and when he appeared before this committee was worth $2.3 million, during which time his sole duty had been that of an aide to the Senate—had our Commission been in effect then, we might have been able to do something about the *Baker* case.

You will remember, by a strict party vote, we were denied the right to the FBI files, we were denied the right to the income tax return—and our committee, unfortunately, in those days, was divided along strictly partisan lines, with the minority demanding this information the majority refusing it.

And out of that experience, that partisan experience, the wounds of which have now healed, came the Ervin committee, which is conducting an investigation in a nonpartisan or bipartisan spirit, fairly and effectively.

It seems to me that is the contrast. That is something we ought to bear in mind, because before we indulge in too much piety around here, we ought to remember the shortcomings of Senate committees in the past, and I think we ought to remove from ourselves the danger and the temptation of partisan divisions by having a truly bipartisan Federal Election Commission.

While I am about it, I think, as the chairman has mentioned for himself, I would favor this committee acting upon a full disclosure law for all Senators.

And if the Members of the House are so willing, I think it would be well if they had a disclosure law, too. That should be an act of Congress.

I was the third Senator to make disclosure of my assets a good many years ago, stating all the securities I had, real estate, and so forth.

I have a standing offer to indicate the exact amount of my worth at any time the other Senators are willing to do the same thing.

Outside of National Bank stock, which I largely inherited from my father, I now make disclosure that my other securities have a book value, as of 2 days ago, of $99,000 less a debt of $12,000, which, I may add sadly, compares with a year or so ago, when it was worth $150,000 without indebtedness.

Now, I will give you that much lure in the hope that we can get a good disclosure bill out.

And let us find out, let us make sure, that nobody has any conflicts of interest—that is a good step, too.

Now, I do praise Senator Kennedy's views, as I have had the pleasure of reading his statement. Since I may not have an opportunity to comment on it later, I would like to say that I agree with what the Senator from Massachusetts proposes with respect to the equal-time provision. It should not only be repealed for Presidential elections, but should also be suspended for the 1974 elections for the Senate and House campaigns. I would like to see it applied to the House if we could work out the third-party situation.

But if we are going to waive equal time and require Presidential candidates to be exposed to the buffeting of the airwaves, I would like us in the Congress to have that same dubious privilege.

I do also acknowledge indebtedness to Senator Kennedy for his support of a new Federal election commission.

And with regard to the dollar checkoff, I opposed that at the time it was proposed, because I frankly did not see why one political party should receive $12 million, as was then claimed, to pay off its indebtedness, while the other political party elected not to be bound by the act.

I think both should be bound by the act or neither. That should be in the act, rather than to allow either party to exercise an option of not being included.

I will, and intend fully, to support the continuation of this dollar checkoff with perhaps some improvements on it, if we are offered that opportunity.

I note that only 3.1 percent have marked the checkoff. I believe I mentioned during the debate that this is what would happen.

The sad part is that the public is apathetic. But it should have more publicity. There should be more of an effort to get this checkoff made. I think it is worth $1 to every taxpayer to do something to get a little better election reform in this country.

The taxpayers themselves should be condemned if they don't register, if they don't vote, if they aren't willing to put up a buck for honesty.

And I would like to see it. I think it is a good thing. And if we can do it absent the partisan considerations which invested the Senate during the last debate, where what we were talking about was not electoral honesty but how to get $12 million—perhaps we can effectively legislate.

I have a broader statement which I will not read, because I have made reference to it before.

I would ask unanimous consent, Mr. Chairman, to include it at the conclusion of my statement.

Senator PELL. Without objection your written statement will be inserted in the hearing record.

Senator SCOTT. I note that Senator Cook, a member of this committee, has made a proposal, which I support, in the Commerce Committee to require approval of Presidential campaign expenditures in excess of $100 by the candidate's national party committee.

The two national political parties in this country have conducted themselves decently and honorably. They do not deserve the opprobrium that is heaped on those who, through arrogance and abuse of power, have tainted the political system.

And whatever we can do to strengthen the hands of the national committees of the parties, I am in favor of doing.

But let's not indulge in too much piety by implying that we suddenly woke up to the existence of a great deal of election wrongdoing, because somebody stupidly and criminally burglarized the headquarters of a political party.

The evils existed before this and we fought them out in this committee for days, and the evils will exist after this unless we do something about it, perhaps even more importantly unless the House of Representatives does something about it when we get to conference.

Thank you, Mr. Chairman.

Senator PELL. Thank you, Senator Scott. I would observe in connection with the checkoff that even though I am personally interested in it, I found to my horror when I filed my income tax return I couldn't find the form and failed to do the checkoff.

And here was I, as chairman of the Subcommittee on Privileges and Elections, having to file a special letter after April 15 to try to get my dollar checkoff to apply, because it is very, very hard to find.

And here was I, as chairman of the Subcommittee on Privileges and for those who file their own individual income tax returns, it is easy to find. All you have to do is look at what is in your packet. You have to look at each sheet of paper.

As a lawyer, I have discovered that that is important—you better do it.

If you have a CPA, I think the CPA ought to do it.

It was too easy to overlook, I agree with that. But I think perhaps we might encourage the American Heritage Foundation and other noble organizations to do more in publicizing these things.

But it wasn't concealed. It was there. It was in the packet.

The thing was that if you picked up each sheet in the packet, you came to that sheet. And it was in big letters, it had a big line here for you and a big line for your wife, and little check places, but clearly visible. And it told you you could put your buck down right here.

I think maybe we have publicized this today and we ought to publicize it more.

But if all we can do is get 3 percent of the American people to show an interest in the electoral process, then we have to condemn their attitude, too.

[The written statement of Senator Scott follows:]

STATEMENT OF HON. HUGH SCOTT, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, as a member of the Committee on Rules and Administration, I am pleased to offer my comments on the two bills now pending before this Committee—S. 372, the Federal Election Campaign Act Amendments of 1973, and S.J. Res. 110, to establish a nonpartisan commission on Federal election reform.

As reported by the Senate Commerce Committee, S. 372 incorporates the key provision from my own bill, S. 1094, which creates an independent Federal Election Commission to monitor and enforce the campaign spending law. If this proposal is enacted into law, the Commission would have full legal powers,

including the power to subpoena witnesses and evidence. Furthermore, it would be empowered to "initiate, prosecute, defend or appeal any court action through its own legal representative."

Other features of S. 372 include: (1) repealing the equal time broadcast requirements as it applies to Presidential and Vice Presidential candidates; (2) replacing a selected media spending limit with a new limit on all campaign spending; and (3) requiring approval of presidential campaign expenditures in excess of $100 by the candidates' National Party Committee.

One of the bills I introduced on March 6, 1973 addresses itself to the "equal time" question. S. 1095 would exempt the equal time requirements in the broadcasting law for *all* Federal offices, not just President and Vice President. This is the only fair way, since each Federal office, especially Senator and Representative, should be given the fullest possible exposure through the medium of broadcasting. In this respect, S. 372 falls short of that goal, and I am hopeful that some time will be devoted in executive session and on the Senate floor to resolving the problem.

In my opinion, the Commerce Committee has made a serious mistake in recommending a limit on all campaign expenditures. When I introduced my comprehensive campaign reform bill on February 25, 1971, I dwelt at great length on the inadvisability of setting such limits. Most available research indicated that an approach embodying full reporting and disclosure is far superior to one embodying limitations on campaign expenditures. This view has been supported by the highly respected Citizens Research Foundation, President Kennedy's Commission on Campaign Costs, the Committee for Economic Development and the Twentieth Century Fund. The new federal election law reflects this point of view as well.

My concern over spending limits today is as real now as it was two and one-half years ago. Limitations on campaign expenditures will tend to limit a challengers' ability to compete effectively, since he would be restricted to the same amount as the incumbent who, of course, is usually much more well known. The challenger will, in all probability, need to spend more to get the same recognition as the incumbent. In this sense, limitations limit competition.

Aside from these considerations, enforcement of a limit on all campaign spending will approach nightmarish conditions. The three supervisory officers who now monitor only selected media spending will tell us that even these figures were difficult to obtain. Are we now prepared to magnify and multiply this difficulty even more by including more items (in effect, all) under the spending limitation? This question still needs considerable study by the Rules Committee.

In looking back on the last presidential election campaign, and its attendant problems, the question of accountability is all important. For example, just how accountable was the Committee to Re-Elect the President to the wishes of the party professionals at the Republican National Committee? Not very. I am pleased that one of our Republican colleagues, Senator Marlow Cook, has proposed a solution to this problem. In the Commerce Committee's executive session, he successfully offered an amendment to require approval of presidential campaign expenditures in excess of $100 by the candidates' National Party Committee. Quoting from the Commerce Committee's report (93–170), "the final responsibility for how campaign funds are spent rests with the party's one National Committee instead of with the many obscure campaign committees that are now created to receive and expend campaign funds." This is an excellent amendment, and Senator Cook deserves the credit for proposing it at this time.

In my statement to the Rules Committee on April 11, 1973, I supported four particular proposals to reduce the paperwork burden and eliminate the temptation to evade the law. I am pleased to note that most of the testimony received during those hearings supported my suggestions. These include using a central campaign committee, reporting amounts of $100 or more, reporting more rapidly large contributions received immediately before elections, and giving more flexibility to the reporting schedule. I am hopeful that these proposals will be favorably considered by the Rules Committee at this time and will be reported out as amendments to S. 372.

Mr. Chairman, I would also like to take this opportunity today to say a good word for S.J. Res. 110, to establish a nonpartisan commission on Federal election reform. I introduced this measure, at the request of the Administration, with Senators Mansfield, Cook, Dole and Griffin. This Commission, to be composed of seventeen members, would recommend a comprehensive reform of campaign laws and practices before the end of 1973. Hopefully, those reforms which are

finally recommended can be enacted before the next Congressional elections in 1974. Time is of the essence here, so I hope that the Rules Committee will favorably report this resolution as soon as possible.

Mr. Chairman, this Committee is charged with the responsibility of reporting out a good bill—one which is consistent with democratic traditions. This is an excellent opportunity to correct what is wrong with the current law and make it even more effective.

Senator PELL. Senator Cook?

Senator COOK. I yield to the chairman.

Senator PELL. Senator Cannon.

Senator CANNON. Senator Scott indicated that this was a fairly new thing—election reform—a new activity, because of recent events. I simply point out that as chairman of the Subcommittee on Privileges and Elections I reported out a total of six bills on election reform since 1960 up to the present time.

Some of those were never acted on by the Senate. They were acted on by the full Rules Committee, reported to the Senate floor and not acted on.

However, in 1967, we did act on S. 1880 and passed that 87 to 0. It went to the House and the House refused to act on it.

So we got no bill that year.

And then we finally got S. 382 in 1971. Now, as I said, I had six different bills that I reported and got four passed, at least by the Senate, since the year 1960.

Senator SCOTT. The chairman has had the full support of the committee, as I am sure you recognize, and sometimes the support of the Senate and not very often the support of the House, that is about it.

Senator PELL. Senator Cook?

STATEMENT OF HON. MARLOW W. COOK, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator COOK. Mr. Chairman, I am very grateful for the opportunity to offer comments in regard to the pending legislation designed to reform the present system of Federal campaign laws. Perhaps no other issue has received as much discussion throughout the country during the past several months as the process by which we select our national leaders.

Although the special Watergate investigating committee is currently in the process of gathering facts preliminary to making recommendations for legislation in this area, the issue demands the immediate attention of the Congress if this country is to have a rational and equitable system of electing the President and Vice President.

As you know, the Senate Committee on Commerce has recently completed action on S. 372, the Federal Election Campaign Amendments Act of 1973. I was deeply involved in the consideration of that legislation, which I consider essential to the achievement of the aforementioned goals.

It became very obvious during the last Presidential campaign that the custom of establishing several different committees to raise funds for a candidate for office was making enforcement of existing campaign laws impossible. For this reason I offered an amendment to S. 372, which would require that all expenditures of more than $100 made on behalf of a candidate for President or Vice President be approved by the national committee of that candidate's party.

That amendment was unanimously adopted by the Commerce Committee. Hopefully such a requirement will preclude the recurrence of the situation that evolved last year with regard to the Committee To Re-Elect the President. With a plethora of campaign organizations throughout the country, the effectiveness of all campaign spending restrictions and reporting requirements were severely diminished.

Although obvious violations may still be detected, the enforcement of such laws will continue to be critically handicapped unless we force one organization to be unilaterally accountable for compliance with campaign laws.

Senator Scott has approached some of these same problems in his legislation. He proposes that every candidate for Federal office designate one committee to be responsible for approving all expenditures of more than $100, and also for immediately reporting exceptionally large political contributions. There can be no question as to the desirability and necessity of putting an end to the proliferation of campaign committees, which from a practical standpoint, render all of the Congress prior efforts totally impotent.

I truly believe that this committee, in acting quickly and thoroughly on the measures before it, can accomplish a major victory for our system of government, and I look forward to these hearings to supply the most desirable alternatives available to us at this time.

I might as an aside report to the committee that it is my understanding that under the present campaign act that the Clerk of the House so far has in his possession some 4,900 violations of that act which come from 435 Members of the Congress.

Senator PELL. Thank you, Senator Cook. This question is going to be asked of the Justice Department tomorrow as to the violations that have been reported to them, what actions they have taken in this regard.

Our first witness today is Senator Kennedy, the senior Senator from Massachusetts.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman. I want to first of all acknowledge from the outset what an important contribution this committee has made in the area of election reform over a number of years.

Senator Cannon, as he has mentioned himself, and who has served with great distinction as chairman of the Elections Subcommittee of this committee and who is well appreciated by the Senate, has been one of the most forceful spokesmen for the kind of oversight, review, and reform which are so essential.

As we talk about election reform here this morning, we realize that he floor-managed and led the fight for the successful Senate passage of the 1967 bill and for the 1971 act. More than any other Senator, he has been responsible for ending our half-century of neglect in this area.

I also want to acknowledge what Senator Scott has contributed in his suggestion of a Federal Election Commission to carry out the current law.

We have a four-headed enforcement monster at the present time, with the Secretary of the Senate, the Clerk of the House, the GAO, and

the Justice Department each sharing various and poorly coordinated responsibilities. That situation can be remedied by the Federal Election Commission in the current bill before us, an important and enormously useful step.

I also remember very well Senator Cook being active in the course of the debate in 1971 and his fine contributions toward improving that legislation. His amendment on the cost-of-living increase was constructive. We weren't always on the same side of that debate, but nonetheless I know he has given this a great deal of valuable thought and consideration. And I know you, Mr. Chairman, taking up your new responsibility as Election Subcommittee chairman, are also playing an important role in this whole area.

So I think there probably has not been any committee of the Congress that has had by members, by interest and by disposition and knowledge the kind of background that his committee has for its work, and that is why I particularly appreciate the chance to appear before you to outline some of the matters that I hope may be considered by the committee.

Let me also commend the excellent example of constructive cooperation and investigation that the Rules Committee and the Commerce Committee are setting in their consideration of the pending legislation.

As in other complex areas, our Federal election laws cut across the jurisdiction of many Senate committees and the prompt and expeditious arrangements your two committees have made for handling this vital subject are an example to other Senate committees that also have to work closely together to achieve the goals we share.

Two years ago, the passage of the Federal Election Campaign Act of 1971 was a landmark reform that brought our archaic and obsolete election laws into the modern world. I believe that S. 372, the bill now pending before this committee, can be a similar landmark in 1973, because it offers us a twofold opportunity—first, to finish the job we started in 1971 and close the loopholes in the new law opened up under the pressure of the 1972 campaign; and, second, to write new provisions into law to deal with the abuses of the system demonstrated by the Watergate case.

In the long run, because of the increased prospects for legislation such as this, I see Watergate as more an opportunity than a challenge for the country. If we learn the lessons that are already beginning to emerge, we can use this present crisis as an unprecedented opportunity to repair the machinery of all our institutions of government. And, of all the lessons of Watergate, perhaps the one that is most obvious today is the lesson that money is a vastly corrosive power in American politics.

For generations, men and women in public life have stood on noble campaign platforms like the politics of peace, the politics of hope, and the politics of reconciliation, but behind them all was a much more insidious form of politics—the politics of money. Indeed, it has been well said that in the United States today, we have the best political system that money can buy, and it is a disgrace to every basic principle on which the Nation stands.

Worse, the skyrocketing cost of election campaigns has produced a situation in which all but the wealthy—or their friends—are prohib-

ited from running for public office. The potential candidate of modest means is being driven from the field. Unless a candidate is a person of sizable wealth himself, he faces the Hobson's choice of running a shoestring campaign or relying on his large contributors. If he takes the shoestring route, he faces the prospect of almost certain defeat. If he goes the route of the large contributors, he inevitably creates the sort of ambiguous relationships in which he is obligated—or appears to be obligated—to his wealthy supporters. There could be no more powerful formula for compounding the cynicism of our citizens over Watergate than for Congress to ignore this opportunity to shut off the vast rivers of cash and contributions that flood our political system in every election campaign.

Thus, I support the principal provisions of S. 372, because they are major steps in the right direction. The repeal of the equal time provision for Presidential elections is long overdue, and the problems we have had for 13 years in accomplishing that result are proof that we should have repealed it outright in 1960, instead of simply suspending it for that election only.

Similarly, the experience of the new Election Reform Act in the 1972 campaign, and the maze of interesting responsibilities among the General Accounting Office, the Secretary of the Senate, the Clerk of the House, and the Department of Justice, proves the wisdom of the Senate's decision 2 years ago to establish an independent Federal Election Commission to enforce the law. I hope that this year we will not compromise again, that the Federal Election Commission will at last become a reality for the future.

Finally, the across-the-board 25¢-a-voter ceiling on campaign spending is an excellent improvement over the attempt of the 1971 act to impose a smaller limit on selected expenditures such as for the broadcasting media. Although the ceilings worked well in their limited purpose, they left an enormous loophole for vast sums of influence money to be poured into other activities not covered by the ceiling. Experience proves that only a comprehensive ceiling can prevent these abuses, and the level chosen by the committee is high enough to allow any candidate to get his message across.

Thus, with S. 372 as an excellent foundation on which to build, I urge the Committee to make the bill an omnibus campaign financing and election reform measure, capable of responding in all the areas where our present laws are deficient.

In my testimony today, I would like to suggest 10 specific reforms for the committee's consideration. The first five deal with areas directly related to the existing provisions of S. 372, and the remaining five are separate areas of our election laws in which I believe that Congress has the responsibility to act.

First, the most flagrant single existing loophole in the existing campaign financing law is the absence of any effective limit on the amount an individual may contribute to a candidate for Federal office. So long as that loophole exists, our campaign laws are just a sieve. At the present time, we know that wealthy individuals are able to contribute tens of thousands, hundreds of thousands, or, even on rare occasions, millions of dollars to a candidate's campaign. All the candidate needs is an imaginative campaign treasurer to carve up a large donation into smaller pieces tiny enough to fit through the gaping hole in the gift

tax laws and the election laws. To close this glaring loophole I ask the committee to impose an absolute limit of $1,000 on the amount any individual may contribute to a candidate or to any political committee acting in his behalf. At a single stroke, by enacting this sort of rigid ceiling, we can dry up the torrents of influence money that pour into campaigns for Federal office. If Watergate has taught us anything, it is that disclosure is not enough, that sunlight is not an adequate disinfectant for the infectious power of money in political campaigns.

Second, another flagrant loophole in the existing election laws is the free flow of campaign cash. It doesn't take much exposure to Watergate to realize that some of the most sordid symbols of the scandal are the suitcases and office safes filled with the cash that was used to advance the nefarious manipulations of the conspirators.

My view is that we should impose a flat ban on cash transactions in political campaigns, subject only to a modest exemption for transactions of, say, $100 or less, in order to facilitate contributions by small donors and to avoid unnecessary complexity for the myriad minor daily transactions that make up any effective campaign. I recognize that a ban on cash at this level will produce inevitable hardships on certain transactions, but that is a small price to pay for the increased public confidence we will bring to the political system as a whole by ending the flow of cash.

Third, another significant loophole that should be closed in the existing law is the so-called "coordinated contributions" loophole, by which, for example, an individual can deliver a $1,000 contribution, made of 10 separate $100 contributions from each of the 10 other persons. By contributing in this manner, the group escapes the letter but violates the spirit of the full disclosure requirements of existing law, which applies only to contributions greater than $100.

Fourth, individuals contributing more than a total of $1,000 to various political campaigns in any calendar year should be required to report their contributions in their own right. Under present law, committees are required to file such reports but in most cases individuals are not, since the law assumes that their names will be contained in the reports filed by the committees and candidates receiving the funds. What often escapes disclosure here is the manner in which wealthy individuals sow their influence among numerous candidates across the country, and sometimes even among opposing candidates in the same election campaign.

Fifth, with respect to the equal time provision, I believe that the measure should not only be repealed for Presidential elections, but should also be suspended for the 1974 election for Senate and other statewide election campaigns.

In its actual operation, the equal time provision should be called the "no time" provision. Instead of fulfilling its original promise to increase the access of all candidates to radio and television, its effect in practice has been precisely the opposite, curtailing the access of legitimate candidates for fear that broadcasting time will also have to be made available to other less legitimate candidates. Because of the equal time provision, the political system as a whole has suffered. Rarely has a Federal law so well-intentioned in theory fared so badly in practice.

The repressive effect of the provision is most notorious in Presidential elections, but its operation has also been insidious in every other election, Federal, State, and local. The satisfactory experience of 1960 is ample justification for outright repeal of the provision for Presidential elections, but I believe that Congress can and should go further. By suspending the provision for statewide Federal and State elections, we can repeat the 1960 experiment in 1974. The FCC's Fairness Doctrine will continue to insure that the viewpoints of all candidates are fairly presented, and, at the same time, by restricting the proposal to statewide elections, we can avoid the potentially damaging impact of such a suspension on congressional or local elections, where the power of a single broadcasting station may be exorbitant and impossible to counteract.

I have every expectation that the experience of suspension in 1974 will be satisfactory for statewide elections, and that once the results are in, we shall be able to move promptly to outright repeal of the provision for such campaigns.

Sixth, I suggest that the committee may wish to authorize the new Federal Election Commission to undertake activities to improve the quality of other aspects of the election process in the Nation, particularly in the areas of voter registration, election administration and election day activities. Last month, thanks to the extraordinary initiative and perseverance of Senator Gale McGee and the Senate Post Office Committee, the Senate took the historic step of approving a major measure to establish post card voter registration for Federal elections, and the bill is now awaiting action by the House.

In the course of its deliberations, the Post Office Committee considered a supplementary suggestion of my own, a bill to establish a modest voluntary grant program to provide Federal financial assistance to State and local voter registration activities. The Post Office Committee did not adopt the program in the bill we passed last month, in part because of the view that the proposal might more appropriately fall within the jurisdiction of this committee.

In the course of the continuing debate on voter registration, I have received the strong support of State and local election officials throughout the country for some form of Federal assistance to help defray the cost of improving the election process. I believe that many jurisdictions are ready to adopt far-reaching changes on their own, if only they can find the financial means to do so in these days of budget crisis at every level of government.

The provision I favor would be a modest program of Federal grants of the order of $60 million a year for the next 3 years to encourage States to undertake reforms in four broad areas—voter registration, voter education, application of computers and other modern data processing techniques to elections, and the forms in the area of election administration with special emphasis on training programs for State and local election officials and on new programs to eliminate the mushrooming problems that too often plague voters and local officials alike on election day. I have drafted some legislative proposals in this area, which I plan to introduce today in the Senate for referral to this committee, and I hope they will be of benefit in your deliberations on S. 372.

Seventh, I urge the committee to make election day a holiday for the congressional elections in 1974, as a means of attempting to im-

prove voter turnout in the Nation. The proposal to make election day a national holiday has had broad bipartisan support for at least a decade, since President Kennedy's Commission on Registration and Voting Participation called in 1963 for election day to be proclaimed a national day of dedication to our American democracy.

To me, whatever the other pros and cons of setting election day as a national holiday, the case for doing so stands or falls according to its effect on voter turnout. And so, rather than enact legislation establishing a permanent national holiday for election day at this time, I suggest that the committee do so on a trial basis for the 1974 elections. If it has the desired effect on voter turnout, there will be ample opportunity to set a permanent holiday for the future.

Eighth, in the wake of Watergate, we should take this opportunity to enact new measures for the prohibition of campaign sabotage and political espionage, in order to prevent the recurrence in the future of the abuses we have already seen revealed. In some cases, it is likely that such nefarious activities are already violations of Federal law. But in order to insure that we have the maximum possible safeguards against campaign sabotage, I suggest that the committee consider a blanket provision insuring that all State and local offenses committed against a candidate for Federal office shall also be Federal crimes. In this manner, we can bring the full force of Federal law to bear for the prevention of such activities and the apprehension of those responsible for them.

Ninth, we should use the magnificent opportunity we now have for reform in order to advance the goal of public financing of Federal election campaigns. Although substantial questions of committee jurisdiction may be involved here, it is my hope that S. 372 can also be the vehicle in this committee and on the Senate floor for major new amendments to the legislation we enacted in 1971, establishing the public financing of Presidential campaigns. To me, there are four obvious reforms we should enact in this area:

We should abolish private financing as an alternative to public financing in Presidential campaigns. Never again, after Watergate, should we tolerate a system in which tens of millions of special interest dollars are spirited to all sections of the country to finance a Presidential campaign. By taking private dollars out of campaigns for the Nation's highest public office, we can restore the office of the President to the people of the country, free of any taint of the corrupting power of private money. The President will again be the President of all the people, not the captive of any special interest group or any private pocketbook.

We should improve the dollar tax checkoff by guaranteeing the visibility it deserves on page 1 on both the long form and the short form of the tax returns. As of May 25, of the 72 million tax returns filed, all but 5 million had been processed, and only 3.1 percent of those have marked the checkoff.

It is my understanding that the Internal Revenue Service has already acknowledged the confusion and controversy caused by the decision to put the checkoff on a separate form in 1972. The Tax Form Coordinating Committee of the Internal Revenue Service is taking steps to put the checkoff on page 1, where it belongs, and I hope that the Senate will insist on nailing down that change in the most effective possible way.

In spite of the obvious explanation that the poor showing of the checkoff in 1972 was caused by the obscure place given it in the tax forms, the suspicion is growing that the checkoff, even on page 1, may not produce sufficient public funds to finance Presidential campaigns at the level intended. Therefore, Congress should amend the act to authorize the appropriation of additional funds to make up any deficit that exits between the checkoff and the spending ceiling to be established by the law.

In order to avoid the uncertainty and confusion engendered by the annual appropriations process, Congress should restore the original Senate-passed version of the public financing bill in 1971, which required automatic appropriation of the funds made available by the checkoff.

Equally important in the area of public financing, Watergate demonstrates that the time has come to apply the principle of public financing to congressional as well as Presidential elections. Senator Philip Hart as already proposed major Senate legislation to achieve this goal, and I endorse its principle. Whether or not we decide to go the route of public financing for primary elections at this time, at least we should be able to agree that the principle is long overdue for application to general election campaigns for the Senate and the House.

Tenth, and finally, I support the principle of Senate Joint Resolution 110, which is also pending before this committee in these hearings. There is nothing that cannot be reconciled between President Nixon's proposal for a long-range study of Federal election reform by a distinguished bipartisan commission, as embodied in the pending Senate resolution, and prompt action by Congress on the reforms we must now achieve.

I would suggest, however, in considering this resolution, that the committee expand the specific proposals for constitutional reform to include a variety of other subjects, such as direct election of the President and representation in both the Senate and the House for the District of Columbia, and other constitutional and statutory reforms that may be required to accommodate our constitutional form of Government to the needs revealed by the unfolding present crisis.

Specific proposals, however, are for the future. For now, it is sufficient that we endorse the proposal for the Commission's study and await its long-run recommendations for reform.

In closing, Mr. Chairman, I would like to emphasize again the importance of the pending legislation and the opportunity we now have for comprehensive election reform. By building on S. 372 and the foundation laid in recent years, we can demonstrate to the people of this country that Congress is capable of responding to the current challenge. As we act promptly and effectively to heal the wounds that our political process has suffered, we will restore the people's confidence in the Government that serves them. And thereby, we shall end the shattering ordeal that Watergate has brought to our modern national life.

Senator PELL. Thank you, Senator Kennedy. I will defer at this time to the chairman for any questions.

Senator CANNON. With respect to the Commission, I would agree with you that it would have the opportunity to study many items within the broad area of election reform.

However, I am sure we are well in accord that the action of creating a commission should not delay immediate action now on the specific reforms that need to be brought about in connection with existing law; would you agree with that?

Senator KENNEDY. I would agree with that wholeheartedly.

Senator CANNON. One further point that has been made to me with reference to the Commission, while it is referred to as a nonpartisan commission in the proposal, it really is balanced in favor of one party or the other.

The suggestion has been made that the Commission should have an equal number of persons, so that there would not be the charge or fear of one party or the other dominating the Commission.

Senator KENNEDY. I think that is a reasonable suggestion.

Senator CANNON. There have been some questions raised concerning a limitation on political contributions, that there might be a constitutional question.

Do you have any thoughts on that?

Senator KENNEDY. I think this is a valid point which has been raised in this committee in its deliberations in the past, as well as on the floor of the Senate. There are first amendment and other constitutional considerations involved in the imposition of any kind of ceiling on contributions by an individual to a particular candidate or group of candidates, just as there are constitutional questions that arise with respect to limits on campaign spending.

I think the Supreme Court has indicated, in a long line of cases going back to the 19th century, that Congress has broad power to regulate Federal elections, including contributions and expenditures. The most recent cases are *South Carolina* v. *Katzenbach* which upheld the 1965 Voting Rights Act, and *Oregon* v. *Mitchell*, which upheld the 18-year-old vote. In many other cases, too, the Court has recognized that the Congress has broad power and authority and responsibility to prevent corruption of Federal elections.

I think that a reasonable exercise by the committee of that power to secure the integrity of the Federal election process would be respected by the Supreme Court.

I am satisfied on the basis of the constitutional precedents that Congress has the power and authority to enact the kinds of recommendations that have been suggested here.

Senator CANNON. During the Commerce Committee's consideration of S. 372, considerable discussion was had with respect to the point that expenditures over the amount of $100 would have to be approved by the candidate or his representative, that this perhaps raised a constitutional question as to whether an individual really might be prohibited from going out and spending more than $100 in support of a particular candidate of his choice or against a particular candidate, if he wanted to go against—and particularly in the light of the fact that these amounts would be included, theoretically, in the overall limitation that the candidate could spend on the election.

It is quite possible that expenditures could exist of which he had no knowledge. He couldn't actually certify to them.

Yet, technically there might be a violation of the law.

Do you have any thoughts on that?

Senator KENNEDY. I think you have demonstrated by your observation that troublesome questions may arise. Reasonable interpretations

of these provisions will have to be developed, but I think that the principle is workable.

I think there probably has to be some elasticity with regard to expenditures in national Presidential elections by State committees as well as by national committees. So long as the authorization power can be appropriately delegated, I think the provision can be effective.

Senator CANNON. In establishing the Elections Commission as we proposed in our bill S. 382, when it passed the Senate in 1971, and which we had to give up on in order to get a bill passed by the House, the suggestion has since been made that if you had only one commissioner in charge, you would get much more prompt action on violations, prosecutions, and enforcement than is now had.

But I think Senator Cook's statement this morning pointed up a very difficult problem, and that is that over 4,900 violations are on file now, have been reported, that is, with respect to violations under the existing act from the clerk of the House.

Obviously you couldn't prosecute 4,900 cases of violations in sufficient time to have an effect on the election, which is really the desired result.

Senator KENNEDY. I think that the Commission or any other enforcement agency would be very much challenged by such a large number of apparent violations. But hopefully, if we are able to enact the reforms that have been suggested here this morning, we will go a long way toward eliminating situations in which violations have developed in the past.

At the present time there is a great deal of legitimate as well as illegitimate confusion about contributions and committees and capital gains, and gift taxes and the other provisions of the election laws. If we accept the concept of public financing of political campaigns, we will dramatically reduce the cause of a substantial number of the violations.

The proposed reforms will simplify the system dramatically and perfect it. And by bringing the Federal presence into it in terms of investigating and reporting, we will create the atmosphere and climate in the United States that has been generally found in the tax system, which most observers agree is self-policing and remarkably free from corruption and violation.

Senator CANNON. In the early stages of Watergate activities, one of the items that came to the public attention was the fact that certain campaign funds had come from a bank in Mexico.

Now, that prompts my question to you as to whether you think that foreign nationals ought to be permitted to make contributions. Should they be permitted to make or prohibited from making contributions to elections in the United States?

Senator KENNEDY. I can't see any reason why they ought to be permitted to do so. I suppose you could find an exceptional case where an American citizen has changed nationality and had a legitimate interest in the public policies of the United States—and I am sure you could give me legitimate examples of people who perhaps should not be excluded—resident aliens might be one case.

But as a general matter, as a rule of law, I would certainly support an absolute prohibition, both for foreign nationals and resident aliens.

Senator CANNON. Thank you very much, Mr. Chairman.

Senator PELL. In connection with this question of foreign nationals, I wonder if any harm comes from the contributions, particularly from an undesirable foreign national, the fact that he has contributed is a matter of reported public knowledge, and that in itself would balance the bad effect of the contribution.

My own thought is that a great deal of the ends to be achieved would be realized if the present law was fully honored and the names of the contributors made a matter of public record. I think then that if the contributor is undesirable, the candidate would be reluctant to accept the contribution.

Would you not think that had merit?

Senator KENNEDY. I would think that public disclosure and accountability obviously would reduce significantly the danger of corrosive or corrupt influences by either foreign contributions. But it is difficult to think of many instances where foreign national contributions would be justified, and I think they should be banned altogether.

The present election law goes part of the way, but its provisions are unclear, and I would hope the committee would do the job clearly.

Senator PELL. I think we are wandering a little far afield now, but when it comes to contributions by foreign nationals to U.S. elections, I would say the United States has probably contributed more money than any other nation to the costs of elections outside the United States in the last 20 years.

But I realize that is beyond our purview.

Are you advocating limitation on the size of contributions to but not on the expenditures by the individual candidate? In other words, you are saying there should be a thousand dollar limit to a candidate, but that the candidate—if one received a large aggregate amount, as much as he wanted, he could spend it, would that be correct?

Senator KENNEDY. Yes, within the overall 25 cents spending limitation, which I endorse.

Senator PELL. Now, with regard to the thousand dollar limitation on contributions, would that be a total amount? What if the man had several different committees?

Senator KENNEDY. The limit would be a total amount, whether contributed to the candidate or to committees supporting the candidate.

Senator PELL. Would this apply to political education funds?

Senator KENNEDY. It would apply to contributions to political education funds, but not to contributions by the funds.

Senator PELL. It should not, because I think that stands for a group of people and they should be permitted to contribute more than $1,000.

Senator KENNEDY. Yes.

Senator PELL. Then we will study the bills, and thank you very much indeed.

Senator KENNEDY. Thank you.

Senator PELL. Senator Bayh, Senator from Indiana.

Senator Bayh, it is a very interesting bill, I haven't had a chance to study. I would add that it does go to several different committees. It is rather hard for every one of us to focus on it.

Perhaps it might eventually be broken up into different portions.

STATEMENT OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator BAYH. Mr. Chairman, I appreciate the courtesy of you and of the committee in letting me express my opinion on a very important subject.

You are absolutely right in suggesting that the bill that I have introduced does cover two or three different areas. For that reason it is beyond this committee's sole jurisdiction.

However, I think that the whole problem of how we rid ourselves of the shortcomings which have led to the present situation, which is known as Watergate, or minimize the chance of that happening again, is so comprehensive and so important that it deserves a comprehensive answer.

I wonder if perhaps for the sake of time I could summarize my statement, taking 10 or 15 minutes to do so, and have the entire statement inserted in the hearing record?

Senator PELL. Without objection, the statement will be in the hearing record in its entirety.

Senator BAYH. Mr. Chairman, I am pleased to have this opportunity to express my views on what I regard as one of the most important areas with which the 93d Congress will have an opportunity to deal—the need to reform the mechanisms by which we choose our elected officials.

Events of recent months have made the time ripe for what I regard as long overdue significant movement in this area, and I would strongly urge this committee and the Congress as a whole to move responsibly and expeditiously to take advantage of this opportunity. Before commenting on specific legislative proposals, however, I would like to address myself for a moment to the meaning of the events which have given rise to the demand for campaign and election reform.

The present tragedy of what has come to be covered by the general term "Watergate" involves one of the most serious problems with which I have had to deal since I have had the privilege of serving in the U.S. Senate. The victim of Watergate, Mr. Chairman, is not any one political party or any one politician. The victim is constitutional government itself, the integrity and credibility of our free institutions.

I am concerned because I don't think we can afford to excuse these crimes against the democratic system with the easy attitude that such behavior is only politics as usual, because it isn't, it mustn't be politics as usual.

Those who are accused of involvement are, of course, entitled to a fair trial and we must see that they get it. Only then can individual guilt be established.

But the events that are already on record are sufficient to fix this incident as one of the most serious attempts in our history to subvert American democracy. The ordinary citizen knows that these events do not belong in the house of Jefferson and Lincoln.

But maybe we will have learned a lesson, maybe we can take this bad set of circumstances and make it become something positive and useful.

Perhaps if we know that—and act upon what we know to legislate fundamental reform in the way we select our elected officials—we can restore true democracy and repair the civic morality which is its foundation. With this in mind, I would like to address myself to some of the specific proposals which are before this committee as well as some that may be in the jurisdiction of others.

Senate Joint Resolution 110 introduced by the distinguished Minority Leader, Senator Scott, which calls for the establishment of the nonpartisan Commission on Federal Election Reform is a proposal which I have no difficulty in supporting. Perhaps we do need this kind of approach.

Mr. Chairman, I will say, however, that I believe many of the solutions to our problems are already clear. They have been studied. We just haven't had the necessary resolve to stand up and be counted and do something about them.

To refer these problems to yet another commission is not, in my view, the kind of answer the American people have a right to expect.

S. 372 proposed by Senator Pastore and Senator Hollings and some others which would modify the equal time requirement of section 315 of the Communications Act and impose maximum spending limitations on congressional candidates would, in my judgment, be a significant and major step in the right direction.

I have cosponsored the proposal of the distinguished Senator from Michigan, Mr. Hart, which would impose the same spending limitations contained in S. 372, but would go one step further and establish a system of public financing for congressional campaigns. I firmly believe that this is necessary because although part of the problem is in the sheer volume of money that is poured into a campaign, a much more serious problem is the source of those funds and the strings that may be tied to it.

I would like also, Mr. Chairman, to direct the committee's attention to a bill which I introduced on May 3, 1973, which we titled the Campaign and Election Reform Act of 1973. This bill contains my suggestions for comprehensive legislation in this area.

Title I of this legislative proposal, the omnibus disclosure section, provides for uniform financial disclosure by all employees of the Federal Government, whether in the legislative, executive, or judicial branches. All those who have an income of over $18,000 per year would have to have a complete financial disclosure.

I think it is particularly important for those of us in Congress to stand up and make a complete and total disclosure. If there are conflicts of interest, the public has a right to know.

And I think we in the Congress should set an example and lead the way, as well as requiring the executive and judiciary branches to do the same thing.

Second, my bill deals with the tremendous costs of Presidential campaigns and the problems and temptations of political fundraising. It modifies the Presidential Election Campaign Fund Act of 1971 to increase the amount an individual can check off of his or her income tax for the Presidential campaign fund from $1 to $2.

Furthermore, it limits the total campaign spending by a Presidential candidate or their parties to the greatest amount allocated from public funds to any candidate. It gives the candidate and the party an alternative, Mr. Chairman, of using the private solicitation route, which is

presently followed, or the public route and to utilize what is now the $1 contribution.

But if you go the private route of going to the fat cats for money, you are limited, you cannot spend any more, you cannot raise any more through that source than you would be entitled to spend if you used the small contribution public source.

In addition, we would, as others have, require that the information about this private checkoff be put on page 1 in clear, concise language of your income tax form. Right now there are too many Americans that just don't know it exists and thus don't take advantage of its provisions.

The third aspect of this bill, which I think is very much in the jurisdiction of this committee, deals with the need to strengthen the present law as far as campaign-related crimes are concerned.

My bill would amend the Federal criminal laws to make it a crime for a candidate or political party or their agent to falsely represent themselves as speaking for or acting for another candidate or political party.

We also bring into the confines of Federal statute and Federal law violations some of those common law crimes—burglary, criminal trespass, and extortion, if they are related to one party or one candidate committing this kind of an act against another party or another candidate. This is a law violation in most of our jurisdictions now, but I think it is important enough that we make it a Federal law violation, if this kind of act is committed in the campaign mode.

Another important aspect of the strengthening of the present campaign law portion of this bill is that it changes the criminal penalties for violation of campaign reporting requirements from misdemeanors to felonies in cases where violations are in excess of $5,000.

There just isn't the kind of incentive that I would like to see in the act if we are talking about a misdemeanor and a $1,000 fine, which previously in most instances has been levied against the party, not against the individual who committed the act.

I think this is serious enough, Mr. Chairman. Let's make it a felony. Let's put somebody away for 5 years. Let's make it a $50,000 fine instead of a $1,000 fine. And then let's give the Comptroller General, as the agent who is charged with enforcing this law—let's give him some prosecutorial tools in the event the Justice Department isn't doing the job.

I don't care whether it is a Republican administration or a Democratic administration, the temptation is going to be there in the Justice Department not to prosecute election violations against some of your own party faithful.

I think the Attorney General and the Justice Department should be given the first chance, but in the event they don't obey the law and don't fulfill the requirements of the law, then I would give the Comptroller General under this bill the right to set up a special prosecutor to proceed against those individuals who have clearly violated the law. Due process would be provided for those individuals, but we would have somebody pursuing the enforcement of these provisions, which now really are not being adequately pursued.

Mr. Chairman, that is the end of my minibuster. I appreciate the courtesy of the committee.

I would say I appreciate the reference of Senator Kennedy to an area that has been of great concern to me. And I notice the presence of the distinguished Senator from Kentucky, who has been one of the most faithful members of the Constitutional Amendments Subcommittee.

He and I and others, including Senator Pell, for a number of years have tried to get the Congress to accept a new way of electing the President, called the direct election of the President.

It seems to me that now the time is ripe to again make a major effort to do away with this anachronism known as the electoral college. It is outdated, it is dangerous, it is undemocratic.

I think the time has come to start at the bottom by giving the people, the individual citizens of this country, the right to vote for their President on a direct popular vote, one-man one-vote basis, the same way they vote for all other elected officials in our country.

Senator PELL. Thank you very much. In connection with the public financial disclosure provision, your view is that all legislative and executive branch officials should make such disclosures?

Senator BAYH. Yes. We have tried this piecemeal, we have a Judicial Disclosure Act, we have had executive ones and legislative ones. I personally have been doing this myself, so perhaps I don't come into it totally objectively.

But I think there is something very cleansing about giving full information to the people and letting them determine if there is a conflict of interest.

And I think this ought to apply across the board. If the judge sits on the case, if we vote on bills, if an administrator in the executive branch owns certain property, then I see nothing wrong—in fact, I think it would be very important for the people to know that this ownership is there.

Senator PELL. Do you think that there should be a limitation on the amount that is contributed by any particular individual?

Senator BAYH. Yes, I really do. If we are talking about a major overhaul, where we put a lid on the amount that can be spent, I think then that a reasonable limitation on individual contributions would be very salutary.

In talking about the various means of the financing, whether it is the individual contributor, whether it is a tax write-off, whether it is plain public financing, which might be the best investment we could make of public tax dollars, I think to do that without limiting in a very strict way the amount that could be spent would be a mistake.

Senator PELL. Senator Cook?

Senator COOK. Thank you, Mr. Chairman. Senator, as you well know, we have not only had hearings on direct election of the President, but we also started hearings last year on a constitutional amendment for a singular 6-year term for the Presidency, and it looks like we will be back on that again some time this year.

Let me ask you, do you feel that the direction in which S. 372 is heading cures some of the problems that we had last year? I refer particularly to the type of media that an individual could use. We in the Congress obviously only had the authority to impose restrictions on radio and television, but not the rest of the media. Do you feel in setting a limitation of 25 cents per eligible voter in the State, for all

purposes, that we have cured one of the main problems that we have in the existing act?

Senator BAYH. Yes. I am not sure that 25 cents is the right figure, perhaps it should be even less. But I think that is a fair way of assessing what a campaign should cost, see that each State and each candidate plays by that same set of rules; namely, the number of people that he or she must reach.

An important ingredient, of course, is how you control the limitation, how you enforce it.

I think that is certainly a reasonable goal to shoot for.

Senator COOK. Let me give you an example, because I think it may be too high. In our report on S. 372, we have listed your State as having the estimated eligible voting population of 3,509,000. Does that sound right?

Senator BAYH. Yes; we have had right about 2 million, that is usually what we have had, as far as actual turnout.

But I think that is very close to right.

Senator COOK. Based on that, you would be allowed $877,250 to expend in a senatorial campaign. I might say for my own State, which is listed as 2,206,000 population, a total expenditure of $551,500 would be authorized. I was far away from raising $551,000 4 years ago.

I am wondering whether your suggestion that maybe 25 cents is too high may be correct. I would like to set it as low as we could possibly get it passed.

Senator BAYH. That figure that you referred to is probably a ball park figure for what it costs to run a campaign in Indiana, unfortunately, but I wish we could cut that in half. I would like to do everything in my power to see that that is limited.

Senator COOK. Well, let me say one thing, although the figures do disturb me and I think they are extremely high, don't you feel, though, Senator, that the lower you cut that figure, the more you benefit an incumbent?

Senator BAYH. Perhaps.

Senator COOK. In other words, if we cut the figures in half, $435,000—the fellow who is seeking recognition in the State would have a very difficult time.

I think we all have to be very careful that we not only observe from our standpoint but also from the standpoint of the competitive system as it prevails in the political arena.

If we get it too low, I think we are eliminating the possibility of a challenger to take on an incumbent.

Senator BAYH. Yes; I think that has to be handled with great care. By the same token, I am sure that my friend from Kentucky realizes that we have had a number of instances, not just in the general election, but we have had a number of instances in primaries of both parties where the price tag of those primaries has been so exorbitant that money has really determined the outcome. We have almost priced democracy out of the marketplace.

Senator COOK. I might say to you that, as there are 139,642,000 eligible voters in the United States, the amount of money allocated to a Presidential campaign would be $34,910,000, which seems to be an astronomical figure.

By the way, I tried to get an adding machine back here to add up this entire thing and double it to see what we are talking about, about Federal assumption of campaign costs.

Do you have any thoughts on the Federal assumption of campaign costs as it deals with primaries?

Senator BAYH. I have some thoughts, but they are rather rambling ones. If you are going to get into the primary area, you are going to have to see to it that anybody who really wants a crack and can prove they are a legitimate candidate can get the crack, that it not be confined to just those supported by the establishment or the organization.

I think it is a fair test to suggest that you have to have maybe 1 percent, whatever the percentage that would be fair, of the people, signatures on a petition, so this wasn't just a frivolous candidate.

But if you could prove that you had the kind of support at a relatively minimal level that would make you a credible candidate after the campaign was over, then I think you have to have a part of the——

Senator COOK. I must say I have misgivings about that, Senator. In my State, all you have to do is fill out an application, have two registered voters sign it and pay a dollar bill for a filing fee.

While this may clutter up the ballot, I am rather opposed to, for instance, the British system where large sums of money have to be posted as bonds. If you don't get a particular percentage of that vote, you forfeit the bond.

Senator BAYH. That isn't what I said. I share that concern.

Senator COOK. We just finished a primary in my State and on the Republican ballot alone, there must have been 40 candidates.

But I think it is the obligation on the part of the electorate to make the determination as to who they are going to vote for. I think we restrict the operation of democracy by making it easier for the voter to make his selection.

I think he has an obligation to determine who the best candidates are himself, regardless of how cluttered that ballot may be.

Senator BAYH. I am not at all concerned about a cluttered ballot. I thought your question was directed as to how we dispense the money.

From the very realistic standpoint, if this Congress can come up with a meaningful financing bill dealing with congressional and senatorial campaigns, as far as the general election is concerned I think that will be a giant step in the right direction.

Let's get that done first and then worry about financing primaries.

Senator COOK. Then, you feel you should get over the hump of general elections, and then see what kind of an activity you could propose relative to primaries?

Senator BAYH. Certainly no question about what should have the first priority. Let's do the general elections and then worry about financing primaries afterwards.

Senator COOK. Mr. Chairman, if you don't mind me going a little afield, there are some questions I would like to ask the Senator.

I have some ideas, Senator, about how we could not only reduce the time length of campaigns, but how we can reduce the costs as well.

Suppose the Congress of the United States passed a law establishing a singular Federal primary day, in States where you do not have conventions, or where you have primaries. If you set that primary

date in the middle of August, as Senator Byrd proposed, then, just move the general election from its present first Tuesday in November to the middle of October.

Suppose you restrict national committees from holding conventions for the nominations for the offices of President and Vice President until on or after the first of September.

You would thereby limit the candidacy and the campaign from the middle of August after that primary to, let's say, the middle of October. You would be limiting the Presidential campaign from the first week in September to, let's say, the end of October.

Now, it would seem to me that if we would give some kind of consideration to this suggestion, we would by reason of its very nature be eliminating the cost of campaigning. Does that make any sense to you?

Senator BAYH. If that is the result, yes. It doesn't necessarily follow. If you are going to move that route, I think it is even more important to impose strict financial limitations with enforcements on there.

Senator COOK. No question about it.

Senator BAYH. Because if it is a shorter period, the party that has the most amount of money is going to be able to compensate for the fact, I mean override the fact that, under normal circumstances, if you have a longer period of time, if you don't have as much money, you can take advantage of free publicity by traveling around the country, and this kind of thing.

I would be for shortening the period of campaigns if we could strictly limit campaign financing.

Senator COOK. I think you have to do both.

Senator BAYH. But I think it is very important, though, that you take into consideration the committee's deliberation, or congressional deliberation, that what you said about the advantage to an incumbent Congressman would also accrue to an incumbent President in the event that you shorten the campaign period.

Senator COOK. I don't know what you could do about eliminating Presidential primaries throughout the United States.

As you well know, you and I have also heard testimony relative to that particular feature. And the best we could really come up with is to zone the United States. Rather than have 50 Presidential preference primaries, on 50 different dates, you have 3 or 4 or 5 zones in the United States. Those States in each zone would be compelled to have a Presidential preference primary on an agreed date that would be prescribed by Congress.

Senator BAYH. The jury is still out on that one, as far as I am concerned.

Senator COOK. It certainly is.

Senator BAYH. I have serious reservations about a national primary on date x. I think this precludes a candidate who is not already a very significant front-running type candidate from ever being considered.

Senator COOK. We had a good example of that the last time, as a matter of fact.

Senator BAYH. The McGoverns, the McCarthys, the Kefauvers, people like that who just by tenacity and presenting themselves to large numbers of people over time take advantage of the ripple effect which now exists in our primary.

And although I for one have been and will continue to search for ways in which we can lessen the burden of the Presidential election and nomination process, I think it is important for us to recognize—let's not try to go too far.

Senator COOK. Well, I might say in regard to the advantage to incumbents in Presidencies, if it is the will of Congress and the will of the respective States that we move in the direction of the singular 6-year term, then that particular advantage would be eliminated.

Senator BAYH. At least the reelection facet, yes.

Senator COOK. Yes.

Senator BAYH. Having had just a peripheral experience in thinking about national politics, because that is all it ever was, so I don't speak with authority—and having studied the experience that others have gone through, there is no question that it is a very demanding ordeal that anybody who wants to run for President is placed under or goes through.

I wonder, being President itself requires an individual who is able to accept very onerous burdens. And perhaps there is something to be said about the testing under fire that a would-be President goes through in the nominating process.

I just don't want this to be a very simple experience in which anybody who subjects himself to just a little inconvenience finds himself being President of the United States, because that is just not a normal job.

And I think in the campaign process, the rigors of that test the mettle of the man. And I want a man with significant mettle sitting down there, regardless of what his party affiliations are.

Senator COOK. Thank you, Mr. Chairman. Thank you, Senator.

Senator PELL. One further question. Do you think that there should be specific reporting of certain amounts that are spent as well as the amounts that are contributed by a political committee?

Senator BAYH. Oh, yes, yes I do.

Senator PELL. In other words, one of the proposals is that there should be reporting by one central political committee to be designated by the candidate of all expenditures of $100 or more.

Do you think that is a good idea or not? Do you think it is enforceable?

Senator BAYH. Yes, I do. I don't know how I would come down if I had to make a decision on what side of the fence I would jump, if one side said disclosure of all money that was raised and another side said disclosure of all money that was expended.

I think if you can enforce it, you sort of assume that money that is raised is going to be spent. And the way that it is spent is not as important really as determining who gives it.

But I think both should be required, very frankly.

Senator PELL. Thank you very much indeed.

Senator BAYH. Thank you very much, gentlemen, for your courtesy.

[The written statement of Senator Bayh follows:]

STATEMENT OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Mr. Chairman, I am pleased to have this opportunity to express my views on what I regard as one of the most important areas with which the 93rd Congress will have an opportunity to deal—reform of the mechanisms by which we choose our elected officials. Events of recent months have made the time ripe for what I

regard as long overdue significant movement in this area, and I would strongly urge this Committee and the Congress as a whole to move responsibly and expeditiously to take advantage of this opportunity. Before commenting on specific legislative proposals, however, I would like to address myself for a moment to the meaning of the events which have given rise to the demand for campaign and election reform.

The present tragedy of what has come to be covered by the general term "Watergate" involves the most serious problem with which I have had to deal since I have had the privilege of serving in the United States Senate. The victim of Watergate is not any one political party or any one politician. The victim is constitutional government itself, the integrity and credibility of our free institutions. We cannot excuse these crimes against the democratic system with the easy attitude that such behavior is only politics as usual.

Those who are accused of involvement are, of course, entitled to a fair trial. Only then can individual guilt be established. But the events that are already on record are sufficient to fix this incident as one of the most serious attempts in our history to subvert American democracy. The ordinary citizen knows that these events do not belong in the house of Jefferson and Lincoln.

But maybe we will have learned a great lesson from these events. Maybe the American people will now see how easily we could lose our freedom. Perhaps if we know that—and act upon what we know to legislate fundamental reform in the way we select our elected officials—we can restore true democracy and repair the civic morality which is its foundation. With this in mind, I would like to address myself to some of the specific proposals which are before this Committee.

Senate Joint Resolution 110 introduced by the distinguished Minority Leader, Mr. Scott, which calls for the establishment of the Nonpartisan Commission on Federal Election Reform is a proposal which I have no difficulty in supporting. I will say, however, that I believe many of the solutions to our problems are already clear. To refer these problems to yet another commission is not, in my view, an adequate answer.

S. 372 proposed by Senator Pastore and Senator Hollings which would modify the equal time requirement of section 315 of the Communications Act and impose maximum spending limitations on Congressional candidates would be a significant and major step in the right direction. I have cosponsored the proposal of the distinguished Senator from Michigan, Mr. Hart, which would impose the same spending limitations contained in S. 372, but would go one step further and establish a system of public financing for Congressional campaigns. I firmly believe that this is necessary because although part of the problem is in the sheer volume of money that is poured into campaigns, a much more serious problem is the source of those funds and the strings that may be tied to it.

I would like also, Mr. Chairman, to direct the Committee's attention to the bill which I introduced on May 3, 1973, the Campaign and Election Reform Act of 1973, which contains my suggestions for comprehensive legislation in this area.

Title I of this legislation proposal, the Omnibus Disclosure Section, is designed to impose uniform financial disclosure requirements upon all employees and officers of the three branches of our government who earn in excess of $18,000 per year. This title represents a reintroduction of a bill which I introduced in May, 1971 and is, I believe, a crucial part of the effort to bring about increased confidence in public officials. It is designed to make full and complete reports available to any interested member of the general public at a covenient and easily accessible place. Under its provisions all federal employees and officers earning over $18,000 must file with the Comptroller General of the United States by May 1 of each year the following information: (1) the identity and value of interests in real or personal property worth more than $500; (2) creditors to whom more than $1,000 is owed and the amount of each such debt; (3) dealings in securities or commodities; (4) transactions in real property; (5) gifts of more than $100; (6) the amount and source of each contribution to defray campaign or office expenses; and (7) except in the case of non-incumbent candidates, the identity of each client who pays more than $1000 to a law firm with which an individual obligated under the act is associated.

Title II contains a series of new federal criminal statutes which would make certain actions by political parties and candidates for federal office or any person or group acting as their agent a crime against the United States. For example, a political party or candidate or their agent who fraudulently represents himself as speaking or acting on behalf of another candidate or political party where the effect is to damage that candidate or party in a material way would

violate Title II. In addition, the common law crimes of burglary, criminal trespass, and extortion, are made federal crimes when they are committed by one candidate or political party or their agents against another candidate or party. Although these are, of course, presently criminal offenses in all our states and the District of Columbia, in my view recent events strongly suggest that our electoral process may well need the added protection of making such acts a federal offense so that if we are confronted with a situation where a series of such crimes are committed in various places around the country, they can be investigated by a single agency and prosecuted efficiently.

Title III is designed to strengthen the provisions of the Internal Revenue Code which permit each taxpayer to indicate that he wants to direct certain amounts of his federal income tax to finance Presidential election campaigns. This bill contains four substantive provisions designed to accomplish this goal. First it would raise the amount of the check-off provision from its present $1 per person to $2 (or $4 for each married couple filing a joint return). Secondly, it would require that the taxpayer be adequately informed about the existence of the check-off provision and the fact that it will not increase his tax liability. My friend from Minnesota, Mr. Mondale, has already introduced a bill (S. 1109) designed to accomplish this purpose which I have cosponsored. The provision in my bill, however, goes one step further by requiring that specific language be put on the first page of individual income tax forms permitting the check-off and stating that to take advantage of the option will not increase a citizen's tax liability. The third provision of this title is designed to remove a potential barrier to the proper operation of the fund: the fact that no monies accumulated under the check-off plan could be spent without further appropriations by the Congress. My bill would, as did the Senate version of the bill, make such appropriations from monies accumulated by the check-off automatic. Finally, and most importantly, under the bill no presidential candidate could spend an amount which exceeded that allocated to the candidate receiving the largest amount under the check-off system, whether he chose to receive funds from the presidential campaign fund or not. The effect of this section would be to limit the amount that could be spent on presidential campaigns, and make all or the bulk of the money come from public revenues—thus eliminating or sharply reducing the role that private special interests play in national political campaigns.

Finally, Title IV is aimed at strengthening the reporting provisions contained in the Federal Election Campaign Act of 1971. Such provisions are needed, in my view, in light of recent events which strongly suggest that the 1971 Act has not been effective. Under this title, the penalties for violating the Act would be increased from their present level of a $1,000 fine and a year's imprisonment, to a fine of up to $50,000 and up to five years imprisonment, in cases where the violations exceed $5,000 in a twelve month period. Secondly, the bill would provide for the use of civil fines of up to three times the amount involved in each violation. The desirability of civil fines as an enforcement tool has been strongly suggested by the Director of the Office of Federal Elections in recent testimony before Senator Pell's Subcommittee. Title IV addresses an enforcement problem which current events suggest constitute a serious weakness in the Act. If the Comptroller General determines that violations which have been referred to law enforcement authorities under the statutes are not being promptly and properly investigated and prosecuted, he is empowered to name a special prosecutor who will have full authority to investigate the violations and to present such evidence to the courts in either criminal or civil proceedings.

I recognize that some will consider the public financial disclosure provisions of my bill to be an unwarranted invasion of personal privacy. However, I am convinced that the loss of privacy in this particular area is a small price to pay for the increased public confidence in government which will result.

Because of my concern about the erosion of public confidence in government and in the integrity of public officials, I have made a full public disclosure of my assets and liabilities each year for the past three years. Although they are not required by current law, I have made these public financial disclosures and will continue to do so in order to indicate my good faith and my concern for the need of the voters to have access to detailed information on the financial affairs of members of the House and the Senate.

I have taken the additional step of requiring members of my staff who earn in excess of $18,000 per year to file full and complete financial disclosures with the Secretary of the Senate and to authorize public access to such disclosures.

The national tragedy we refer to as Watergate came about as the result of zealotry. No legislation can possibly provide an absolute assurance that imperfect and zealous men will not engage in illegal and unethical activity intended to corrupt the electoral process. But insofar as it is possible to do so, it is our obligation as responsible public officials to devote our best efforts to this end.

Thank you for your time and attention.

Senator PELL. Our next witness is Senator Stevenson. Proceed as you wish, Senator.

STATEMENTS OF HON. ADLAI T. STEVENSON III, AND HON. CHARLES McC. MATHIAS, JR., U.S. SENATORS FROM THE STATES OF ILLINOIS AND MARYLAND, RESPECTIVELY

Senator STEVENSON. Mr. Chairman, I want to first thank you for giving me the opportunity to participate in these important hearings.

I commend you and all of the members of this committee for the dispatch and energy with which you are attempting to eliminate one of the evils from our politics.

I should add that Senator Mathias and I have offered the Congress a number of reform proposals. We are offering another today—a comprehensive campaign finance reform bill.

Senator Mathias is on the floor at the moment. I expect him to appear here momentarily. I hope that when he comes he might be able to join me and we could proceed together.

Until he comes, with your permission, I would offer for your record a statement and proceed, if I might, with a summary of that statement.

Senator PELL. Please. The statement will be printed in full in the record.

Senator STEVENSON. Thank you, Mr. Chairman, Congress has sought several times to recognize the corrupting potential of money on our politics. Each of these laws, unfortunately, attacked the problem without conquering it. Each proved inadequate, piecemeal, or easily circumvented. And I fear that the campaign reform measures now under consideration are not sufficiently strong or comprehensive to overcome the problem.

Despite Congress' efforts at reform, money still poisons the rivers of our political life.

In 1972, the total amount spent by all political candidates was estimated at $400 million. More than 10 percent of that $400 million was collected for the reelection campaign of the President, nearly $50 million for one campaign. At current rates of inflation and of increases in campaign costs, campaign spending will reach $1 billion by 1984.

One condition which made the Watergate scandal possible was the presence of so many dollars, collected by questionable methods, available to be spent in ways both unethical and illegal.

Even if all of the dollars were honestly contributed and honestly spent, they would still have a corrupting influence on our politics. For the vast sums now required for political campaigns raise the unholy specter that politics in the future will be an enterprise for rich people only, for rich candidates, or at the very least candidates backed by rich contributors, and for public officials beholden to rich benefactors.

So the case for reform is compelling.

It is time to set some limits on the costs of campaigning for public office.

It is time to set some limits, workable and enforceable limits, on campaign spending and campaign contributions in Federal elections.

And it is our considerable challenge to do all this without drying up the campaign money which is essential if we are to sustain a vital and active political debate in our country, which means financing campaigns at least in part with public funds.

The alternative is a political system in which candidates are beholden to large donors, if not literally up for auction. Such a system literally invites abuses, from the unethical to the criminal.

The absence of strong laws and clear standards means that even the most honest and conscientious citizens in public life will always be vulnerable to false and damaging charges about their campaign financing, unless and until we establish "a standard to which the wise and honest may repair."

The overwhelming argument for reform is not that reform will end all abuses and punish all offenders, but that it will protect the great majority of candidates and elected officials who are honest, decent, and law abiding.

For this reason, Senator Mathias and I are introducing in the Senate today the first truly comprehensive campaign reform bill, and the first with bipartisan sponsorship: the Federal Election Finance Act of 1973.

The bill has four main provisions:

First, it establishes an independent Federal Elections Commission to oversee campaign financing and campaign practices in Federal elections.

At present the Justice Department is charged with responsibility for prosecuting campaign financing abuses and for enforcing election laws.

This system has one overwhelming defect: the temptation to enforce the law in partisan and discriminatory ways, ignoring violations by one's own party members and either aggressively pursuing violations by the opposition, or holding back for fear that prosecutions will look politically motivated. Even if the Justice Department were capable of absolutely evenhanded enforcement, its every action would be open to charges and insinuations of partisanship.

This is a clear argument for insulating the enforcement of election laws from partisan influences. Our bill, if enacted, would achieve that end.

Under this bill, responsibilities now scattered between several agencies and officials would be united in one agency, the Federal Election Commission. Campaign disclosure reports now are scattered between the Secretary of the Senate, the Clerk of the House, and the General Accounting Office, none of which have enforcement powers.

Under this legislation, all reports would go to the Commission, and it would have the power to enforce the law. It would have an enhanced power to punish violators who now receive only a slap on the wrist, if any penalty at all.

Violations of disclosure laws are at present punishable by penalties of only $1,000 per count and/or 1 year in jail. This bill would increase penalties to $25,000 and/or 5 years' imprisonment per count.

Second, the bill would set up a Federal election campaign fund, which would make disbursements from the Treasury of the United States to candidates for Federal office.

Disbursements from the election campaign fund to candidates would be apportioned this way:

A campaign organization or candidate could qualify for assistance as either major or minor, under definitions established in the bill. It would receive assistance accordingly, either by demonstrating past electoral potency through voting statistics or present public appeal through signed voter petitions.

A major-party nominee for President would receive from the fund up to 5 cents for every voting-age citizen of the United States, one-third of the maximum he would be allowed to spend.

A major-party candidate for the House of Representatives or Senate could receive from the fund up to one-third of the total amount this law will allow him to spend.

A minor-party candidate or an independent candidate could receive disbursements from the fund according to a formula based on previous voter performance or on current strength as demonstrated by voter petitions.

The Commission, in administering the fund, would require from all candidates, committees, and parties, reports of all contributions and expenditures for all Federal campaigns.

Third, the bill would establish strict and enforceable limits on campaign spending in Federal elections, limits that apply to all candidates.

In campaigns for the Presidential nomination, the basic requirement would be that candidates could spend no more than 15 cents per voting-age citizen in each State.

In general elections, Presidential candidates would be limited to 15 cents per voting-age citizen in the United States. This is the same amount granted by the existing checkoff law to major-party Presidential candidates.

Candidates in general elections for the Senate would be allowed to spend the greater of two sums, either 20 cents for each voting-age citizen in his State, or $175,000.

Spending by candidates for the House in general elections would be limited by a similar formula; the greater of two sums, 25 cents per voting-age citizen in the district, or $90,000. In the case of States having only one congressional district, a candidate would be allowed up to $175,000.

In any primary, a candidate for the Senate or the House would be subject to the same limits as in general elections; and in runoff primaries, to half that amount.

All disclosures of campaign expenditures on behalf of any candidate would be made, under the law, through a single central campaign committee. This would discourage abuses by lodging responsibility for full disclosure in one person rather than scattering that responsibility as it now is scattered.

Fourth, Mr. Chairman, the bill would set limits on contributions from all donors. The basic requirement is that no person or group shall contribute, and no candidates shall receive, individual donations totaling more than $3,000.

No candidate could collect, in the aggregate, more money than the maximum he would be allowed by the law to spend in his campaign.

The only exception to the $3,000 limit on individual gifts would be the respective congressional campaign committees, since donations to them would be directed not to individuals, but to all the candidates of a party. Earmarking of gifts to congressional campaign committees of particular candidates would be prohibited.

Finally, cash contributions of more than $25 to any candidate would be strictly prohibited.

These are the highlights of a bill that is actually quite complex and detailed. But I hope I have made clear that this bill offers a truly comprehensive approach to the various problems of campaign finance. It is not another high-minded, unworkable scheme; it is a practical, workable, effective way to end campaign abuses and supply badly needed campaign funds.

Recently, the President declared himself in favor of reform. He announced that he favored a high-level commission which would study and recommend legislation after much deliberation.

We should commend the President for his concern and not speculate on his motive for it. But what we need is not more lengthy deliberation, but the cleansing therapy of action, action by Congress and action now.

It is time for us to show our own power and our determination to tear out the root of most evil in our politics.

The legislation we are proposing, if it is enacted, will have four major benefits:

It will end skyrocketing spending for Federal campaigns.

It will make it financially possible for all candidates, regardless of their wealth, to sustain their campaigns, without having to choose between bankruptcy on the one hand and dependence on large, corrupting donations on the other.

It will bring order to the chaos of campaign law enforcement.

Finally, and most important, it will restore in some measure the confidence of our fellow citizens in the good faith and integrity of the system under which they live, and in the public servants who are its trustees and stewards.

Mr. Chairman, the cost of this legislation would average about $25 million annually. The dollar return from that investment in decency is incalculable.

It is no exaggeration to suggest that the savings from that investment, that modest investment, may also include the public's faith in its hallowed but tarnished system of government.

Senator PELL. Thank you very much, Senator Stevenson. Before going into any questions, Senator Cook and I thought it would be advisable if Senator Mathias made his presentation.

Senator MATHIAS. Thank you, Mr. Chairman, I have a statement. I ask unanimous consent that the statement be submitted and I will attempt to characterize it briefly for the committee, so that we get to your questions.

Senator PELL. Without objection, your written statement will be inserted in the hearing record in its entirety.

Senator MATHIAS. You have been tied to the desk here and have not heard the proceedings down the hall this morning, but it is in a sense a tribute to the work of this committee and to the changes that were made in the Federal Election Campaign Act of 1971, that the 1971

act had as much of an impact as it did. As the testimony before the Ervin committee is revealing today, the kinds of requirements that were imposed in the spring of 1971 have resulted in considerably more accountability in elections than we have had before.

The tragedy is that those provisions were not in effect throughout the entire campaign period, the 1972 campaign. The further tragedy is that the kind of steps proposed now in S. 372 were not then in effect.

I am happy to be here with Senator Stevenson to testify on the provisions of S. 372, and to join with him in supporting the concept of public financing. I know this committee will hold more extensive hearings on that subject later in the year.

Public financing is an old Republican idea and I am glad to have Senator Stevenson along to give some bipartisan support for it.

Senator STEVENSON. If I may interrupt, it was a Republican idea at the time of Teddy Roosevelt, and look what the Republicans did to him.

Senator MATHIAS. Theodore Roosevelt did publicly advocate the concept of public financing in 1907. It has been since endorsed—let me say to Senator Stevenson—by President Truman, by President Johnson, and, of course, by many other significant figures in American public life. I think its time has come, and I am happy to join in sponsoring legislation which might bring it about in our time.

It seems to me that it has three significant and important features. One, that public financing would equalize access to the public arena, which clearly today is not equal.

Two, I think it would permit us to control the tremendous growth of political expenditures. Three, and perhaps most important, it would remove a large part of the corrosive influence of big money from political campaigns.

Let me turn very briefly to the provisions of the bill that is immediately before you and try to relate it to S. 1094, which is the bill introduced by Senator Scott of Pennsylvania, Senator Stevenson, and myself—which has features which I think should be included in S. 372.

One of them is a single campaign committee. I think one of the elements of politics that gives it the character of a shell game, at least in the eyes of the general public, is the number of proliferating committees by which money is passed from hand to hand.

Let's get it down to a single committee.

Another provision of the Scott-Stevenson-Mathias bill, S. 1094, relates to the amounts to be reported. It seems, I suppose, to the layman to matter only a gnat's eyelash whether you say you are going to report contributions of $100 and over or contributions of over $100.

But most political units of contribution seem to be in the hundred dollar range. And if you say you only report matters over $100, you are effectively exempting a great body of political contributions from any reporting whatever.

There is a question of reporting dates. We had suggested that reporting dates be changed to the 10th of April, July, and October and 10 days prior to the election, leaving the final report required by the succeeding January 31 unchanged.

And I am sure the committee has a wealth of detail on the reasons for that particular change.

The bill also relates to the compromising of campaign debts. Presently, the means or consideration by means of which a debt is extin-

guished are not reported. This, of course, can lead to serious abuses and is a major loophole.

Another one is the shielding of dues-paying members of clubs that were not specifically created to influence a particular election. This seems to be another one of those loopholes which needs closing.

But, finally, Mr. Chairman, I think the one feature which is common to the Scott-Stevenson-Mathias bill and S. 372, and which is perhaps the most important feature, is the establishment of an independent elections commission.

This really seems to be the critical instrument needed at this time and I heartily endorse the concept. The differences between the two proposals as to membership and as to the selection process are not critical. I hope that that particular feature will be written into law at the earliest possible date.

Senator PELL. Thank you very much. The concept, as you know, of the election commission was passed by the Senate overwhelmingly in the last Congress but we lost it in conference with the House. No argument on this side of the Capitol about its merits.

I would hope that this concept will come to be.

Senator MATHIAS. I hope, Mr. Chairman, that we would pass it this time so overwhelmingly that conferees who are resolving any differences will agree on its merits.

Senator COOK. Senator, may I say to you, having sat through the conference committee on that bill, it wasn't a matter of losing to the House. It was a matter of losing to one Member of the House, who made it very clear that if that provision was not taken out, there would not be a bill.

I have no qualms about saying that that remark was made by Congressman Wayne Hays of Ohio. He feels that same way now.

I would suggest that we would walk into the conference committee and be faced with the very same thing. I would hope that this year he might understand and realize, as chairman of the House Administration Committee, that he has placed on the Clerk of the House the responsibility of reporting to the Justice Department some 4,900 violations in the reportings of 435 Members of Congress.

And maybe we can make him understand and realize this time that when you propose to put that responsibility in the hands of your own employees and you put that kind of a burden on those employees, then ultimately you impede the ability of the individual employees over there to really do the job they are supposed to be doing.

Senator MATHIAS. I agree with you and I think clearly the intervening events should have had some educational effect.

Senator COOK. Let me ask you both a question, may I, Mr. Chairman?

Senator PELL. Please.

Senator COOK. Senator Kennedy said he felt there should be a limitation of $1,000 on any one individual.

As you well know the law now provides that an individual himself or a member of his family may contribute to his own campaign, a sum not in excess of $35,000.

Senator MATHIAS. $50,000 for the Presidency, $35,000 for the Senate, $25,000 for the House.

Senator COOK. That is right. Now, let me give you a real problem that we all apparently overlooked. A defeated candidate came into

my office the other day and he said I am sure that the Congress of the United States did not want an individual not to pay his debts. He said that he was faced with a debt of approximately $300,000 in his losing campaign in his State, and he wanted to pay that debt off. He wanted to pay his creditors, but he cannot do it unless he does it on the basis of $35,000 one time.

Therefore, as a defeated candidate, he has no way whatsoever to raise funds. He can't ask everybody to support a defeated candidate and have a great big dinner and raise $300,000.

Let me read this to you, both of you, and give me your reaction, because he sat down with his attorneys and asked if we would consider an amendment to the existing bill that reads as follows:

> The discharge of a political committee's debts and obligations by a candidate who is not nominated or elected, or by an immediate member of his family, shall not be barred by this subsection after a period of one year following such failure of nomination or election.

Here is a man who said, "I just really want to pay these debts off, and I am absolutely in violation of the law if I do it." Yet I am quite sure that the Congress did not intend that a candidate for public office not be in a position where he would extinguish his debts.

Senator MATHIAS. You pose a hard case. An almost equally hard one, which would not be included by that kind of amendment, is the case of a candidate who wins and who is saddled with a very large debt from his campaign.

Senator COOK. Obviously he wasn't thinking to that extent. He lost.

Senator MATHIAS. But there are such cases. And it seems to me in an effort to help the creditors in this one particular kind of situation, you would create inequities with other creditors and you would really create a major loophole, because the wealthy candidate knowing that he would ultimately be able to pay his bills, would be looser than the law wants him to be.

Senator COOK. Are you saying, then, in an effort to overcome this kind of a situation, which obviously could very easily happen, that you would propose in any legislation that you cannot conduct a political campaign and create a debt?

I am not opposed to that, mind you.

Senator MATHIAS. I don't want to preempt Senator Stevenson's time, but this goes to the proposal that he and I are making today, and this is one of the reasons we should move toward public financing.

Senator STEVENSON. Senator Cook, under this proposal, we try to minimize that risk, first by providing for public financing for up to one-third of the cost of the campaign. The costs of the campaign are limited. We take $3,000 as the limit on individual donations, in the expectation that the candidates, with one-third of their campaigns financed from public sources, with a $3,000 limitation, would be able to finance their campaigns adequately.

Now, if this bill were law, if the candidate were to incur a debt, he could after the election, within these limitations, raise additional funds, but he could not raise funds with which to pay debts which exceeded the aggregate spending limits.

If any such funds were collected, they would be unlawful collections. They would be subject to reversion to the fund which is established in the bill.

I think it minimizes the risk of that happening in the future. It takes care of the situation should it happen.

Senator Cook. By the way, in the report on S. 372—and if you all do not have it in your offices, you ought to order from the Commerce Committee—we use the figure of 25 cents for all purposes.

And Senator Bayh and I suggested that maybe 25 cents is too high and we ought to use a figure of 20 cents.

Senator Stevenson, in your case, on 25 cents—20 cents for Senate candidates.

Senator Cook. Yes, I understand. And in your State you would have an eligible voting population of 7,542,000, which would be $1,885,000.

In the State of Maryland, Senator Mathias, based on a population of 2,688,000, it would be $672,000.

Senator Mathias. There never has been a Republican senatorial campaign that has had that much money in the history of the State.

Senator Cook. Mine is $551,000, Senator Mathias, and there is no way that I ever spent that kind of money.

But let me say, one of my basic arguments some time ago against the 15 cents based on radio and television was the fact that in my State your 15 cents is so diluted. I have to use television in the States of Indiana, Ohio, West Virginia, Tennessee, and Missouri.

I am much more pleased with taking a flat figure per eligible voter, and I can't quarrel between the 20 cents and 25 cents.

Senator Stevenson. What reason is there for saying, in effect, to a candidate that he cannot spend x dollars on billboards as opposed to radio?

Senator Cook. I agree wholeheartedly with you, Senator. I think we arrived at our decision in the Commerce Committee because we had the authority within the committee over radio and television, and we did not have the authority over nonbroadcast media.

I think that is a mistake we made.

Thank you, Mr. Chairman.

Senator Pell. The ideas which you have in your joint bill, which is being filed today, as I understand it——

Senator Mathias. That is right.

Senator Pell [continuing]. Will come into this committee's consideration, within its jurisdiction and will be studied very carefully.

Senator Stevenson. We have limits, Mr. Chairman, different limits, for Presidential, for Senate, and for House contests.

In the case of the Presidential races, it is 15 cents for every individual of voting age. In the Senate it is 20 cents for every such individual or $175,000 whichever is larger.

And in the case of the campaigns to the House, it is 25 cents or $90,000.

Senator Pell. This is rather similar to the Pastore bill, is it not? The same basic amounts.

Senator Stevenson. I think in the Pastore bill it is 25 cents all the way across.

Senator Pell. But doesn't he have a floor for a State which has a low population?

Senator Cook. Yes.

Senator Pell. So it would be about the same amount of money.

Senator Stevenson. His is 25 cents for a Senate contest, ours is 20 cents.

Senator PELL. I think he also has a low limit, is that correct, Senator Cook?

Senator COOK. Yes. For States like Nevada, Alaska, Wyoming it is $175,000.

Senator STEVENSON. I believe the Pastore bill and our bill contain that same $175,000 figure.

Senator PELL. With regard to the overall spending limitation, do you think this is in any way restrictive of the first amendment?

Senator STEVENSON. I don't believe the spending limitation is restrictive. It could be argued that the limitation on amounts which can be donated is an unconstitutional limitation.

Any figure is arbitrary. I don't know nor does anyone know where the line can best be drawn.

It might well be unconstitutional to say that no individual can contribute $1 or $2 or $3 to the candidate of his choice, but at some point you can reasonably conclude that the size of the contributions does have a corrupting influence in our politics.

And at that point it becomes reasonable under the Constitution to draw the line.

We selected $3,000, partly because we felt it was necessary, being realistic, to permit candidates to raise contributions in that amount. It was necessary if they are to, even with these limits on spending, to raise the money with which to finance a campaign.

The figure is not entirely arbitrary. It also conforms with the $3,000 gift tax exemption. It is lower than the old $5,000 limitation in the Corrupt Practices Act.

Senator MATHIAS. Might I just add to that, Mr. Chairman, just one thought. As far as constitutionality is concerned, we are up against one of those hard cases, like the one the whole Senate faces now—the question between a guarantee of a fair trial and a guarantee of a free press.

There are cases for which there are no very clear answers. You have to consider the application and the circumstances.

And I would agree with Senator Stevenson that the equities here argue very strongly for some limitation in the light of our experience and of the difficulties that unrestricted money has brought to the American political system.

It seems to me that the time has come to grapple with this problem, and that, if there are constitutional arguments to be made in one direction, there are also constitutional arguments which lean in the other, and that we have to resolve it in favor of some action which promises relief against influences that may otherwise destroy the system.

Senator PELL. To ask a philosophical question, do you think that the instances revolving around the Watergate and all of the stories connected with it would be changed particularly by these new laws that you are advocating?

It seems to me that what Watergate is demonstrating is more the question and necessity of following the present laws. And if present laws had been fully adhered to and if they had been in effect before April 7, many of the problems that have the public aroused and excited at this time would not have arisen.

So it is not a question of new laws, but following the present laws.

What would be your reaction to that?

Senator STEVENSON. Mr. Chairman, the present laws, imperfectly enforced, because they are imperfect, do not even touch the heart of the corruption in our politics. That politics is big money, money which at the very least buys access. It is money that buys favors, buys favoritism, in government.

Until we have public financing, which relieves us of dependence on large contributions, the heart of the problem is going to be with us.

And until that time comes when we not only have public financing and can be relieved of dependence on large contributions, but also limitations on amounts that can be contributed and spent in campaigns, the people won't have any confidence in the impartiality of this system.

Senator COOK. Let me debate that with you a moment. Your bill provides one-third public financing. Is it one-third public financing and two-thirds the same ball game, is that what we are talking about?

What do you do about primaries?

Senator STEVENSON. It is an entirely different ball game. I think the public is concerned now not about $3,000 contributions. It is concerned about $10,000, about $100,000, about million dollar contributions, which rather clearly are not given from the goodness of the donor's heart.

They are given because that donor has an interest in the government, oftentimes a legislative interest. He expects something in return. And the evidence indicates that he receives something in return.

That has to go.

Senator COOK. What do you do in relation to primaries?

Senator STEVENSON. We do not in this bill provide for public financing in primaries.

Senator COOK. Do you impose the $3,000 limit in primaries?

Senator STEVENSON. Yes, the limits are on amounts which can be spent and received and do apply to primaries. But we do not provide for public financing, partly because of a concern that public financing in primaries could lead to a proliferation of candidacies.

Senator COOK. Let's take, for instance, the Presidential primaries that we watched. Conceivably as much money was spent in those primaries as was spent in the fall.

How do you evaluate that degree of favoritism when one has to go to the private individual for his nomination, and then feel we have made a true, good, nontainted candidate out of him because the Federal Government helps him out in his fall election?

Senator STEVENSON. You are raising another question. This bill establishes overall national ceilings on expenditures by candidates for the nomination.

It also establishes ceilings on a State-by-State basis with no aggregating of the amounts which can be spent in the States.

Senator Cook, you are raising another separate question.

The President proposed a commission. We don't need a commission to tell us that campaign finance reform is needed now.

We do, I think, need a commission to tell us how to reform the candidate selection process. In the last Presidential election year, one Democratic candidate, perhaps more than one, entered 23 primary campaigns—23 major campaigns, all simultaneously. Each of them was expensive, and even was a drain not only on his financial resources but also on his resources of energy. It was an impossible situation.

What we ought to do also, it seems to me, is to study the selection process, so that in the future we can be reasonably confident that the parties at the national level, and other contests, too, will offer the people a real choice. We want to offer the people each party's wisest and best men.

Senator COOK. I may say to you that in reading the President's message on that commission, he made it clear that he didn't want this study to stop or in any way impede any legislation that was presently pending or under consideration by any committee of the Congress.

He did go into the constitutional amendment for one 6-year term for the President, and he took into consideration the suggestion that Members of the House run 4-year terms and half of them run every 2 years.

So there are some suggestions in his message that are going to take more than a cursory amount of time. You are correct.

Thank you, Mr. Chairman.

Senator PELL. Thank you very much. Also, this general question of the large contributions. It seems to me that if a large contribution is publicly disclosed and is on record—one knows, for example, Mr. Vesco has given a large contribution.

But when that is a matter of public record, does the executive branch of Government ipso facto lean over backward in order to give them any special break?

This is why I say that if the law had been in effect earlier, I think many of the problems that are plaguing our people now, would not be so.

And this is the idea I wanted to toss at you, if you thought that was correct or incorrect?

And, to add on that thought a little bit, it also would be the kiss of death. If the Mafia made a large contribution and it was known, that would be the kiss of death for that candidate.

Senator STEVENSON. I support a public disclosure bill, a sound one. I have for many years. I regret to say that in my own State there is still no public disclosure law.

What is disclosed now is the large campaign contribution, the large contribution from the oil industry, from the labor unions.

And it is invariably followed by real or imagined rewards for the donors.

And when that happens the public is bound to lose its confidence in the impartiality of our Government, the system.

For financing campaigns now compels us, with or without public disclosure, to accept large contributions from individuals, also from entities, which have interests in Government.

Those interests, either deliberately or quite innocently, are rewarded. And, on the basis of circumstantial evidence, the public can draw only one conclusion—and they are drawing that conclusion on the basis of the present law and the disclosure of how we finance our campaigns today.

I think it might be argued, Mr. Chairman, that the public's present knowledge as a result of disclosure has made the need for public financing more apparent than ever before. Now they know the truth. And it is a grim truth. It is an intolerable truth.

Senator PELL. What would your bill do with regard to the expenditure of a candidate's own money in a campaign?

Would there be a limitation there?

Senator STEVENSON. We retain the limitations in existing law.

Senator COOK. My only observation, as a Republican, Mr. Chairman, is that there seems to have been, at least within the framework of the Committee to Re-Elect the President, as many violations after the date of the act as there were before.

I can only suggest to you that there has been a lack on our part to impose strong civil and criminal penalties for violations.

I think that we have to keep this in mind in any bill that we write. We must not revert to tokenism in regard to the criminal and civil penalties that one has to face under the law.

Senator MATHIAS. Of course, there is accountability now, even under the present law, which there wasn't prior to the 1971 act.

Senator COOK. That is correct.

Senator MATHIAS. And I think, as Senator Stevenson has suggested, that has brought about an awareness, a consciousness, which is now leading us into the position where the significant things can be done.

And I am hopeful that the committee's action on the bill before it will be one step toward that significant action.

Senator COOK. Thank you.

Senator PELL. Thank you.

[The written statements of Senator Stevenson and Senator Mathias follow:]

STATEMENT OF HON. ADLAI E. STEVENSON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Congress has sought several times to recognize the corrupting potential of money on our politics—notably with the Corrupt Practices Act of 1925, the Federal Election Campaign Act of 1971, and with the tax checkoff law.

Each of these laws, unfortunately, attacked the problem without conquering it. Each proved inadequate, piecemeal, or easily circumvented. And I am afraid that most of the campaign reform measures now under consideration are not sufficiently strong or comprehensive to overcome the problem.

The truth is that—despite our previous efforts at reform—money now threatens to poison the rivers of our political life.

In 1972, the total amount spent by all political candidates was estimated at four hundred million dollars. More than ten percent of that four hundred million was collected for the re-election campaign of the President—about 50 million dollars for one campaign. At current rates of inflation and of increases in campaign costs, campaign spending will reach one billion dollars by 1984.

Surely no one can doubt that one condition which made the Watergate scandal possible was the presence of so many dollars, collected by questionable methods, available to be spent in ways both unethical and illegal.

Even if all of these dollars were honestly contributed and honestly spent, they would still have a corrupting effect on our politics. For the vast sums now required for political campaigns raise the unholy specter that politics in the future will be an enterprise for rich people only: For rich candidates, or at the very least, candidates backed by rich contributors—and for public officials beholden to rich benefactors.

So the case for reform is compelling.

It is time to set some limits on the costs of campaigning for public office.

It is time to set some limits—workable and enforceable limits—on campaign spending and campaign contributions in Federal elections.

And it is our considerable challenge to do all this without drying up the campaign money which is essential if we are to sustain a vital and active political debate in our country. This means financing campaigns at least in part with public funds.

The alternative—and we must face it squarely—is a political system in which candidates are beholden to large donors, if not literally up for auction. Such a system literally invites abuses—from the unethical to the criminal.

The absence of strong laws and clear standards means that even the most honest and conscientious citizens in public life will always be vulnerable to false and damaging charges about their campaign financing—unless and until we raise "a standard to which the wise and honest may repair." The overwhelming argument for reform is not that reform will end abuses and punish offenders—but that it will protect the great majority of candidates and elected officials who are honest, decent and law-abiding.

For this reason, Senator Mathias and I are introducing in the Senate today the first truly comprehensive campaign reform bill—and the first with bipartisan sponsorship: The Federal Election Finance Act of 1973.

The bill has four main provisions:

First, it establishes an independent Federal Elections Commission to oversee campaign financing and campaign practices in Federal elections.

At present the Justice Department is charged with responsibility for prosecuting campaign financing abuses and for enforcing elections laws.

This system has one overwhelming defect: the temptation to enforce the law in partisan and discriminatory ways, ignoring violations by one's own party members, and either aggressively pursuing violations by the opposition—or holding back for fear that prosecutions are politically motivated. Even if the Justice Department were capable of absolutely evenhanded enforcement, its every action would be open to charges and insinuations of partisanship.

This is a clear argument for insulating the enforcement of election laws from partisan influences—and our bill, if enacted, would achieve that goal. The Federal Elections Commission it would establish would be removed as far as possible from partisanship.

The Commission would have seven members—the Comptroller General plus six others: two appointed by the President, two by the President Pro tempore of the Senate, and two by the Speaker of the House. No more than three members could be of the same political party, and all would serve staggered terms.

The Commission, which would report to both the President and Congress, would have the power to receive and disburse funds; to issue regulations; to require reports; to make investigations; to subpoena witnesses, records and testimony; to prosecute violators of the law. In short, it would be vested with all the necessary powers to administer and enforce the law.

Under this bill, responsibilities now scattered between several agencies and officials would be united in one agency—the Federal Election Commission. Campaign disclosure reports, for example, now are scattered between the Secretary of the Senate, the Clerk of the House and the General Accouning Office, none of which have enforcement powers. Under this legislation, all reports would go to the Commission and it would have the power to enforce the law.

Another important feature of this legislation is enhanced power to punish violations which now receive only a slap on the wrist, if any penalty at all. Violations of disclosure laws are at present punishable by penalties of only $1000 per count and/or one year in jail. This legislation would increase penalties to $25,000 and/or five years imprisonment per count.

Second, the bill would set up a Federal Election Campaign Fund, which would make disbursements from the Treasury of the United States to candidates for Federal office.

Though the idea of public financing for political campaigns may seem novel and even visionary to some, it is neither; President Theodore Roosevelt proposed public financing as early as 1907.

But though debate about the idea has gone on for years, it always foundered on two questions.

First, there is the difficulty of fairly distributing public funds. In a nation without constitutionally established political parties, how shall we decide which parties and which candidates are eligible for public campaign assistance—and how much shall they get?

Second, there is the question of voluntary participation: Would not a system of public financing stifle the impulse of private citizens to participate in the political process by contributing to candidates of their choice?

Serious questions like these are not easily laid to rest; they merit serious debate. But the difficulty of finding perfect answers certainly is no reason for clinging to our present abuse-ridden system. We believe that our bill, though the answers it offers may not be perfect, provides a generally fair and workable system of public financing—and one which will permit private citizens to support their candidates with their contributions as well as their work and their votes.

Disbursements from the Election Campaign Fund to candidates would be apportioned this way:

A campaign organization or candidate could qualify for assistance as either "major" or "minor", under definitions established in the bill.

It would be defined as "major" or "minor"—and would receive assistance accordingly—either by demonstrating past electoral potency through recent voting statistics or present public appeal through signed voter petitions.

A major-party nominee for President could receive from the Fund up to five cents for every voting-age citzen of the United States—one-third of the maximum he would be allowed to spend.

A major-party candidate for the House of Representative or the Senate could receive from the Fund up to one-third of the total amount this law will allow him to spend.

A minor-party candidate or an independent candidate could receive disbursements from the Fund according to a formula based on previous voter performance or on current strength as demonstrated by voter petitions.

The Commission, in administering the Fund, would require from all candidates, committees and parties, reports of all contributions and expenditures for all Federal campaigns.

Third, the bill would establish strict and enforceable limits on campaign spending in federal elections—limits that apply to all candidates.

In campaigns for the Presidential nomination, the basic requirement would be that candidates could spend no more than fifteen cents per voting-age citizen in each state.

In general elections. Presidential candidates would be limited to fifteen cents per voting-age citizen in the United States. This is the same amount granted by the existing checkoff law to Presidential candidates.

Candidates in general elections for the Senate would be allowed to spend the greater of two sums—either twenty cents for each voting-age citizen in his state, or $175,000.

Spending by candidates for the House in general elections would be limited by a similar formula: the greater of two sums—twenty-five cents per voting-age citizen in the District, or $90,000. In the case of States having only one Congressional District, a candidate would be allowed up to $175,000.

In any primary, a candidate for the Senate or the House would be subject to the same limits as in general elections—and in runoff primaries, to half that amount.

Under this bill, the limitation on personal investment by a candidate in his own campaign would remain the same as under the existing law: $50,000 for Presidential candidates, $35,000 for Senatorial candidates, and $25,000 for House candidates.

All disclosures of campaign expenditures on behalf of any candidate would be made, under the law, through a single central campaign committee. This would discourage abuses by lodging responsibility for full disclosure in one person rather than scattering that responsibility as it now is scattered.

Fourth, the bill would set limits on contributions from all donors.

The basic requirement is that no person or group shall contribute, and no candidate shall receive, an additional donation totalling more than $3,000.

No candidate could collect, in the aggregate, more money than the maximum he would be allowed by the law to spend in his campaign. Any funds collected in excess of the maximum—and any anonymous donation over $25 or apparently illegal contribution shall be turned over to the Federal Elections Commission for incorporation into the Federal Election Fund.

The only exception to the $3,000 limit on individual gifts would be the respective Congressional Campaign Committees, since donations to them would be directed not to individuals but to all the candidates of a party. "Earmarking" of gifts to Congressional Campaign Committees would be prohibited.

Finally, cash contributions of more than $25 to any candidate would be strictly prohibited.

I have covered only the highlights of a bill that is actually quite complex and detailed. But I hope I have made clear that this bill offers a truly comprehensive approach to the various problems of campaign finance. And I hope I have made clear my conviction that this legislation is not merely another high-minded, unworkable scheme; it is a practical, workable, effective way to end campaign abuses and supply badly needed campaign funds.

Recently the President—whose zeal for campaign reform had not previously been widely known—declared himself in favor of reform. He announced that

he would favor a high-level commission which would study and recommend legislation, after some months of deliberation.

Certainly we should commend the President for his concern, and not speculate upon the motive for it. I can only say I wish that the President's support had come before the 1972 election—and that I wish the President's hospitality to ideas from high-level commissions in the past had been somewhat warmer.

I submit that what we need is not more lengthy deliberation, but the cleansing therapy of action—action by Congress.

It is time for us in the Congress to show our own power and initiative.

The legislation we are proposing, if it is enacted, will have four major benefits:

It will end skyrocketing spending for Federal campaigns.

It will make it financially possible for all candidates, regardless of their wealth, to sustain their campaigns—without having to choose between bankruptcy on one hand and dependence on large, corrupting donations on the other.

It will bring order to the chaos of campaign law enforcement.

Finally, and most important, it will restore, in some measure, the confidence of our fellow citizens in the good faith and integrity of the system under which they live, and in the public servants who are its trustees and stewards.

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Mr. Chairman, I want to thank you and the other members of the Committee for giving me this opportunity to testify today.

S. 372 is an attempt to take another step in the struggle to reform our system of elections and campaigns. As you know I have long been concerned about this question. Senator Scott and I introduced Senate bill 956 more than two years ago. Many provisions of that bill were contained in the Federal Elections Campaign Act of 1971, plus thirteen amendments which I added on the floor of the Senate.

The 1971 Act went a long way toward correcting problems in our system of campaigns. The bill you have before you today is an attempt to extend that corrective process still further. It contains some important proposals which have considerable merit. I have a number of suggestions for additions to or changes in S. 372 which I will speak to in a moment.

But before I get to those matters, I want to offer an alternative proposal for the Committee's consideration. Either instead of S. 372, or as a replacement for it in the near future, I urge the Committee to consider a comprehensive system of public financing of federal election campaigns.

Today I have joined with Senator Stevenson in introducing the Federal Election Finance Act of 1973. In addition I have joined as a cosponsor of Senator Hart's public financing proposal, S. 1103, which has been referred to this Committee.

I would like to emphasize at this point that the idea of financing federal elections out of public funds has long been recognized as consistent with basic American values and beliefs. Public financing was proposed as early as 1907 by President Theodore Roosevelt and has been more recently endorsed by Presidents Truman and Johnson. Indeed, the Congress itself has endorsed the concept by twice enacting tax checkoff plans to finance Presidential elections.

A system of public financing would have three major benefits: it would equalize access to the political arena among candidates and among members of the general public, it would permit us to control the incredible growth in campaign expenditures; and perhaps most important it would enable us to remove a large part of the corrosive influence of big money from our political campaigns and our governing process.

For the sake of brevity, I have appended my floor statement on public financing to this testimony. I will now turn to the specific suggestions I have for changes in S. 372.

First, there are a number of provisions contained in S. 1094, introduced by Senator Scott and Senator Stevenson in addition to myself, which I believe should be included in S. 372.

The most important of these provisions is the proposal that each candidate be required to designate one political committee as his central campaign committee. Under present procedures, each political campaign committee raising or expending over $1,000 must transmit reports to its supervisory office. Each

candidate may have more than one political committee. Indeed, the federal gift tax regulations encourage the proliferation of committees. While not outlawing or discouraging the creation of committees, the proposed central campaign committee will correct the reporting confusion caused by the present arrangement by requiring consolidation of each candidate's reports by the central committee prior to transmittal of the reports.

Another provision of S. 1094 relates to amounts to be reported. The present act requires reporting of contributions "in excess of $100," and we proposed that this wording be changed to read "contributions of $100 or more." It would seem logical that a person would be more apt to give a contribution of $100 rather than $101, and if the objective of the law is to disclose to the public contributions of the $100 level, we are defeating the purpose of the act by keeping the present language. Of course, if the Committee chose to report an even lower figure, I would support it.

Next, S. 1094 included a provision that will change the reporting dates to the 10th of April, July, October and 10 days prior to the election, leaving the final report required by January 31 unchanged. There were numerous complaints about the cumbersome process of fulfilling these reporting requirements which this provision would correct. To assure a more accurate and timely accounting of expenses we have moved the monthly reports up a full month from March to April. To alleviate many of the redtape complaints, we have combined the five and fifteen day reports prior to the election. Then, to discourage last minute large contributions, we require that gifts amounting to $2500 or more be reported within 24 hours of receipt, instead of the present law which requires reporting of contributions of $5000 or more within 48 hours of receipt.

Another section of our bill related to the comprising of campaign debts. Presently, the means or consideration by which a debt is extinguished are not reported. Thus, one can forgive a debt or accept token consideration for its satisfaction, and the report will only indicate that the debt is satisfied or extinguished. The new provision would require that when a debt is cancelled, that the report indicate the amount of money or consideration for which the debt was extinguished or a statement as to the circumstances under which the debt was cancelled.

Another loophole in the 1971 Act which S. 1094 addressed is the shielding of dues-paying members of clubs or organizations not specifically created to influence the outcome of an election.

At the present time, if such organizations contribute more than $1,000 to an election they do qualify as a political committee. Only the names of the officers of these committees must be filed. Our proposal requires the reporting of names and addresses of members of a non-political committee which attempts to influence the outcome of an election. This provision will eliminate some of the so-called pass-through donations we witnessed in the 1972 elections, that is, the shielding of the identity of the original donor so that his relationship with the candidate is not made public.

Finally, S. 1094 proposed the establishment of an independent elections commission. I am truly pleased to see that the Commerce Committee included an elections commission in S. 372, and that its powers and duties are largely what we had suggested. The independent commission is perhaps the most important of all the election reform proposals. Whatever set of laws we finally adopt to govern our elections, an independent elections commission will be needed to insure compliance. The only major difference between our proposal and the commission as contained in S. 372 relates to membership selection and tenure. While I am not wedded to any specific proposal, further reflection has led me to believe that it would be best if the power of appointment were divided among the President, the Senate and the House. All three will be affected by the operation of the commission, and thus all three should have a direct say in the membership.

The next two proposals I would like to offer for the Committee's consideration are contained in S. 1095, introduced by Senator Scott and myself. The first of these proposals deals with the definition of a candidate as contained in section 102 of the 1971 Act.

The definition of the term "candidate" is particularly significant in title I of the act for it triggers the media spending limitations for the candidate, and would trigger the proposed total expenditure limits in S. 372. In title I of the current law a "legally qualified candidate" is one who first, meets the qualifications prescribed by the applicable laws to hold the Federal elective office and second, is eligible under applicable State law. This narrow definition is contrary to the more inclusive definition contained in titles II and III where a "candidate"

is defined in terms of accepting contributions or expending money to influence one's candidacy or having the knowledge of another doing same. To contain a more narrow definition applicable to spending limitations than to the title's dealing with criminal sanctions with reporting and disclosure, seems inconsistent and contrary to the objectives of the act. Furthermore, the FCC contains a definition of a "candidate" which is broader in scope than the one contained in title I and one which is equal in scope at least to the one contained in titles II and III. It could be argued quite persuasively, I think, that the new legislative definition would pre-empt any regulatory one. It is also perplexing that title II contains a similar definition to that contained in title III, for it is here in title II that the act contains the other spending prohibition—that is, the prohibition of a candidate contributing to his own election beyond certain prescribed amounts.

The narrow definition in title I permits unlimited spending during a time when a candidate might be a candidate in every way except formality. Under the definition contained in title I, a candidate can meet the first criteria of qualifying under Federal law, say, in the case of a Senate election, by merely being 30 years of age and a citizen. The second criteria of qualifying under applicable State law varied, of course, from State to State; however, in some States, it is the responsibility of the candidate to file a petition followed by a period of grace when the petition is considered by State authorities. In this latter case, we encounter the most obvious example of permitting the candidate to have a "Roman carnival." During this interim period, he may spend what he wants without any statutory limitations and only when the State acknowledges the petition and the candidate is registered does he formally come within the purview of the statute.

However, the point is that in this definition, the criteria requires only affirmative action therefore permitting the candidate to be a passive, unannounced, or informal candidate for any period of time—accepting and spending contributions given to influence his candidacy without regard to any spending limitations.

Because of the inconsistent coverage in titles I and III of the act, it would not seem inprobable for a candidate, during this unrestrained period, to be required to file reports under title III.

Certainly the application of the law should commence at the first act of candidacy or the last act of noncandidacy. Clearly, however, this definition permits one to act like a candidate in the eyes of the public and, at the same time, hide behind the cloak of lose legislative draftsmanship. Obviously, if all States allowed writein candidates, it could be argued that the problem would not exist for then the candidate, by his mere presence, would, as a matter of law, have qualified under State law; however, this is obviously not the case.

Our proposed amendment would add a new and third criteria to this title I definition of "legally qualified candidate." The new addition would cover the candidate who has publicly announced, or has knowledge that another person or political committee has received contributions or made expenditures in behalf of his candidacy. This addition would restore the public's right to know what the candidate is spending once he begins to act and function like a candidate for Federal office.

The other provision of S. 1095 would repeal the equal time clause of the broadcast law for all federal elections.

I am encouraged that S. 372 provides for repeal for presidential elections, but I remain convinced that the best interests of the electorate would be served by extending the repeal to Senate and House elections as well. For the Committee's information, I have appended copies of S. 1094 and S. 1095 to my testimony.

At this time I would like to draw the attention of the Committee to what appears to me to be another possible loophole in the present law. Section 102(3) of the Campaign Communications Reform Act reads "The term 'Federal elective office' means the office of the President of the United States, or of Senator or Representative in, or Resident Commissioner or Delegate to, the Congress of the United tSates (and for the purpose of section 103(b) such terms includes the office of Vice President)." Thus the office of Vice President is not included as a federal office for purposes of either the media spending limit of the present law or the proposed total expenditure limits in S. 372. Therefore, my reading of the law would indicate that unlimited amounts of money could be spent to advance the election of a candidate for the Vice Presidency. If this is correct, the law should be changed to eliminate this possibility.

Finally, I would like to offer some comments on the proposed expenditure limits in S. 372, and two other matters proposed for this Committee's consideration: limits on case contributions and limits on the amounts of individual contributions to campaigns.

I support a limit on cash contributions. Any contribution of $100 or more should be required to be made by check. This would facilitate enforcement of the reporting requirements in the present law.

I must confess that I am concerned about the effect of both contribution limits and expenditure limits without also providing for public financing. There is the danger that these limits could turn into an "incumbent protection plan," which would make effective electoral challenges difficult. On balance, however, I think at least individual contribution limits are necessary. The influence of "big money" must be removed from our political process. The Stevenson-Mathias bill proposes an individual limit of $3,000. I think the limits should be set at least this low and perhaps lower, and must apply to groups as well as individuals.

In regard to the expenditure limits in S. 372, I would like to raise two points. First, the twenty-five cents per person of voting age formula seems to have the effect of setting relatively low limits on House races and Senate candidates in the small states and unrealistically high limits on the Presidency and Senate candidates in the large states. For example, in 1972 a Senate candidate in California could have spent a total of almost seven million dollars in the primary and general election combined.

Second, the problem of unrealistically high limits is exacerbated by the fact that limits will increase at the same rate as the Consumer Price Index. I have had my staff prepare projections of the growth of the Presidential expenditure limits for a general election in the future, employing population projections from the Census Bureau and assuming a 3½ percent annual growth in the Consumer Price Index. The projections appear in the table below. While we cannot perfectly predict the future, these projections give us some idea of what the limits will look like in the years to come. We can see that by 1980 a Presidential candidate would be permitted to spend up to $54.5 million in the general election alone, and by the year 2000 the limit would reach the incredible sum of $136.6 million. If we really want to impose realistic expenditure limits, some change must be made in the proposed formula.

PROJECTION OF EXPENDITURE LIMITS FOR PRESIDENTIAL CAMPAIGNS (GENERAL ELECTION)

Year	Population 18 years and over (millions)	Spending limit (millions)
1976	149.4	$44.6
1980	158.9	54.5
1984	166.9	65.6
1990	176.6	85.4
2000	200.4	136.6

In closing, I want to emphasize that while a number of valuable reforms can be made in our system of federal campaigns through the vehicle of S. 372, the truly necessary and desirable reform would be the adoption of a system of public financing of all federal election campaigns.

Senator PELL. The committee will recess until 3:30 this afternoon and the hearing will be resumed at that time.

[Whereupon, at 12:15 p.m., the hearing adjourned to reconvene at 3:30 p.m., the same day.]

AFTERNOON SESSION

Senator PELL. The committee will come to order.

The first witness for this afternoon's session is Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Mr. Chairman, I am pleased to be here. I appreciate the opportunity of being able to speak my piece before your committee. I may not be the most experienced man in the Senate, but I

have shared experiences with you Senators, and that is the one of having to finance a campaign to run for the U.S. Senate.

Rather than deliver a prepared statement which I have here, in the interest of conserving the committee's time as best we can, I am going to submit for the record, if I may, a full text of my statement, and I would just like to make a few brief comments to highlight this.

Senator PELL. The full text of your statement will be printed in the record.

Senator BIDEN. Mr. Chairman, although I have no magic formula as to how I feel elections for Federal office should be financed, I do think as a basic principle that there is an absolute need for us to begin to finance elections for all Federal offices—that is, for the Presidency, for the House and for the Senate, out of the Public Treasury. This should be done in the public interest.

I realize there are going to be a number of difficult problems which will have to be resolved if we go the public financing route: (1) how does one qualify as a contender; (2) when is one a "serious candidate"; (3) what proportion of public funds should go into primaries; and (4) a number of other complicated questions which should first be answered.

But I submit that it is a good deal easier to resolve these cumbersome and complicated issues than it is to try to legislate morality into the existing system whereby we, as elected public officials, are required to seek our funds from private sources.

In my opinion, almost implicit in such a system is an element of corruption, and very few of us want to appear in the second editions of "Profiles in Courage." Very few of us, I believe, want to be put in the position where, although we know if we take particular positions during a campaign on a particular issue, it will mean a campaign contribution for us, some of us, at least me would be tempted to say, "Yes, I'll support SST." Would I have supported the SST had I been in Congress last time around, if I knew that that organization, which has asked me the question, is giving $5,000 to those whom they endorse? I am not particularly stupid, and it is fairly easy for us to determine what answers the people asking us the questions want to hear.

I am not suggesting that anyone in the Senate now, or running for Congress or for the Presidency, is taking any money under the table, or is being told: "We will give you money if you will change your position, or we will support your campaign if you take such and such a position." But there is temptation for a candidate who sees he or she is a point behind in the polls of realizing a lifetime ambition of being a U.S. Senator or Congressman, or President—it is difficult to ask of a man or woman in that position, to not be at least considering prostituting their intellect, at least.

And I think as long as we have the major portion—or quite possibly any portion—of our campaign funding for Federal offices coming from the private sector, we are not going to be able to get at that particular problem. And until we get at that particular problem, in my opinion, we are not going to be able to restore the faith and confidence of the American people in their public institutions and in their elected public officials. We are not going to do that until we have men and women in public office who are totally unfettered, or, at least,

the American people have an impression of their elected officials being significantly unfettered by particular interest groups.

And I don't mean to imply that anyone here is in that position, necessarily. I am just saying the temptation is very great.

My wife, who was less of a politician than I, used to have an expression she used. She said, "You should not burden your elected public officials with too much responsibility." I think she is a true Jeffersonian.

I happen to agree with her. I think that when we ask men and women to go out and raise the hundreds of thousands of dollars that is necessary to run for public office in this Nation, we are putting them in a position of being exposed to great temptation. Not personal financial gain, but great temptation to maybe not say what they think all the time, maybe not take the positions they support all the time, and maybe I feel this way because I am weaker than most of the Senators up here. Maybe I felt that pressure because I don't have the strength of character that many of the men had who have gone before me.

All I know is that I have felt that pressure, and I am one young fellow at 30 years of age who will probably not only be the youngest Senator but the youngest one-term Senator here. But the fact remains I know I have felt it, and I think that it is in the public interest to see to it that we who are running for public office can get about the business of telling the people what we think and not have to worry that if we take a position that is in opposition to any major interest group, whether it be labor or big business, that we are going to have campaign funds cut off that we need for radio and television time and whatever other means we need to get our case before the people.

I have taken more than the 5 minutes; probably if I had delivered my prepared text it would have been shorter, but I feel strongly about this. I think if there is nothing else that I am able to do in the one term that I will be in the U.S. Senate—if there is nothing else I do to make some little impact on moving us toward the public financing of elections, I would consider my stint in the Senate a success.

My constituents probably would not feel as I do—and maybe my colleagues wouldn't either—but I would feel it is that important. I think it is the single most important issue to come before this body in a long, long time.

I appreciate your time, Mr. Chairman.

Senator PELL. Thank you very much, indeed. Your statement, an eloquent one, will be considered seriously by the committee, and I know that many of your colleagues share in your views.

Senator BIDEN. Thank you very much, Mr. Chairman.

[The written statement of Senator Biden follows:]

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Mr. Chairman, I appreciate an opportunity of being able to speak my piece before your committee. I may not be the most experienced man in the Senate, but I've a shared experience with you seniors—financing a campaign and trying to dissolve the debt afterward.

Your willingness to sit here this afternoon to take testimony is one more indication that campaign-financing reform is an idea whose time has come. We may not agree upon specifics, but there is a growing concern that present practices

should be altered and altered they will be. Some steps have been taken: but the journey is yet incompleted.

Many in the Senate deserve credit for advancing the cause of campaign-financing reform. But I don't want the occasion to pass without expressing my admiration for Senator Pastore whose bill, S. 372, is before you this afternoon. I particularly applaud his bill's provisions that would establish limits on the total amount of money which candidates for President, the Senate, and the House of Representatives could spend in both primary and general elections. Before I became a member of this distinguished body, I applauded, while struggling to conform to his handiwork, the 1971 Federal Elections Campaign Act, the first major revision of campaign financing laws in nearly 50 years.

Senator Pastore's achievement is particularly commendable because it came about in a sector of political life where there are enormous pressures to do nothing.

Therefore, it is with no disrespect for past achievement that I appear here this afternoon to urge a change in course—one that may more swiftly lead to our mutually shared goal—competitive, open elections wherein merit, not wealth, dominates.

In furtherance of this objective, I support the concept of public financing of primary and general federal elections.

Earlier today Senator Abourezk offered this subcommittee a collective statement in support of public financing—a statement in which I, among others, joined. This statement is consistent with the action of the Senate Democratic Conference which on May 9 of this year endorsed the idea of public financing of Federal elections—that is, public subsidy to candidates for Congress and the Presidency.

Why do I support public financing?

The answer lies not in our stars but in our statistics, Mr. Chairman.

In reviewing the history of Federal election campaigns in modern times, I am impressed by several factors:

1. No candidate has ever been prosecuted for violation of the 1925 Corrupt Practices Act.

2. No more than 20 corporations and a couple of trade unions have ever been prosecuted for violating prohibitions contained in this act.

3. Total costs of all political campaigns in 1972 apparently exceeded $400 million, a 25 percent increase from the 1968 elections.

4. The National Committee for an Effective Congress suggests that more than half of political spending goes unreported and that the expenditure per voter in a Presidential campaign has doubled in 12 years to more than 60 cents.

5. Not unrelated, incumbents since 1954 have won 9 of 10 races in the House and 4 of 5 races in the Senate, according to the Twentieth Century Fund (in 1972, I am pleased to report to myself I was in that fifth race in which a non-incumbent won a Senate seat.)

I'm pleased I won—so are my campaign contributors. But I do think there is a condition in politics which is best described as a "tyranny of the incumbency." Without disrespect to incumbents, it is difficult for a challenger to get a fair-shake, as the statistics I've just offered suggest.

I'm now an incumbent myself. Nevertheless, I do not believe the old ways of campaign financing are sufficient. In fact, they are deficient. The time has come for all good men of both major political parties to come to the aid of the system by changing it.

These are sober times. Here in this building—on this very floor—there is unfolding a disastrous chapter in the history of American campaigns. There is reason to think that shoddy men, with access to great gobs of unreported money, have savaged our political system. Watergate, like Pearl Harbor, is a name that will go down in history as an event of infamy.

I share with Americans a rising sense of dismay about the abuses in the electoral process.

The outrageous cost of getting elected to public office—that is, the influence of money-in-politics—has been commented on by Republican and Democratic Presidents alike—General Eisenhower, John Kennedy and Lyndon Johnson, among others.

The 1984 of Presidential elections will come about when there are no candidates available who can each raise the trillion-dollars to finance the campaigns. Even now, the rising cost of running for office is disqualifying many otherwise well-qualified persons who can not or are unwilling to rely heavily upon large contributors.

This is an unhealthy condition and, consequently, the American electoral system suffers—the American voters suffer.

Fortunately, the accumulation of campaign financing indiscretions—or worse—have jarred us. American voters now realize the scandalous grip money holds over the outcome of elections. And their distrust is not being directed at Republicans—whose party organization, in fact, is not involved in the Watergate affair—or at Democrats. The dangerous clue, that I discover in my travels within and without my State of Delaware, is that the Watergate is breeding distrust, even disgust, at both political parties and all politicians.

As a result, we politicians are in deep trouble both in Washington and in the river cities of America. The political system is in trouble because, as someone has said for us, democracy is less a *form* of government than a *system* that assures we shall be governed no better than we deserve.

The hazard is not necessarily that the voters will rise and vote us all out of office within the next few years. A clear-and-present danger is that the voters may turn away from the ballot-box—after all the 1972 Presidential voter turnout was the lowest in this century.

The real danger, then is that the dismayed American voter may act like Mark Twain's cat which sat down on a hot stove lid—the cat never will sit on a hot-stove lid again, but also the cat will never sit down again.

The winds of change are already blowing through the Congress. Various steps have been taken within the last couple of years in both the Senate and the House to open the legislative process itself to public scrutiny.

But these improvements, in my judgment, are largely quarantined by the scandalous grip of money on politics.

The rapid increase in the cost of campaigning is the most important element in degrading both our politics and our politicians. The high cost of running places even the most innocent candidate in the position of being in the pocket of such contributors—or assumed to be by the contributor and, more importantly, by the public.

Slowly, Mr. Chairman, I have become convinced that efforts to place ceilings on overall campaign expenditures, to prohibit certain groups from contributing funds, to restrict the size of campaign contributions—these and other devices, however well-intentioned and well-designed—are not fully effective.

Disclosure and ceilings have merit, but the ingenuity of political operators outranks that of an Einstein in finding ways of funneling private funds of undisclosed, if not dubious origins, into campaign coffers.

Public-subsidy would allow candidates—incumbents and challengers alike—to compete more on the basis of merit than on the size of the pocketbook—free from potentially corroding dependence on personal or family fortune or the gifts of special interest backers—be they those of business, organized labor or conservative or liberal interests.

Public subsidy has an honorable ancestry, Mr. Chairman.

Theodore Roosevelt proposed this approach in an effort to insulate political parties from the influence of wealthy contributors and to permit candidates of modest means to seek elective office and to assure that opposing candidates and their parties will have more respectable resources.

In 1967, the Senate Finance Committee reported out a subsidy plan as title II of the Honest Elections Act, H.R. 4890, although the bill was never discussed on the floor.

As you know, we now have in law a provision authorizing a taxpayer to assign $1.00 of his Federal individual income tax obligation to the 1976 Presidential campaign fund.

The point I am making, Mr. Chairman, is that the concept of public subsidy is not a startling new one. It has been discussed here in the Senate. The tax checkoff provision is now law. I hope that we can now discuss the possibility of taking larger steps.

Public subsidy is not without problems, of course. Previous provisions, such as that in the Honest Elections Act, did not treat minor parties fairly.

And, if a public-subsidy statute is enacted that barred the use of private funds in campaigns, then there should be a provision to accommodate future minor parties that may develop.

But these problems surely could be resolved.

The issue remains that of money-in-politics, if money by itself does not win elections, absence of money guarantees defeat.

Senator Hart's pending bill addresses itself commendably to this problem, although I plan to offer a differently tailored bill.

In my judgment, the ideal public subsidy program would combine public subsidy as the only source of campaign financing—combined with compulsory free radio and television time.

The solution may appear stiff: but the penalty, in the form of further erosion of voter confidence in the electoral system, is stiffer.

I suggest an additional benefit may accrue from adoption of public-subsidy campaign financing. I believe it would hasten the day when we in the Congress enact tax-reform for the American people. Revision of the Federal tax code so as to make it fairer is made more difficult, in my opinion, because those wealthy who benefit by existing tax shelters also make large campaign contributions.

In summary, Mr. Chairman, I support public subsidy but I discredit no other method.

I simply assert my judgment as an individual Senator that adoption of public subsidy is the swiftest and surest way to purge our elections system of the corruption that, whatever the safeguards, money inevitably brings.

Thank you.

Senator PELL. Senator Abourezk?

STATEMENT OF HON. JAMES ABOUREZK, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator ABOUREZK. Thank you. I, first of all, want to echo the sentiments expressed by my colleague Senator Biden.

Second, I want to submit my written testimony for the record, and also the testimony that is drafted separately on behalf of five Democratic Senators, including myself, Senator Biden, Senator Clark, Senator Haskell, and Senator Huddleston on this particular piece of legislation.

Senator PELL. That will be entered into the record, together with the table?

Senator ABOUREZK. Yes, and the table, and that is merely a proposal to be added on to S. 372 if the committee sees fit, that would take care of the problem, Mr. Chairman, of large States with sparse populations such as South Dakota or other States where it takes a minimum base amount of campaign money to run in spite of the fact that there aren't many people. I would submit that for the record as well.

I just want to take this opportunity to express publicly my real gratitude for your pledge and your participation in this public financing effort that a lot of us have taken an interest in. I sincerely appreciate the fact that you are holding hearings, that you are listening to testimony and that you intend to do something about this.

Senator PELL. "Try" to do something about it.

Senator ABOUREZK. Yes, to try to do something about it.

I think the farm bill that is coming up today points out with more specificity, what Senator Biden is talking about. It is really the appearance of corruption that harms us, I think, more than any corruption that does go on, because there are certain controversial amendments up today that I would like to vote for, but because I received contributions from dairy farmers around the country, I am almost afraid to vote for them because it is set up now in the press that anybody who does vote for them who has taken money from the dairy farmers has been bought off.

It is a very difficult thing that you cannot vote for your friends without being accused. This is one of the things that I think public financing would take care of.

Senator PELL. It would take care of part of it. The public finance proposals vary; they all seem to include specific parts of private financing as well as public.

Senator ABOUREZK. Well, with the limit, I think, Mr. Chairman, of $500 or $1,000; I think that would be taken care of as well.

I thank the Chair very much.

Senator PELL. Well, thank you very much for being here.

Senator Bentsen and Senator Mondale were not able to present their statements in person but asked that they be included in the record, and there being no objection, they will be included at this point.

[The written statements of Senator Abourezk, with attachments; Senator Bentsen; and Senator Mondale follow:]

STATEMENT OF HON. JAMES ABOUREZK, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Mr. Chairman, I would like to open my testimony by reading briefly from a statement that I am presenting for myself and four of my freshmen Democratic colleagues.

We appreciate the opportunity to testify here today on Senator Pastore's bill S. 372 which would make several important changes in the areas of campaign expenditures, policing of campaign reports, and would alter the equal time rule. The five of us have decided to offer this joint statement to underscore our common belief that reform of legislation governing our electoral process is critically important at this time.

Senator Pastore's bill which you are considering builds on the strong reform record that the distinguished Senator from Rhode Island, together with the able Chairmen of this Committee and of your Privileges and Elections Subcommittee, Chairmen Cannon and Pell, have built over the last several years. We do not wish to comment jointly on the merits of matters about which your Committee and your other witnesses are far more knowledgeable than we. We are confident that your Committee will act on S. 372 with an eye toward the rebuilding of public confidence in our electoral system that we feel is needed.

Our joint statement here today is made to urge this Committee not to stop with this bill. We believe that immediate inquiry must be made into the question of public financing of Federal elections.

We know that public financing is a tremendously complex area. It raises difficult questions of constitutionality, of effect on incumbents and on both major and minor parties, of tie in with existing law, and of effect on organizations of all kinds.

But this complexity is not an argument for delay, it is an argument for immediate action. Debate on public financing should begin now. This Committee can perform an invaluable service in opening and guiding this debate.

As freshmen who have just come through the mill of campaign fund raising we are acutely aware of the pressures, the pitfalls, and the generally demeaning aspects of our present system. We believe that a better system of campaign funding can be devised. We are confident that your Committee will be instrumental in making fundamental improvements. We would like to join in that effort which we hope will commence with hearings on public financing before your Subcommittee on Privileges and Elections at the earliest possible date.

Mr. Chairman, I share fully in the sentiments expressed in this joint statement. As I will make clear in a moment, I believe that S. 372 is extremely good legislation. Its author, Senator Pastore, is to be congratulated, as is your Committee. Your work has led the way in the field of campaign reform. I am confident that your leadership will be continued by passage of this bill.

But I also feel that your leadership is sorely needed, and needed now on the matter of public financing. Public financing is the best insurance we as a nation can provide against repetition of the kind of scandals we find ourselves embroiled in today. It is a way to free ourselves of the perennial, demeaning, often corrupting need to go hat in hand to wealthy private groups and individuals.

Public financing might cost from 100–500 million dollars every two years. This sum is next to nothing when compared to other expenditures we vote almost daily.

It is next to nothing when compared to the public good it could produce. And it is certainly next to nothing when measured against the absolute need to re-

store public confidence that elected representatives are something more than public businessmen ready to sell their legislative wares to the highest campaign bidder.

I hope that your Committee will seize what I honestly believe is a golden opportunity to take leadership in this critical field by opening public financing hearings just as soon as possible.

With regard to S. 372, it is, as I have said, an excellent bill. I heartily concur with the plan to abolish equal time rules and open the way for public debates in Presidential elections. I also strongly support your plan to establish an independent Federal Election Commission to administer and enforce campaign spending and reporting laws. This kind of commission will do much to insure that these laws are enforced fully and impartially.

I also concur in principle with your plan to impose an across-the-board expenditure limit of 25¢ per voting age resident in all Federal elections. However, I do have some reservations and specific suggestions on this point.

As you know, the problem with any expenditure limit is how to take account of the varying characteristics, and therefore the varying costs of campaigning in different states. S. 372 attempts to make adjustments in its flat 25¢ limit by writing in a minimum ceiling of $175,000 for any statewide race, and $90,000 for any Congressional race, no matter how small the voting age population.

I believe that this formula has two serious problems.

The first problem is one that was stated again and again in the hearings before the Commerce Committee, but which was not solved. It is the problem faced by candidates campaigning in large, sparsely populated areas. These candidates have expenditures which vastly exceed those of candidates from smaller or more populated states. As Chairman Cannon certainly knows, the need for air travel, for numerous offices in widely separately small communities, for staff travel, for use of numerous separate media outlets, and for use of direct mail is much greater in South Dakota or Nevada than it is in Rhode Island or Delaware.

In my own state of South Dakota both of the past two Senate races have seen expenditures of about double the $175,000 that would be permitted under S. 372. These expenditures may be excessive, but a limit of $175,000 seems to me to be unrealistically low.

The second problem arises in the way that S. 372 differentiates between Congressional candidates who must run statewide and those who do not. Again, my own personal experience as a representative of the second district of South Dakota is helpful. Under S. 372 I would have been permitted to expend only $90,000 to campaign in a district that is 350 miles by 200 miles in size and has a voting age population of 217,000. This limit would apply because South Dakota has two Congressmen, so I would not be running statewide.

Yet right across the border in Wyoming my friend Congressman Teno Roncalio would be permitted to spend $175,000 to campaign in an area only slightly larger than my old district and having a voting age population of 225,000, virtually identical to the 217,000 in my district.

I believe that influential Congressmen like Al Ullman of Oregon's huge Second District, as well as virtually every Congressman from a large, two district state, is going to wonder why he can spend only a little more than half as much as a Congressman from a state like Delaware or North Dakota or Wyoming.

Even if you accept the questionable theory that incumbent Congressmen are happy with low spending limits, you still have the problem of the challenger who may demand a court test of a law that would permit him to spend $175,000 challenging an incumbent in Wyoming, but only $90,000 challenging one across the border in the district covering the Western four-fifths of South Dakota.

I believe that there is a simple formula which would alleviate both the problem of high per voter expenses in large, sparsely populated states and the problem of discrimination against nonstatewide House candidates from large districts. This formula would work as follows:

Every candidate for Federal office would be permitted to spend an additional two dollars for every square mile in the area from which he was seeking office. This amount would be his 25 cents per voting age resident allotment as provided by S. 372. The two dollars per square mile formula would be limited to the first 100,000 square miles to take care of the single special case of Alaska whose 586,000 square miles would entitle candidates there to a ridiculous $1,172,000 without this limitation.

In addition my proposal to provide two dollars per square mile for the first 100,000 square miles in a state or district would not affect the minimum of

$175,000 and $90,000 for statewide and Congressional races as written in S. 372 now. That is, if a candidate would receive less than $175,000 or $90,000 after adding together 25 cents per voter and two dollars per square mile, then his ceiling would simply be set at $175,000 or $90,000 as the case may be.

This adjustment based on two dollars per square mile in a state or district seems to me to work almost perfectly. I have prepared a chart showing how it would affect the amounts that could be expended in each of the 50 states.

In my own state of South Dakota this square mile plan would provide $262,000 for a statewide race, $108,000 from the 25 cents per voter portion and $154,000 from the two dollars per square mile provision.

The square mile plan would also work well in small, densely populated states and in large, densely populated states.

For example, in California the extra $200,000 provided for a statewide race by the square mile add-on is insignificant next to the more than 3½ million dollars that could be expended anyway under the 25 cents per voter provision of S. 372.

In the case I pointed out earlier involving large Congressional districts from multi-district states, this square mile plan would also work very well. As I said, under S. 372 as now written the Congressman from Wyoming would have $175,000 to run in an area having 98,000 square miles and 225,000 voting age residents. A Congressman from South Dakota's Second District would have only $90,000 to run in an area of about 65,000 square miles which has 217,000 voting age people. Thus, under S. 372, the Wyoming man would have 94% more money than the South Dakotan. Under my plan, factoring in square mileage, the Wyoming man would have just 26% more than the South Dakotan. This is about the right amount given the fact that his area is 34% greater and his population about 5% greater.

I believe that this two dollar per square mile proposal will effectively remedy the problem of higher per voter expenses in large, thinly populated areas. It will also eliminate the discrimination against large district, non-statewide Congressmen inherent in S. 372 as now written. It will not materially affect the present formula in S. 372 as it affects large urban states and it will have virtually no effect on the formula for Presidential races.

Mr. Chairman, I recognize that the variations that can be made in any expenditure limit formula are endless. I favor S. 372 as it is now written and offer my suggestions for a square mile formula by way of a possible improvement in an already good piece of legislation.

I have just one further observation. I notice in the report from the Commerce Committee on this bill that they suggest that your Committee examine the possibility of a limit in the size of individual contributions. I believe that such a limit is absolutely vital to the integrity of our political process. A wealthy individual simply should *not* be permitted to back a House candidate to the tune of 25 or 50 or even the full 90 thousand dollars he can spend under S. 372.

But I think the need for a limit like this points up again the crying need for some system of public financing. Individual contributions should be limited to perhaps the range of $250 to $1,000. But if that were done without public financing to fill the void I think it would be virtually impossible to raise even the minimum amount needed to run an informative campaign.

So again, I conclude by urging your able Committee to act favorably on S. 372 and then to move on to consideration of public financing legislation just as soon as your calendar permits.

Thank you very much.

COMPARISON OF CAMPAIGN EXPENDITURE LIMITATIONS UNDER S. 372 AND UNDER CHANGES PROPOSED BY SENATOR ABOUREZK TO ADJUST FOR EXTRA EXPENSES IN LARGE, SPARSELY POPULATED STATES

State	25 cents per person	$2 per square mile	Abourezk ceiling[1]	S. 372 Ceiling[2]
Alabama	$568,500	$103,200	$671,700	$568,500
Alaska	50,000	200,000	250,000	175,000
Arizona	309,750	200,000	509,750	309,750
Arkansas	327,500	106,200	433,700	327,500
California	3,486,250	200,000	3,686,250	3,486,250
Colorado	389,500	200,000	589,500	389,500
Connecticut	526,500	10,000	536,500	526,500
Delaware	92,750	4,100	175,000	175,000
District of Columbia	145,250	100	175,000	175,000
Florida	1,276,250	117,100	1,393,350	1,276,250
Georgia	776,000	117,750	993,750	776,000
Hawaii	132,750	12,900	175,000	175,000
Idaho	119,750	177,100	296,850	175,000
Illinois	1,885,500	112,800	1,998,300	1,885,500
Indiana	877,250	72,600	949,850	877,250
Iowa	477,250	112,600	589,850	477,250
Kansas	385,250	164,550	549,800	385,250
Kentucky	551,500	80,800	632,300	551,500
Louisiana	584,750	97,050	681,800	584,750
Maine	166,500	66,450	232,950	175,000
Maryland	672,000	21,150	693,150	672,000
Massachusetts	988,750	16,500	1,005,250	988,750
Michigan	1,468,500	116,450	1,584,950	1,468,500
Minnesota	640,000	168,150	808,150	640,000
Mississippi	350,750	95,450	446,200	350,750
Missouri	816,500	139,350	955,850	816,500
Montana	115,000	200,000	315,000	175,000
Nebraska	255,500	154,450	409,950	255,500
Nevada	87,000	200,000	287,000	175,000
New Hampshire	130,250	18,600	175,000	175,000
New Jersey	1,256,250	15,650	1,271,900	1,256,250
New Mexico	159,000	200,000	359,000	175,000
New York	3,193,250	99,150	3,292,400	3,193,250
North Carolina	865,750	105,150	970,900	865,750
North Dakota	100,500	141,350	241,850	175,000
Ohio	1,796,250	82,450	1,878,700	1,796,250
Oklahoma	453,000	139,850	592,850	453,000
Oregon	375,000	193,950	568,950	375,000
Pennsylvania	2,040,250	90,650	2,130,900	2,040,250
Rhode Island	168,250	2,450	175,000	175,000
South Carolina	426,500	62,100	488,600	426,500
South Dakota	108,500	154,100	262,600	175,000
Tennessee	678,250	84,500	762,750	678,250
Utah	172,250	169,850	342,100	172,250
Vermont	77,250	19,200	175,000	175,000
Virginia	799,250	81,650	880,900	799,250
Washington	592,750	126,400	719,150	592,750
West Virginia	292,500	48,350	343,850	295,500
Wisconsin	738,750	112,300	851,050	738,750
Wyoming	56,250	195,850	252,100	175,000
Texas	1,920,250	200,000	2,120,250	1,920,250

[1] Based on 25¢ per voting age resident plus $2 per square mile for first 100,000 square miles. Includes $175,000 minimum.
[2] Based on 25¢ per voting age resident. Includes $175,000 minimum.

JOINT STATEMENT ON BEHALF OF FIVE FRESHMAN DEMOCRATIC SENATORS (SENATORS ABOUREZK, BIDEN, CLARK, HASKELL, AND HUDDLESTON)

We appreciate the opportunity to testify here today on Senator Pastore's bill S. 372 which would make several important changes in the areas of campaign expenditures, policing of campaign reports, and would alter the equal time rule. The five of us have decided to offer this joint statement to underscore our common belief that reform of legislation governing our electoral process is critically important at this time.

The collection of events that go generally under the name of Watergate have cast a cloud of suspicion that extends far beyond just the White House. The public at large has never been more skeptical of politics and politicians. The belief that big money contributors buy off public figures en masse is widespread. Young and old alike are despairing of the system. They see their vote as useless against the power of organized special interests.

While our individual views on specific legislation may differ, we share one simple, fundamental concern. We believe that the stock of politics and politicians has never been lower. We believe that this deep public mistrust seriously threatens our democracy. And we believe that action must be taken immediately to restore public confidence in all of the branches of our government.

Senator Pastore's bill which you are considering builds on the strong reform record that the distinguished Senator from Rhode Island, together with the able Chairmen of this Committee and of your Privileges and Elections Subcommittee, Chairmen Cannon and Pell, have built over the last several years. We do not wish to comment jointly on the merits of matters about which your Committtee and your other witnesses are far more knowledgeable than we. We are confident that your Committee will act on S. 372 with an eye toward the rebuilding of public confidence in our electoral system that we feel is needed.

Our joint statement here today is made to urge this Committee not to stop with this bill. We believe that immediate inquiry must be made into the question of public financing of Federal elections.

The temptation to reform and perfect the landmark legislation of 1971 is surely strong. We certainly do not object to such perfection. That legislation was good legislation. It can and should be perfected in light of the experiences gained in the 1972 elections.

But we believe that immediate inquiry into the subject of public financing is equally important. Public financing is fundamentally different from the legislative efforts that have been made in the past. It carries to its logical conclusion the efforts your Committee has made to limit by disclosure and expenditure limitation the distorting effect of large private contributions on our electoral process.

We know that public financing is a tremendously complex area. It raises difficult questions of constitutionality, of effect on incumbents and on both major and minor parties, of tie in with existing law, and of effect on organizations of all kinds.

But this complexity is not an argument for delay, it is an argument for immediate action. Debate on public financing should begin now. This Committee can perform an invaluable service in opening and guiding this debate.

As freshmen who have just come through the mill of campaign fund raising we are acutely aware of the pressures, the pitfalls, and the generally demeaning aspects of our present system. We believe that a better system of campaign funding can be devised. We are confident that your Committee will be instrumental in making fundamental improvements. We would like to join in that effort which we hope will commence with hearings on public financing before your Subcommittee on Privileges and Elections at the earliest practicable date.

Senator JAMES ABOUREZK.
Senator JOSEPH BIDEN.
Senator DICK CLARK.
Senator FLOYD HASKELL.
Senator WALTER HUDDLESTON.

STATEMENT OF HON. LLOYD BENTSEN, CHAIRMAN, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE

Mr. Chairman, in 1971 the Congress enacted election campaign reform legislation in response to the scandalously high and ever-rising costs of financing campaigns for federal office and the outmoded reporting and disclosure laws pertain-

ing to campaign expenditures and contributions. This legislation was long overdue and, I believe, one of the most significant pieces of legislation to be enacted by the 92d Congress. It was an important first step towards getting political campaign financing out into the open. This legislation was based on a realization by the Congress of the urgent need to restore the confidence of the American people in the democratic process and an awareness of the necessity of basic changes in both the form and substance of financing campaigns.

Shortly thereafter, the Congress approved a dollar check-off provision to broaden the opportunities for participation in financing campaigns and to make funding less dependent on the wealthy. The base of financing had to be broadened so that more people could become involved in the basic exercise of providing the means for candidates to get their messages across to the public. These two laws were important first steps, but they were just that—first steps. I am convinced that we must go further. The people of this country are demanding to know the sources of campaign financing and they have a right to know from whence comes the "mother's milk of politics."

Let me emphasize, Mr. Chairman, that I am not making a categorical condemnation of those who now contribute. I believe in most cases those who support candidates financially do so *not* with the intent of demanding a quid pro quo, or a favor for a favor, but because they believe as the candidate does or because they have a sense of public responsibility.

There are, of course, abuses, and it is these abuses which are publicized and which undermine the confidence of the people in their public officials. This, Mr. Chairman, is the biggest and most compelling reason to get campaign funding out into the open.

It would be easy, as a Democrat, to base arguments on the inequities of contributions to the two major parties, but that, Mr. Chairman, is not the basic issue. The issue is non-partisan, and it is that all citizens have the right to know the sources of candidates' financing. The issue is a deadly serious one—public confidence in our political system.

The Federal Election Campaign Act of 1971 was a healthy start toward getting campaign financing out into the open. I strongly support its disclosure requirements, its limitations on the amount a candidate and his family can contribute of their own money, and the limitations on media expenditures. But there is great need for additional, tougher legislation and the abuses of the 1972 presidential campaign—slush funds, suitcases and attache cases full of cash, secret foreign bank accounts—serve to highlight the urgency with which the Congress must approach and approve additional legislation tightening up present campaign spending and financing limitations.

Mr. Chairman, we are all familiar with the astronomical increase in the cost of campaigning. We see campaigns costing tens of millions of dollars and expenditures on radio and television alone running in the millions of dollars. The statistics on spending for political campaigns reflect expenditures in the late sixties being double that of the mid-fifties. Continued ballooning of campaign costs will permit special interest groups to exercise increasingly perilous influence over the candidates. Costs will continue apace if we do not do something about it.

For these reasons, Mr. Chairman, I strongly support limitations similar to those in S. 372, as reported by the Senate Commerce Committee, being placed on all federal campaign expenditures. This is certainly a most significant step towards holding down escalating campaign costs. Limitations on campaign spending can return political campaigns to their proper orbit of creativity, objectivity and independence of the financial powers who would too readily open their pursestrings to influence the direction of legislation.

But if we are concerned with the dangers threatening our democratic form of government, if we are concerned with the eroding confidence of the people in their government, then we must address ourselves not only to the problem of campaign spending but also to that of contributions.

When 90% of political contributions come from 1% of the population, then a potentially dangerous situation exists. Politics in the United States should be less a game of big contributions and more an art of talent and ideas and dedication. Wealth must not be allowed to become the yardstick for political talent. Political success must not be allowed to be equated with financial success. The people of this country must not be forced to choose among competing financial interests, but should be permitted to have a free choice of men and ideologies and ideas. They must be permitted to choose from independent candidates, minimally influenced by the great financial sources which have the wherewithal to share their wealth in campaigns.

For these reasons I strongly support placing limitations on individual contributions. One talks about millions and millions of dollars being spent on campaigns but how can a meaningful lid be put on expenditures if the question of how much we are going to allow an individual to contribute to a campaign is not addressed as well. We must restore public confidence in the democratic process and that will be hard to do as long as individual candidates are receiving thousands of dollars from a single source and, in one particularly well-known case, over a million dollars.

Mr. Chairman, I recommend for this Committee's consideration a limitation of $3,000 on any individual's contribution to a candidate in a particular campaign for federal elective office. I submit as well for the Committee's consideration a limitation of $100 that can be made in cash. Funds in excess of $100 would have to be in the form of a written instrument, i.e., a check. We are all familiar with the abuses that can result from thousands of dollars in cash floating around campaign headquarters. A limitation on the amount that could be paid in cash would minimize this problem as well as maximize traceability. There is simply no reason why suitcases full of hundred dollar bills have to be part and parcel of a political campaign. The American people are quite legitimately concerned about the influence that money can wield on candidates for political office. I don't think money should be a requirement for public office. It has too often been said that our political system is the best that money can buy. It is contrary to the responsibilities of public office as well as to our political tradition to see candidates spending excessive amounts of time raising money rather than issues—seeking sources of campaign financing rather than seeking solutions to pressing problems.

Recent public opinion polls have pointed out the all-too-obvious public disenchantment with our political process, disenchantment which has been strengthened by recent, flagrant campaign financing abuses. The need for more stringent controls on money is thereby highlighted and I urge this Committee to expand the work of the Senate Commerce Committee by providing limitations on contributions as well as limitations on expenditures. It is time the Congress enacts legislation to strengthen the confidence of the public in our democratic system. Reform is not only necessary, it is urgent.

STATEMENT OF HON. WALTER F. MONDALE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. Chairman, I appreciate this opportunity to appear before you today.

I would like to direct my remarks specifically this morning to the section of S. 372 which sets up an independent nine-member Federal Election Commission to administer and enforce the spending limit and reporting and disclosure provisions of the Federal Election Campaign Act of 1971.

As you know, I have introduced a similar bill (S. 1883) which has been referred to this Subcommittee. There are, however, important differences between the Office of Federal Elections my bill would set up, and the Federal Election Commission provided for in S. 372. I would like to discuss these differences, and to urge the Subcommittee to consider them as possible modification to S. 372.

Both S. 372's Federal Election Commission and S. 1883's Office of Federal Elections would go a long way toward remedying one of the central defects of the 1971 Act—the lodging of responsibility for supervising and receiving campaign spending reports in three different officials, two of whom are directly responsible to many of the candidates they are supposed to oversee. The Comptroller General, who monitors spending and disclosure in presidential campaigns, is dependent of the Executive, but the Clerk of the House or the Secretary of the Senate are clearly not independent of the incumbent candidates for office in those bodies.

These duties would be transferred to the Commission under S. 372, and the Office under S. 1883. In addition, both the Commission and the Office would take over from the Justice Department the responsibility for investigating and prosecuting violations of the spending limit and reporting and disclosure provisions of the 1971 Federal Election Campaign Act.

This too is a significant improvement. Senators have insisted—rightly—that the Watergate special prosecutor must have full and complete independence. The circumstances which led to this demand will be present whenever crimes committed in connection with an election are at issue. The Justice Department is

always under the control of the incumbent Administration, and it will always be suspected of failing to pursue the violations of those who are in power, and of unfairly pursuing those who are not.

Any agency set up to monitor campaigns on a long-term basis will need the same independence that the Senate has demanded be granted to the Watergate prosecutor. We need a permanent independent prosecutor.

But while S. 372's Commission would be an important step forward, I believe it stops short of what the Watergate affair shows we must do.

AUTHORITY TO MONITOR ALL ELECTION CRIMES

First, I believe that its mandate is too narrow. It could investigate and prosecute violations of the spending limit and reporting and disclosure provisions of the Federal Election Campaign Act, but that is all.

It could do nothing about the kind of bugging, wiretapping, conspiratory, campaign sabotage, obstruction of justice, perjury, subornation of perjury, and other Federal criminal acts associated with the Watergate affair. Any of these crimes, as we have seen, can seriously taint an election, but the Commission set up by S. 372 would not be able to investigate or prosecute them.

We would have to continue to rely on politically-appointed U.S. Attorneys and the Justice Department to investigate and prosecute what are clearly political crimes—crimes committed to affect the course of an election. The political pressures to ignore violations of campaign spending and disclosure laws. But only the latter violations could be investigated and prosecuted by the Commission established by S. 372.

An independent prosecutor is needed to deal with *all* criminal attempts to subvert our electoral process—not just those which violate the narrow provisions of the 1971 Federal Election Campaign Act.

Therefore, the Office of Federal Elections which my bill would establish is given authority, through its Director to investigate the violation of *any* law of the United States occurring in connection with any campaign for nomination for election, or for election, to Federal office or occurring in connection with any attempt to influence the outcome of any such election, and to prosecute any violation of such law.

SINGLE DIRECTOR VERSUS MULTIMEMBER COMMISSION

A second important difference between my bill and S. 373 is that my bill would set up an Office headed by a single Director, while S. 372 would set up a nine-member Commission with staggered terms. The term of office for both the Director under my bill and the Commissioners in S. 372 would be fifteen years. Both the Director and the Commissioners would be appointed by the President, and subject to confirmation by the Senate.

I believe experience has shown that lodging full responsibility in one person has substantial advantages over dividing responsibility among a number of commissioners.

Decisions are made and actions are taken more quickly and firmly in a body headed by one person. As President Roosevelt's Committee on Administrative Management observed in 1937: "For the purpose of management, boards and commissions have turned out to be failures. Their mechanism is inevitably slow, cumbersome, wasteful, and ineffective. . . . Even strong men on boards find that their individual opinions are watered down in reaching broad decisions. . . . The conspicuously well-managed administrative units in the Government are almost without exception headed by single administrators."

One person can be held more accountable than a commission. When everyone is partly responsible, no one is fully responsible and everyone has an excuse. As former Federal Trade Commissioner Philip Elman put it in a speech to the American Bar Association three years ago: "When the public is only dimly aware of an agency as a distant and impersonal institutional entity, when one man cannot clearly be identified as responsible, who is there to hold accountable for the agency's shortcomings?"

Finally, giving one person full responsibility will make it easier to find a strong and able person to fill the job. Good people thrive on responsibility and challenge. Yet both are diminished when authority is diffused as it inevitably must be in a multi-member commission. When people are asked to serve 15-year terms—to take 15 years out of their lives—they must be given truly important and responsible work to do. It is at least an open question whether being one member of a nine-member commission would be sufficient for an

able person. There is a strong possibility that only time-servers would accept appointment.

The strong performance of the General Accounting Office over the years is a good illustration of the advantages in having an agency headed by one person. We have had a series of distinguished Comptrollers General—culminating in the highly able and dedicated Elmer Staats—and under their leadership the GAO has been one of the most effective and professional of all Federal agencies.

CHECKS ON THE DIRECTOR

There is, of course, a danger in putting all authority in the hands of one person, as S. 1883 would do. There are some checks on the Office and its Director, however.

First of all, the Senate must give its advice and consent to the appointment of the Director. It is clear that whoever is nominated as Director will receive the most careful and thorough scrutiny in the Senate. All of us will be aware that the person who fills this office will have significant authority for years to come over matters that are of more than passing concern to us. None of us will want a partisan or incompetent Director looking over our shoulders in the next campaign.

Second, funding for the new Office would have to be voted each year by Congress, and clear abuse of the powers of the Office could lead to a cut-off of funds.

Third, Congress could change the law and limit the powers of the Office if its powers were abused.

Fourth, the President could remove the Director "for cause". Although it has never been firmly established in court cases how extensive this removal power is, the consensus of legal scholars is that it would at least include the causes for removal of the Comptroller General spelled out in the statute setting up the General Accounting Office. The statute specifies that the Comptroller General may be removed if he "has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude."

Fifth, Congress could remove the Director—as it can any "civil officer of the United States"—by impeachment for and conviction of "Treason, Bribery, or other High Crimes and Misdemeanors."

Sixth, S. 1883 provides that the Office of Federal Elections shall have an Assistant Director, separately appointed by the President, and confirmed by the Senate, with a fifteen year term that would normally not coincide with the term of the Director. The Assistant Director would thus have enough independence to challenge the Director if necessary on particular cases and on general policy.

Seventh, the Federal courts would of course act as a check on the Director's power to initiate prosecutions, since poor cases would be thrown out. In addition, the Director could be enjoined in Federal court from taking actions which exceed his authority or which amount to abuse of authority.

Finally, the scrutiny of the press and public opinion would be so great that a Director concerned for his reputation, his credibility, and his continuing ability to perform his duties would have a strong incentive to act responsibly.

Despite these checks and safeguards, concern has still been expressed that the single Director in S. 1883 may have too much unreviewable power.

Accordingly, I intend to amend S. 1883 to provide for an Oversight Committee to review the work of the Office of Federal Elections.

This Oversight Committee would be composed of five independent, non-partisan citizens with established reputations for good judgment, integrity, high character, and expertise. They would be appointed by the Chief Justice of the United States to serve staggered six year terms.

The Oversight Committee would oversee the work of the Office of Federal Elections, receive complaints, and report to Congress and the President annually. It would have authority to hire a small staff of its own, and would have offices separate from the Office of Federal Elections. It could make recommendations for changes in the law governing the Office, and in extreme cases could recommend removal of the Director by the President "for cause" or by Congress through impeachment proceedings.

Since there are already a great many checks that would keep the Director from acting too vigorously, I believe the most important role for the Oversight Committee would be to prod a laggard or overly-cautious Director into taking action when it is justified.

S. 1883, in sum, seeks to establish an investigator and prosecutor of political crimes who will be as independent as possible of political control, while still remaining subject to the checks and balances which are the genius of our political system.

OTHER ISSUES

As this Subcommittee well knows, establishment of an independent Commission or Office to monitor campaign spending and disclosure laws and other violations does not exhaust the potential for election reform.

I am now working on legislation to provide for public financing of Presidential campaigns, and the Subcommittee now has before it Senator Hart's bill (S. 1103) to provide for public financing of Congressional campaigns. I am pleased to be a cosponsor of Senator Hart's bill.

Although public financing of elections presents many difficult and troublesome issues, I am convinced that this is the best long-run solution for many of the problems we have encountered in recent years—both in campaigns and in the day-to-day operation of our government.

Until public financing of campaigns is a reality, however, there is a modest step that we can well take now. That is to provide candidates with reimbursement for the expenses they now incur in complying with the reporting and disclosure provisions of the 1971 Federal Election Campaign Act. Many candidates are compelled to hire a full-time accountant just to handle the record-keeping involved in meeting these requirements. This can be a real burden for candidates with relatively small campaign war-chests.

While this burden is a proper one and one I fully support, it does take time and resources away from what is clearly the principal business of any campaign—winning the election.

In my judgment, providing financial help to meet Federal reporting and disclosure requirements would do much to assure that compliance came—not only with better humor—but also with more completeness, accuracy, and timeliness than we saw in this past election.

I urge the Subcommittee to give serious consideration to adding an amendment to S. 372 to assist candidates with these costs.

Senator PELL. This committee will recess until 10 o'clock tomorrow morning.

[Whereupon the committee recessed to 10 o'clock, a.m., Thursday, June 7, 1973.]

FEDERAL ELECTION REFORM, 1973

THURSDAY, JUNE 7, 1973

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m. in room 301, Russell Office Building, Senator Claiborne Pell (chairman of the Subcommittee on Privileges and Elections) presiding.

Present: Senators Pell (presiding) and Cannon (chairman of the full committee).

Full committee staff present: William McWhorter Cochrane, staff director; Hugh Q. Alexander, chief counsel; Joseph E. O'Leary, professional staff member (minority); John P. Coder, professional staff member; Denver Dickerson, professional staff member; Livingston L. Biddle, Jr., professional staff member; Hildreth S. Ludewig, assistant chief clerk; Gretchen Doss, secretarial assistant (minority); and Jack Sapp, editorial assistant.

Subcommittee on Privileges and Elections staff present: James H. Duffy, chief counsel; James S. Medill, minority counsel; and Mary G. Daly, secretary.

Senator PELL. The committee will come to order.

Our first witness this morning, the second day of hearings on bill S. 372, the election reforms bill introduced by Senator Pastore, and Senate Joint Resolution 110, a proposal to establish a nonpartisan study commission, proposed by the administration, and on other pertinent election legislation, and particularly on the revision of the proposed legislation to make sure that we achieve compliance even more efficiently and candidly by the various candidates, with greater understanding and competence than the present administration sometimes observes.

Mr. Dixon, I believe, is representing the Department of Justice.

STATEMENT OF ROBERT O. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY NATHAN SIEGEL, ATTORNEY-ADVISER, OFFICE, OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. DIXON. Mr. Chairman, that is correct. I have with me this morning Mr. Nathan Siegel, an Attorney-Advisor in the Office of Legal Counsel, Department of Justice. I am pleased to present to this committee the views of the Department of Justice on Senate Joint Resolution 110 and S. 372, on the topic of Federal campaign finance and election reforms.

As the President recently stated in his message to Congress, this matter—and I quote him—"ranks high on our list of national priorities."—House Document No. 93–102, 119 Congressional Record H3697, May 16, 1973—Daily edition. The electoral process is the font from which all other democratic processes flow.

Both bills seek to improve Federal laws dealing with campaign practices and related problems. However, the approaches of the two bills is quite different.

Senate Joint Resolution 110, as a prelude to legislation, seeks to provide Congress with a broad base of research and recommendations attested to by a commission drawn from leaders in public and private life.

S. 372 would amend the Federal Election Campaign Act of 1971 regarding campaign costs and revise the system of administration and enforcement. However, S. 372 takes, we feel, a somewhat partial approach to a problem multidimensional in scope, and some of its provisions may be of doubtful constitutionality.

Taking up first Senate Joint Resolution 110, this is a bipartisan bill sponsored by leaders of both parties; it affirms that the strength of our democratic system rests on the integrity of its political processes, and that public confidence in the integrity of those processes must be assured. The bill would establish a bipartisan commission on Federal election reform, called hereafter the Commission, with authority to make a broad study of all practices employed by political parties and individuals in Federal political campaigns. Nothing involving the Federal election process would be excluded from the Commission's mandate. It could be to politics what the Hoover Commission was to administration. The Nation needs and deserves such a commission.

Included in the scope of the Commission's study of political campaigns and financing would be the adequacy of enforcement procedures under existing laws, existing and alternative methods of financing, review of relevant Federal tax laws, use to which political campaign funds are devoted—for example, organizational activity, advertising, voter registration and polling; nomination methods and procedures, adequacies of safeguards against unethical, disruptive, fraudulent or violent tactics, and regulatory interrelationships of Federal, State, and local campaigns and financing.

Senate Joint Resolution 110 also calls for a study directed to the desirability of changing the terms of office of Members of the House of Representatives, the Senate, and the President. The product of the Commission's study is to be embodied in recommendations for corrective legislation and if need be, constitutional amendments.

Regarding the composition of the Commission, in order to assure its independence from domination by one party, the Commission would consist of 17 members, as follows: four Members of the Senate, two from each major party, appointed by the President of the Senate as recommended by the majority and minority leaders, four Members of the House of Representatives, two from each of the major political parties appointed by the Speaker of the House of Representatives, and nine individuals from private life, appointed by the President, two of whom would be the chairmen of the Democratic and Republican National Committees. No more than four of the remaining seven public members could be from the same political party.

To further insure the independence of the Commission against Congressional or Executive control, its chairman and vice chairman would be designated by the Commission itself from among its members.

Although not crucial, we should like to suggest minor modifications on this branch of the bill. In keeping with its bipartisan spirit, it might be well to provide that the chairman and vice chairman cannot be of the same political party. The recent mixed membership National Commission on Reform of the Federal Criminal Laws achieved great respect and an absence of partisanship even though President Johnson appointed the chairman, Edmund G. Brown, of California. Congressman Poff was chosen vice chairman. I mention this as an aside with the thought that this Commission may have some relevance as a model for setting up the electoral commission.

Further, it may be desirable as a suggestion to denominate the Commission as an "Independent Commission" in order to signify an absence of control by one party, rather than to call it a "nonpartisan Commission." In politics, and that is a respect term going to the root of democracy, only the unconcerned are nonpartisans. However, there can be, and frequently should be, balanced and fair intake from all sides. That, of course, is what the makeup of this Commission assures.

Regarding the functions and duties of the Commission now, it could conduct hearings anywhere in the United States, or otherwise secure data and expressions of opinion pertinent to its study. It could require directly from the head of any Federal executive department or agency, or from the Congress, any available information. The Commission also could contract with Federal or State agencies, private firms, institutions and individuals for the conduct of research.

The Commission may submit interim reports and recommendations to the Congress and the President, and it must file a final report at the earliest practicable date; at present that is specified as being no later than December 1, 1973. As the President has said, "Time is of the essence."

Further, in the President's words, the mission of the Commission is to "design a comprehensive reform of the campaign system so that in its totality it will work fairly and honestly."

By this quest and the wide-ranging reforms that are likely to emerge, the President hopes to restore public faith in the integrity of the political process, and indeed, provide a guide to other democratic states.

As an aside, I might suggest that we should remember that with few exceptions, even with our current troubles, we already lead much of the world in the political quality of large-scale democracies. Indeed, our problem is in large part one of scale and not of desuetude.

Along with the Commission's virtually unrestricted authority under Senate Joint Resolution 110, the President has suggested several basic prevailing principles, as follows: That "reforms stay within the spirit as well as the letter of the Constitution"; that they do not "unduly infringe either on the rights of the States or on the first amendment rights of individuals to freedom of expression and freedom of assembly"; and that they be "fair, effective, realistic and enforceable."

The study commission approach is particularly appropriate for additional reasons. A large body of research and comment has been building during the 1960's and the 1970's. However, it has never re-

ceived the scrutiny and reaction of a Federal Commission. The Brown-Poff Commission, properly called the National Commission for the Reform of the Federal Criminal Laws, appointed by President Johnson to revise the Federal Criminal Code, to which I was a consultant in the area of voting laws among other topics, was keenly aware of this fact.

The only aspects that the Brown-Poff Commission had jurisdiction to consider dispositively were those aspects of political and electoral conduct and expenditure related to a handful of old and somewhat outmoded sections in our present Criminal Code. For example, title 18, sections 592 through 613, regarding political contributions and expenditures and other matters.

The Brown-Poff Commission's necessarily somewhat cursory treatment of these provisions was predicated on the notion that a thorough-going revision should await further study on the specific topic of campaigns and elections, including the old Corrupt Practices Act found in title 2 of the United States Code.

The comments I refer to are in the working papers of the Brown-Poff Commission. (See National Commission Reform of Federal Criminal Laws, working papers, Vol. II, pp. 815–816.) The Corrupt Practices provisions, as we know, have now been largely replaced by the Federal Election Campaign Act of 1971, but an integrated whole has yet to emerge.

Some aspects of the problem can be handled by explicit prohibitions, enforceable by the U.S. attorneys, without any central direction, and leading to the imposition of a criminal penalty. Other aspects of the problem are essentially of a regulatory nature. Those provisions should not repose on the Criminal Code, where they would be subject to challenge on the ground of vagueness and not be fully amenable to the restricted resources of U.S. attorneys. They should be developed, rather, in an election code support by an administrative process of rulemaking, with reports, research, formal inquiry and civil sanctions.

A study commission on elections and campaigns should also draw on the rich resources of political science scholars as well as the legal profession and concerned interest groups of all kinds. Such a broad-gaged study is a pressing national need, we feel. As the President has observed, the reforms that are needed "are sweeping rather than scattered, and each should be considered in relation to the others."

I turn now to S. 372, which aims at the same general target of campaign reform, but, we feel, in a somewhat piecemeal way. Also, several of its key provisions pose serious problems, and thus seem to demonstrate, we believe, that the study approach of Senate Joint Resolution 110 merits congressional approval at this time, and that action on S. 372 should be deferred until recommendations of the Commission are submitted. A brief reference to several key provisions of the bill should suffice by way of example, to indicate why Senate Joint Resolution 110 merits congressional approval at this time, and why action on S. 372 should be deferred, might well be deferred until the recommendations of the Commission are submitted.

S. 372 would have, among others, the following effects:

(*a*) Repeal of the equal-time requirement of section 315 of the Communications Act, as it applies to candidates for President and Vice President—section 2;

(*b*) Imposition of State-by-State limitations on expenditures for candidates for Presidential nominations—section 4; and

(*c*) Creation of a Federal Election Commission to administer and enforce the proposed Federal Election Campaign Act of 1973. This Commission, if we read the bill aright, would have authority to take over from the Attorney General the entire gamut of criminal prosecutions under the act. The transfer would include, we assume, the Attorney General's responsibility—and that of the Solicitor General—to represent the Government on review of judgments of convictions or dismissal in the Supreme Court and lower courts of appeals.

These three items merit brief discussion now, and thorough study and modification by the proposed Senate Joint Resolution 110 proposed commission before they become the law of the land.

Let me take up first the equal-time privilege (47 U.S.C. 315(a)), and our comments on that as it applies to candidates for President and Vice President.

Section 315 of the Communications Act, at the present time, requires a broadcaster who permits any legally qualified candidate for a public office to use his station to give equal opportunity to all other candidates.

For example, should a broadcaster give one candidate free time, he must give all candidates the same amount of free time at an equally convenient hour. If a charge is imposed, the equivalent time must be offered at the same price to every other candidate.

In the 1960 Presidential campaign, section 315 was suspended by the Congress. It has been stated that in that election, broadcasters gave substantial amounts of free time to the candidates of the major parties, apparently without having to afford equal time "to the plethora of minor and fringe-party candidates for those offices." This is brought out in Senate Report No. 93–170, 93d Congress, first session (1973), pages 2–3.

Subsequent attempts by the Congress to suspend section 315 for Presidential elections after 1960 failed.

S. 372 would repeal the equal-time rule of section 315 as it applies to candidates for President and Vice President, but 315 would remain applicable to candidates for congressional office. The Senate Committee on Commerce has justified the distinction between the two on the ground that "individual congressional races usually do not have a large number of candidates, and broadcasters are therefore not inhibited from giving candates free time if they wish." Senate Report No. 93–170, supra, page 9.

The committee also felt that "congressional experience with the removal of the equal-time requirement, although salutary, is limited," and that the provisions of S. 372 will enable Congress "to build on the experience of the 1960 suspension." Id. On the other hand, and this is the President's view, it can be said that the distinctions are sup-

positions, and that equality of treatment requires or merits a general repeal.

It is essential to control the cost of congressional as well as Presidential campaigns. Free broadcasting time is one means to that end, but very little of it is now provided in congressional campaigns, probably because broadcasters anticipate demands from fringe candidates just as in Presidential campaigns.

Furthermore, as a problem meriting further study, to go in this direction, there could be a plethora of candidacies encouraged by equal free time, which may split the vote, forcing consideration of a need for runoff elections to assure a true majority choice for the office. Striking the proper balance between encouraging candidacies and maintaining majority rule merits further study, we feel, before legislation is enacted.

Turning next to the provisions of S. 372, which deal with State-by-State restrictions on expenditures by candidates for Presidential nomination, we find that section 4 would amend section 104 of the Campaign Communications Reform Act (Public Law 92-225), which is in title 1 of the Federal Election Campaign Act of 1971, by providing that no candidate for Presidential nomination could spend, in a State on behalf of his candidacy for that office, a total amount in excess of the limitations that would have been applicable to him had he been a candidate for the office of Senator from that State, or for Delegate from the District of Columbia.

This provision may raise a constitutional problem under the free-speech clause of the first amendment. It is arguable that as part of a Presidential candidate's right of free political expression he has the right to allocate campaign funds in his discretion among various States. Proposed section 4 possibly could operate to make a Presidential primary campaign ineffective or more difficult to operate.

Even assuming broad congressional power to legislate with respect to Federal elections, it may still be quite difficult to defend the validity of such a restriction on freedom of political expression and campaigning in a national constituency. This restriction is also questionable in policy terms. Try as we may, we cannot and should not federalize the Presidency, beyond the weighting already imposed by the electoral college system, a system itself warranting careful scrutiny.

As an aside, the bill would tend to federalize the nature of the campaign process, at least for the Presidency.

As a practical matter, the two offices—President and Senator—are altogether distinct. Their campaigns generally involve different issues; one essentially of local interest, the other almost exclusively of national interest. Moreover, a Senatorial candidate frequently is so well known in his State as to require little campaigning; the Presidential candidate may be a comparative stranger.

We note that in its section 2 repealing the equal opportunity requirement of section 315 of the Communications Act, also called the equal-time requirement, S. 372 draws a distinction between Presidential and congressional candidates. Yet under section 4, now being discussed, this distinction is obliterated.

Regarding Presidential elections, the bill also creates a requirement that a single national committee for each party control and report all expenditures in excess of $100. Although the purpose of

central reporting is appealing, this proposal could raise problems of free political expression, and merits further study. For example, support for a candidate may come outside his regular party channels from members of the opposing party.

These are precisely the kinds of problems which a study commission should look into with great care before Congress reaches the stage of substantive legislation.

Turning lastly now to the independent litigating authority proposed for the Federal Elections Commission, section 8 of S. 372 would amend title 2 of the Federal Election Campaign Act of 1971 and establish as "an independent establishment" of the executive branch of the Government a commission to be known as the Federal Elections Commission. Its powers would include authority, and I quote the bill:

> * * * to initiate through civil proceedings for injunctive relief and through presentation to Federal grand juries, prosecute, defend or appeal to any court in the name of the commission for the purpose of enforcing the provisions of title 1 and this title through its General Counsel * * *

Every step of a criminal prosecution seems to be embodied in this language: Presentation to a grand jury, the prosecution itself, and appellate proceedings in the name of the Commission through its general counsel. These, we feel, are extraordinary powers to vest in any Federal Commission. No precedents were cited by the committee in its favorable report, nor are we aware of any such precedents.

If section 8 is to be read as vesting in the Commission the authority to initiate and prosecute criminal cases, it raises a most serious constitutional question under the doctrine of separation of powers.

The authority to detect and prosecute crimes against the United States is presently vested in the Attorney General (28 U.S.C. 533), these are all citations here. Such authority is an Executive function, and in our view, cannot constitutionally be transferred outside the executive branch. We cite the statement of the Supreme Court case of 1928, one of 1922, and a court of appeals case of 1956, on our proposition that we feel it unconstitutional to transfer this function outside the executive branch. (See *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *United States* v. *Cox*, 342 F. 2d 167, 171 (C.A. 7, 1965), cert. denied 381 U.S. 935; 2 Op. A.G. 482, 487–493 (1831)).

Senator PELL. Isn't that 1965, Mr. Dixon?

Mr. DIXON. Excuse me; I misread that. The lower court case, the court of appeals case, I said, of 1965.

Although the bill establishes the Commission as "an independent establishment of the executive branch" (§ 308(a)), as we construe the bill the Commission is for constitutional purposes not subject to Executive control. The members of the Commission are to be appointed by the President, by and with the advice and consent of the Senate, for a term of years. However, since it appears to be the intention of the bill to create the Commission as a basically quasi-legislative and quasi-judicial agency and require its members to act independently of Executive control, it would seem that those members could not be removed by the President during their term of office. (*Wiener* v. *United States*, 357 U.S. 349 (1958); *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935)).

In our opinion an agency of that character cannot be empowered to initiate and prosecute criminal cases, because it is not really inside the executive branch, and we are not aware of any such agency possessing a like power.

In addition to this constitutional objection, there appears to be no reason for a departure from the longstanding policy of both the Executive and the Congress that the representation of Federal agencies in court should be under the supervision and control of the Attorney General. The Attorney General's traditional control over litigation enables the Department of Justice to maintain a consistency in enforcement litigations, and to insure that common questions of law are presented by the Government in a uniform posture. Available to the Department of Justice, moreover, are the substantial litigative capabilities of the U.S. attorneys' offices, as well as the extensive investigative resources of the Federal Bureau of Investigation.

It should be noted, moreover, that the Commission's litigating authority would extend to the Supreme Court. This attempt to divest the Solicitor General of longstanding jurisdiction to handle Supreme Court litigation on behalf of the United States would be contrary to the best interests of both the Federal Government as a major litigant before the Supreme Court, we feel, and of the Court itself.

A similar question is involved regarding section 101 in H.R. 5050. That bill would authorize the Securities and Exchange Commission to conduct in its own name and through its own attorneys litigation in the U.S. Supreme Court. I respectfully request this committee to permit Dean Griswold's statement opposing section 101 of H.R. 5050, in his role as Solicitor General, before the House Subcommittee on Finance of the Committee on Interstate and Foreign Commerce to be made a part of the record of these hearings, which the dean is making at this very moment, I believe.

Senator PELL. Without objection, so ordered.

[The statement of Erwin N. Griswold, referred to above, appears as exhibit 2 in appendix II of these hearings, p. 318.]

Mr. DIXON. In conclusion, wide-ranging reform of the Federal electoral process poses problems that are not only highly complex but also legally controversial. The solution to many of these problems depends in large measure on reliable factual information. A Commission established on—under Senate Joint Resolution 110, and operating independently, would be singularly well-suited to assemble here the facts and to distill them for appropriate consideration by the Congress. As Senate Joint Resolution 110 contemplates, and as the President has commented, the Commission would be composed of "a bipartisan group of recognized experts working in a nonpartisan atmosphere and broadly enough based to give their recommendations the full authority of manifest impartiality."

For these reasons, the Department of Justice strongly believes that the approach of empirical research and recommendation provided by Senate Joint Resolution 110 is the preferred step to take at this time. We urge therefore that the committee report favorably on Senate Joint Resolution 110.

We recommend accordingly that action on S. 372 be deferred until the study proposed by Senate Joint Resolution 110 has been completed. Thank you, Mr. Chairman.

Senator PELL. Thank you very much indeed, Mr. Dixon. Your statement was excellent and its points will be considered by this committee.

Before moving on to your statement, I would like to discuss the letter that I wrote to Attorney General-designate Richardson on May 7, 1973, the then Attorney General-designate, concerning the present enforcement of the Federal Election Campaign Act of 1971, and I had six questions.

You probably have a copy of that letter there? If not we will see that you are provided with a copy.

Mr. DIXON. My colleague, Mr. Siegel, indicates that we have not received that letter, or had a chance to work on it, for which we apologize.

Senator PELL. Well, this is frankly rather startling to me, because you are here at a meeting of the Rules and Administration Committee. This is a letter written to you by the chairman of the subcommittee a month ago, and I have been asking about it.

Try to refresh your memory on that, because I am sure——

Mr. DIXON. I do have a letter dated May 23——

Senator PELL. No. May 7, 1973. "Dear Mr. Richardson * * *."

Mr. DIXON. We are at the moment—this is unfortunate but unavoidable—in a period of transition in the Department of Justice, and we think that very little falls through our fingers in this transition period, but apparently this has, because—and I apologize again—we are not prepared to provide information as requested in this letter.

Senator PELL. Well, when they say "Government is at a standstill," and I take personal umbrage at this, as chairman of the Subcommittee on Elections. You are in charge of the enforcement of Federal election laws, I understand, in the Justice Department, and a letter has not sifted through the Government to your level, which is immediately below Richardson—I am shocked at that.

At any rate, I will ask the questions, but I am shocked at that and it certainly emphasizes the Watergate, the musical chairs game in the administration, and the harm that it is causing the Government.

I don't like to ask you these questions cold; I presumed that with a month's notice you would have had adequate chance to have thought them out. But at any rate I will read them out. You have a copy there?

Mr. DIXON. I now have a copy.

Senator PELL. Question No. 1. How many apparent violations have been referred to the Department of Justice by the Secretary of the Senate, the Clerk of the House of Representatives, and the Comptroller General?

Mr. DIXON. It may well be that this letter now reposes in the Criminal Division, which has the litigating authority and the investigatory authority for this statute, rather than the Office of Legal Counsel.

As a footnote to that comment, I am informed by my colleague, Mr. Siegel, and also informed by another Department of Justice person we have with us, that responses to these questions are now being prepared. It is in process in the Criminal Division of the Department of Justice.

Senator PELL. Well, there is something very peculiar here. I don't want to go back onto your subordinates, but we have had telephone

conversations at the staff level and we understood that you at the Department of Justice would be prepared to reply.

Mr. DIXON. I think we are prepared to reply. The letter that came to me, to my office, from—it was Chairman Cannon's May 23 letter addressed to the Attorney General, and it requests testimony this morning only on S. 372 and Senate Joint Resolution 110.

Senator PELL. I believe that was the invitation to appear before the subcommittee, without asking you questions of substance.

Mr. DIXON. Well, perhaps we misunderstood. We did prepare for the two bills that we have discussed.

Senator PELL. At any rate, as I said, this underlines the damage that is being done to the Government, and when a letter from the chariman of the appropriate subcommittee is not acknowledged by the right level of Government, or not even seen, it shows that something wrong is going on in the Government.

Can you answer these questions now, or may we have them for the record?

Mr. DIXON. The ones in your letter of May 7?

Senator PELL. I want to read them into the record. The first one I have already read; can you answer that now?

Mr. DIXON. We have no information about what the Criminal Division is preparing in response to these questions, nor are we a part of the enforcement process.

Senator PELL. Please answer each of the questions ad seriatum.

How many apparent violations have been referred to you by the Secretary of the Senate, the Clerk of the House and the Comptroller General? Can you give me that information?

Mr. DIXON. No, I cannot.

Senator PELL. Will you submit it for the record?

Mr. DIXON. We would, I assume—we can gather all these materials and submit them for the record.

Senator PELL. Well, please answer each of my questions for the record.

Can you submit the answers to that question, the number of apparent violations that have been referred to the Department of Justice?

Mr. DIXON. Not knowing the facts at all, I can only say I certainly assume that this material can be furnished to the committee.

Senator PELL. Well, are you beating around the bush about executive privilege here, or something?

Mr. DIXON. No. The question is about availability here of some of the material.

Senator PELL. My question to you is: How many apparent violations have been referred to you, to the Department of Justice, by these three different officials?

Mr. DIXON. As far as I can see, there is no reason why this can't be forthcoming very promptly to the committee.

Senator PELL. Fine. I would ask that it be submitted to the committee within a week.

Mr. DIXON. We will certainly do our best.

Senator PELL. Thank you.

Second, are the violations chargeable against candidates, political committees, or treasurers of political committees?

Mr. DIXON. I have no idea, but we will try again.

Senator PELL. All right. Let's set the time at a week. I think, since it has taken a month for the letter not to reach you, maybe you could take a week to give us these replies, because it does involve—we have to move fairly fast on this bill. As you know, there is a certain legislative deadline that we face with Senator Pastore's bill, S. 372.

Third, what action has the Department of Justice taken to date against violators of the Federal Election Campaign Act of 1971?

Mr. DIXON. We don't know about that in the Office of Legal Counsel, but we shall again——

Senator PELL. Well, I wonder if it wouldn't be a good idea at this hearing if you would ask the appropriate man to appear and testify and give these answers?

Mr. DIXON. This would be in the Criminal Division, not the Office of the Attorney General. Indeed, on this, the Attorney General, if we were to have him name someone to appear in a week, as was first suggested, he might well feel that the Criminal Division or its Assistant Attorney General should respond on these questions, rather than the Office which I head, the Office of Legal Counsel.

I will certainly take this back to the Attorney General today, and we can probably inform the committee in a matter of hours today what the disposition would be.

Senator CANNON. Might I request whether or not you could find out, in your Department, whether you could have a man up here to testify on these specific issues later this week, or whether or not you could furnish the answers? That might take as much as a week's time.

Could you advise us of that this afternoon?

Mr. DIXON. I will inform Attorney General Richardson of this matter and we should be able to get back to you today in response to your question.

Senator PELL. If you can give them to us in writing, and if you can give them to us promptly in writing, that will answer our needs.

Fourth, I just want to run down these questions—against whom are complaints being lodged? Can you answer that?

Mr. DIXON. Same response.

Senator PELL. Five: beyond the obligations imposed upon the Department by the Federal Election Campaign Act, does the Department of Justice intend to initiate any action against violators, on its own initiative, as the enforcement arm of the Federal Government?

This surely you can answer.

Mr. DIXON. I have no direct or indirect knowledge at all of the investigatory process or the litigative process, so I think for the time being, though it may sound odd, I would just be guessing if I said something.

So it is the same response.

Senator PELL. And six: how many cases are now in litigation or in the process of preparation for litigation?

Mr. DIXON. I do not know.

Senator PELL. That is obviously very disappointing, because we looked forward to the answers to those questions today.

Now, going to your testimony, I am struck—I am not surprised that you support the President's proposal for a commission to study election reform. My own view is that I question the need for new laws; I think we have seen plenty of laws violated, but the old laws were faulty. If

the deadline for the reporting of contributions had been in effect for a couple of years instead of April 7, I think a great many of the problems that have developed simply would not have developed.

What is your view of that comment? Do you really believe that what is needed is a study commission that will in fact postpone this whole procedure for a while, when the committee is actually faced with the problem now? Will it come up with some magic legislation that will affect human behavior and violations of laws?

Burglary, forgery, ethics are not going to be changed by laws. At the other end of the hall here, for example, we have a circus going on with all the television cameras; I don't think the situation they are investigating would be any different if the laws were more restrictive because the people involved were violating the laws anyway.

What is your comment on that?

Mr. DIXON. Well, I would make a distinction between our topic here, focusing on campaign finance, and election reform, and the totally inexcusable violations of criminal law that have occurred.

I should point out that these violations of criminal law have been prosecuted by the Department of Justice; the first Watergate Grand Jury did indict, and a trial jury convicted.

It often is a process, as we all know, in group crime, and often in organized crime——

Senator PELL. I would like you to define the term "group crime."

Mr. DIXON. Group crime involving more than one person—conspiratorial activities.

In order to open the matter up, prosecutions against persons initially caught who are often underlings, is necessary as a first step. After the convictions are obtained, it is often the case that there is a disposition to talk, once they face a jail sentence; this increases, and also immunity can be given, after the sentencing process is complete, and that has occurred.

Indeed—I should check this further—but I believe there has been a two-step process, moving up the ladder from the lower to the higher, as was used in the United Mine Workers election problem. There was a murder, and finally the higher culprit was reached by this process.

So I think the premise—maybe I am erroneous, but the implied premise that the Department of Justice is doing nothing about these matters—is not quite true. The matter is now under further intensive work by the top special prosecutor's office, Mr. Cox, and my feeling is that the testimony we are on today, campaign financing and elections, is not in the same area as the criminal law violations which we feel we are pursuing vigorously.

Senator PELL. Let me interrupt a second to ask you a commonsense question.

Do you think that what has happened—that there would have been the proposal for this study commission, if it hadn't been for the activities that are being discussed now at the other end of the corridor?

Mr. DIXON. Well, the commission proposal is the result of a complex of many forces.

Senator PELL. Well, you know and I know the answer; it may be true. You can't say it.

Mr. DIXON. We are supporting the special prosecutor, the Cox group, fully. Indeed, the charter for the Cox group specifies full cooperation by all parts of the Department of Justice in the Cox criminal prosecution activities.

Senator PELL. Thank you. Your three points in connection with the Pastore bill merit study and the committee will examine them and take them into consideration.

I defer now to the chairman of the full committee.

Senator CANNON. Thank you, Mr. Chairman.

I, too, am a little disappointed in the fact that you are now not able to testify on the specific questions that were posed to the Department some time ago, and I also am disappointed in the conclusion; that is, for the reasons that you have stated, the Department of Justice strongly believes that the approach of empirical research and recommendations provided by Senate Joint Resolution 110 is the preferred step to take at this time. You urge the reporting of resolution 110 and no action on S. 372?

I certainly agree with the implication presented by Senator Pell that had it not been for the Watergate incident there would have been no recommendation for a commission at this time to study the matter. That is the usual procedure when something happens—to appoint a commission to study it.

Now, in the specific questions that you have responded to, you have, in good lawyer-like fashion, said that they raise constitutional questions. That is why we have invited you here; we want to know what your opinion is on those constitutional questions.

You simply have responded by saying that they deserve further study.

Well, these matters—most of them—have been studied for years, and they have been talked about pro and con, and I would think that a commission that is going to have to report by December of this year is not likely to come up with a detailed study on these matters, or to give us a firm and positive opinion—a lawyer-like judgment, as to what the constitutional position is.

You see the problem confronting us?

Mr. DIXON. Yes. Yes, Mister Chairman, I appreciate the depth of your concern, and I think many persons share it. We do feel that there are some aspects of the proposed bill that are questionable, as we suggested in our testimony.

Just thinking out loud, it might be well for the Congress, if it should see some merit in a study commission approach, to itself consider the appropriate reporting deadline for it, in order to assure that it is a very detailed intensive report.

If our concern is primarily at the level of Presidential elections, and it seems to be at that level, because that is where the campaign finance problem is most urgent, then we have some time. The next Presidential election is in 1976; the campaign process would start some time in late 1975 perhaps, or early 1976. Indeed, it may be unrealistic to expect that this study commission's recommendations could have much impact in the 1974 congressional elections, because the study commission reports in December of 1973 and the next election is 11 months away, and there is a time problem.

But we do feel that these are enduring questions. They do affect the Congress, but much concern is directed to Presidential campaigns, Presidential campaign finances. It may be that the study commission approach does have some merit, and that the reporting date could be negotiable, depending upon how persons assess the needs.

Senator CANNON. I think myself, and despite what I said I do support the study commission, that some good can come out of it, out of a detailed and in-depth study of these issues, some of which are not as pressing as others; for example, whether we have to change the terms of Members of Congress and the Presidency. I don't think, however, that this has the pressing importance of the areas that I envision in S. 372.

But I can assure you that the Members of Congress are not of a mood now to delay action on S. 372. Waiting for a report of this study commission would have the effect of just delaying our action until the subject cools and people forget about it.

Some of these problems you referred to are problems we are trying to find answers to at the present time. For example, when you talk about the question of whether we ought to repeal section 315, and you say in your final response that striking the proper balance between encouraging candidacies and maintaining majority rule merits further study, well, we want to know what is the position of the Department with respect to constitutional problems that may be involved there.

You said there may be a constitutional problem, and we want to know what it is and what the chances are for approval rather than tell us in good lawyer-like fashion: "Some of my friends believe this, and others of my friends hold the opposite view, but I am with my friends."

So, we would like to have some advice as to exactly what these positions ought to be.

Also when you say the State-by-State limitation on expenditures per candidate may raise a constitutional problem under the free speech clause of the first amendment, we would like to know: does it raise one? Can we uphold such a provision constitutionally, in your judgment?

In other words, if we impose a limitation like that, are we likely to be overruled by the Supreme Court? Are the chances with us or against us on that kind of issue?

And also, even assuming broad congressional power to legislate with respect to Federal elections, it might be quite difficult to defend the validity of a restriction on freedom of political expression and campaigning in a national constituency. Then you go on again to say: "* * * although the purpose of central reporting is appealing * * *" this is related to one committee having control of all expenditures or approving all expenditures over $100—the proposal could raise problems of free political expression and merits further study.

You have raised a very good point there, but I think these matters have been studied and studied and studied, I for one would like to know what you think about the possibilities of upholding such a provision. And then you raise the most serious one.

That is, if you give power to a particular political body that can say: "We exercise control over all expenditures," and I come from an opposing party and say: "I want to spend $500 on behalf of that candidate," and I spend it, can I be put in jail? Would that be a violation of my constitutional rights under the freedom of speech?

I certainly would like to have your judgment as to what you think about that now—can you respond to any of that? Can you give us—you know, in terms of the weather, one may say we have a 20-percent chance of rain today—can you tell us whether we have a 20-percent chance or a 40-percent chance or a 60-percent chance of upholding some of these provisions if we put them into effect?

Senator PELL. This is really why you were invited to appear.

Mr. DIXON. Well, as you know, Senators, attorneys are always loath to either predict the outcome of a potential court case that might arise, or pinpoint the odds very narrowly.

We do have some cases, decided cases, cited on the last proposition about putting criminal enforcement power outside the executive branch, so based on those cited cases, I would say there is a really serious question mark.

Senator CANNON. I agree there; I think you have responded to that one.

In other words, as I have listened to your testimony, and review it here, what you are saying is that you don't believe that we could vest this enforcement authority in a completely independent commission, completely independent from the Office of the Attorney General. Is that right?

Mr. DIXON. Certainly in regard to the criminal enforcement authority, which is what we are talking about at this point—the prosecution process.

Senator CANNON. That is a very serious one, because you may recall that in a bill we passed in 1971, we, in the Senate, attempted to create an independent commission and give it enforcement authority, so that we were not having, as some people have said, a "fox watching the henhouse" sort of situation.

But, to report to a separate elections commission, and give that commission the authority for enforcement. What you seem to be saying is that that type of provision, in your judgment, could not be upheld constitutionally. Is that correct?

Mr. DIXON. In our judgment we think it is doubtful, because of the separation of powers concept and the clause in article II known as the take-care clause, which specifies the President's obligation to take care that the law is faithfully executed, and also the language of the cases we cite, on page 16.

Senator CANNON. Could you review your testimony on these other issues and give us some affirmative statement on those points?

That is, that you think it is doubtful that they may be upheld constitutionally rather than say that they deserve further study? Could you review those issues and help us to that extent?

Mr. DIXON. I think we could pursue the matter to the level of case research and try to identify cases. There are none directly on point that I know of on those questions, but there are cases that have analogous value. We could try to identify and submit cases relevant to some of these propositions, or potentially relevant.

Senator CANNON. I have in mind that when we were considering the present act, the Attorney General, Kleindienst, testified and gave us some pretty firm positions as to what he thought could be upheld and what he thought could not be upheld. That is the sort of guidance we are looking for now, because as I said, I don't think the Congress is of

a mind to wait until this study commission may return with a rather nebulous report on this whole broad area of elections to make some changes indicated by existing deficiencies in the law we passed in 1971.

Mr. DIXON. Yes; our objections here are directed to certain proposed revisions and not to the 1971 act, which apparently posed far fewer questions or problems or possible doubts about constitutional issues, as I recall that testimony. I was not in the Department at that time.

Senator CANNON. But you see, some of these issues that we are concerned about now—one, can we uphold, giving this reporting responsibility from the candidates to a special commission, and giving that commission the power to enforce it, the power to process?

You have responded to that; you say that you don't think that would meet the constitutional test.

We want to know whether or not a limitation or contributions and on expenditures can be upheld constitutionally. Particularly the issue of an individual who may want to spend money either for or against a candidate, without going through a committee and without having that expenditure included in the candidate's overall limitation.

I might want to spend money against one candidate, and yet the candidate to whose benefit that expenditure would accrue might not want to have any part of me. Still this might be charged to his overall allowance now under the provisions we are considering.

Mr. DIXON. I think that is a real problem, Senator; indeed, that line in the statement was put in just this week, because it occurred to me as I was reflecting on the overall posture of this matter.

Senator CANNON. And we have a further question of whether a candidate himself can be prohibited from spending as much of his own money as he wants. Is that a problem? Is it a proper restriction that would withstand a constitutional test, if you tell me as a candidate that I can't spend as much money as I want, my own money, to try to get elected to a particular office?

Mr. DIXON. Yes; we can respond, Senator, I believe, to the inquiry concerning campaign expenditure ceilings, ways of doing it, and also see if we can ascertain some analogous judicial rulings on the other questions that you posed.

Senator CANNON. Thank you very much.

Senator PELL. I am sure, Mr. Dixon, that you are a fine attorney, and you are doing your job.

I would hope you would take my personal message back to the Attorney General, whom I like and admire, and indicate to him the breakdown that has occurred in his Department; tell him about it, that a letter was written from the chairman of the subcommittee on May 7, with no acknowledgement from the Justice Department whatsoever.

But the important thing is, no answer when the Justice Department witness comes before this committee. I think it is a disgrace; this is the only word I can use. So please pay my respects to the Attorney General and tell him of this incident.

Mr. DIXON. Well, I apologize, Senator, that the letter containing the questions of special interest to the committee never reached me, and therefore was not assigned to my staff as part of the mission to prepare for this testimony.

Senator PELL. We didn't ask for you particularly. We wanted a wit-

ness from the Justice Department to testify on legislation before us. It was in connection with that legislation that I wrote the letter.

So, say that, in my view, it is a disgrace and I thank you for taking the time.

Senator CANNON. Mr. Chairman, may I ask one further question? I have just been advised that one political candidate, who was defeated, now finds himself in a position, because of the law, that he dare not pay off his obligations personally. He has some substantial obligations. He couldn't very well go out and have a fundraiser to pay off these debts because people probably wouldn't respond since he lost, but he is prohibited by law from paying off his own obligations out of his own personal funds, and he has many creditors who threaten lien actions or who have perhaps filed some liens against some of his property.

The suggestion has been made that we might want to try to amend section 203, section 608 of title 18, as follows:

> The discharge of political debts and obligations by a candidate who is not nominated nor elected, or by an immediate member of his family shall not be barred by this subsection after a period of one year following such failure of nomination or election.

Would you give some consideration to that particular point and whether we ought to offer an amendment like this so that a defeated candidate could in fact pay off obligations that remained in his political campaign?

Mr. DIXON. We have made a note of that, Senator. We will try to respond to that also.

Senator PELL. I would like also to mention that this can happen to a winning candidate. I expended my full personal amount. I had a debt. I didn't want to have a fundraiser after having won, but I did, and there was a great deal of good help, which I appreciated, but I was in a position where I could not pay off my own debts from personal funds.

So I am not sure it should be restricted to losers. We can talk about that further in committee.

Our next witness is Mr. Basil Paterson, vice president of the Democratic National Committee.

Mr. Paterson, good morning; would you introduce your associate?

STATEMENT OF BASIL PATERSON, VICE CHAIRMAN, DEMOCRATIC NATIONAL COMMITTEE, ACCOMPANIED BY MARK SEIGEL, ASSISTANT TO THE DEMOCRATIC NATIONAL COMMITTEE CHAIRMAN

Mr. PATERSON. Yes, I will, Mr. Chairman. I would like to introduce my associate, Mr. Mark Seigel, assistant to the Democratic National Committee chairman, and I come before you today in my capacity as vice chairman of the Democratic National Committee, and on behalf of Chairman Robert Strauss and the entire Democratic National Committee.

Let me first say that it is an honor to testify before this distinguished committee, and I welcome the opportunity.

It is unfortunate, indeed, that it took the Watergate scandal to finally bring the Nation's attention to an issue which has been fore-

most in the minds of many concerned Americans for a number of years; namely, campaign reform.

For too long we have allowed money to serve as a corrupting influence in politics; for too long the present system has caused our citizenry to believe that the public trust can be bought and sold as if it were a commodity on the market.

For too long great and decent individuals running for public office have been forced to pander to large contributors, to degrade themselves, to ingratiate themselves with the rich, and to place heavy demands on their friends, to behave in a manner which not only humiliated themselves, not only compromised the office they sought but which was inconsistent with the basic tenets of good government.

But the travesty of the democratic process which is referred to as Watergate may have irrevocably altered the climate of American politics with respect to campaigns and elections, and we would hope this new climate would generate a serious reconsideration—reconsideration followed by definite action, to take the public trust out of the marketplace.

We would hope that our Republican friends, now relieved of the burden of Presidential obstruction to campaign reform, would join the Democrats in Congress to enact meaningful legislation to curb the senseless spiral of money in politics, to provide for public funding of election campaigns with reasonable spending limitations.

Now is the time. We urge action.

While I realize the dollar checkoff provisions are not before this committee, I would like to touch on them just briefly as they relate to campaign financing.

The dollar checkoff system was a move in the right direction. We would have preferred, and are now prepared to recommend, that the dollar checkoff system be implemented by the executive branch of Government in a way that truly reflects the will of Congress when it passed the enabling legislation.

The checkoff system was not meant to be a national secret, yet in looking at the Treasury Department and Internal Revenue Service actions with respect to the checkoff, I am afraid to say that is exactly what it has become: one of the Nation's best kept secrets. It appears that only about 4 percent of the Nation's taxpayers have utilized the provision of the checkoff, and we can respectfully assert: "No wonder."

There was no publicity geared to inform the taxpayers of this Nation on the existence of the public financing system and the separate form employed by the IRS served as an obstacle to compliance. Although there is nothing we can do with respect to the checkoff system for calendar 1973, there is a great deal that should be done in 1974 and in the future.

First, we recommend to Congress that it enact legislation which would require the Director of the Internal Revenue Service to submit to Congress before October 1 of each year the proposed IRS forms to be utilized in the subsequent year. If Congress feels that the forms are not consistent with optimum citizen participation in the checkoff system, they should have the authority to make the necessary alterations.

We also respectfully request the Congress consider legislation re-

quiring the Secretary of the Treasury to report to Congress by October 1 of each year a plan of affirmative information dissemination, a plan by which the checkoff system would receive maximum exposure to the American public through public service advertisements and other wide exposure media forms. If such lgislation is enacted, the act which Congress passed in 1971 and which the President signed into law would become constructive, meaningful, and consistent with the intent of its drafters.

I will now direct my comments to the legislation before the committee.

S. 372, the Federal Election Campaign Act of 1973, although I believe the Nation is ready for public funding of election campaigns, I realize that much of the work of this legislative body is cumulative, and I realize the merits inherent in incremental change. Thus, S. 372, which calls for a spending ceiling for congressional campaigns and for repeal of section 315 of the Federal Communications Act of 1934, allowing for equal time to candidates for President, is a sensible beginning in attacking the problem of campaign reform, and is a step toward a truly equitable system.

With respect to the section of this bill calling for repeal of the equal time provisions of the Communications Act, I think we all realize why this act is both necessary and long overdue. Media costs for Presidential campaigns are now phenomenal, and unfortunately much of the media effort takes the form of short spots, 30 to 90 seconds, which are more effective than cognitive in their voter appeal. I am sure we are all concerned that voters be given the opportunity to make their electoral decision on the basis of issues and information, free from either ignorance or manipulation. Repeal of the equal time provision would, in large measure, allow for such information to be disseminated in an orderly and dignified way, to the largest possible mass media market.

Our national television and radio networks have already pledged to cooperate to a great extent. They have promised to provide adequate media time, prime media time, for programs of public campaign information, to allow the major candidates for national office to appear before the American people, hopefully including a debate type forum, so that the candidates can appeal intelligently for the votes of an informed electorate.

Repeal of section 315 is not really a partisan issue. In 1976 an incumbent will not be running for President, and thus the natural constraint, one which I can empathize with although not totally approve of, of incumbents engaging in open debate, would not be in effect.

We cannot predict which candidates or which party might in the end benefit from the repeal of the equal-time provision. So I urge that this action be taken now, before the 1976 election campaign begins, so that partisanship need not obstruct our responsibility to the American public to provide information, to provide maximum intelligent media exposure to candidates. Since media activites account for a large and growing proportion of campaign activities, such an action would considerably reduce the costs of campaigning in America.

We are all aware, and on this none more aware than the distinguished members of this committee, of the costs involved in running for senatorial and congressional seats in this Nation. Running for the

Senate in a State like New York, from whence I come, requires such a vast sum of money—in the many millions—that few are able to run effectively, and the inequities in campaign expenditures for running for a senatorial seat are unconscionable. The situation is not that different in other States of our Union. The senseless spiral of campaign spending must stop—we must put a ceiling on what can be spent in senatorial and congressional campaigns, and I commend to you the provisions of S. 372, which would implement such a limitation. Such congressional action might serve also as a catalyst for needed comparable statutes on the State and local levels.

The limitations on spending in S. 372 are both reasonable and workable. By computing the amount which may be spent per eligible voter, with some modification for smaller States, we in effect would be doing a great service, not only to candidates, but more importantly, to the voters of America.

In the congressional and senatorial races over the last 10 years, we have witnessed a dramatic and I might add, scandalous increase in costs. Between 1962 and 1964 such spending rose 10 percent; from 1964 to 1966, spending increased 36 percent. Between 1966 and 1968, spending rose an additional 35 percent, and in the 1968–70 period, the spurt was an astounding 40 percent. Though figures are not yet in for the 1973 period, we can assume that the increase has gone unchecked.

This situation parallels the cost of Presidential campaigns. Spending almost doubled in Presidential campaigns in the 1960–68 period, and although the complete story is not yet known for 1972, we may be sure that the money spent in the Nixon-McGovern campaigns, and especially by the Committee to Reelect the President, is unparalleled in American history. Because of fraud and violations of the 1971 act, we might never really know the total of all funds spent to reelect the President, but I shudder to make a projection of this sum.

To curb this senseless trend, the Democratic National Committee urges this committee to give serious consideration to S. 372 as amended and reported out of the Commerce Committee. The adjustments that Senator Pastore's committee made in the original legislation, especially those recognizing the problems of sparsely populated large land areas, are reasonable, and we would hope you would recognize the special problems of campaigning in such States.

I believe the 25 cents per eligible voter provisions of this bill will provide enough money for reasonable and serious campaigns to inform the voters, and prohibit the expenditures of vast sums which are often geared to charge and countercharge. When these vast financing sums are prohibited, the evil associated with such fund-raising, pandering to special interests, demeaning our candidates, wasting valuable campaign time and resources on fund-raising efforts, would simultaneously be curbed, if not eliminated.

On December 2, 1971, major Democratic Presidential candidates, under the auspices of the Democratic National Committee, voluntarily agreed to a media spending limitation agreement for the 1972 Democratic Presidential primaries. This agreement put a ceiling on of 5 cents per registered voter.

All of the candidates who signed and their respective campaigns abided by the agreement, and as far as we know there was no violation in any instance.

To demonstrate the seriousness by which this agreement was considered, a substantial delegate challenge was filed against the 271-member McGovern California delegation by Californians who believed the McGovern campaign had violated the media spending limits of the agreement.

Although it was later discovered that the McGovern campaign did not violate the agreement and stayed below the ceiling, and this portion of the challenge was withdrawn, the very fact that such an action was taken manifests the credibility of the original arrangement.

Thus, campaign spending limits are not only desirable, but we in the Democratic Party believe we have proven that they are practical.

The last provision of S. 372 which I would like to address is that provision for the financial coordination of all Presidential activities by the national committees of our two great parties. One might believe that, owing to my position as vice chairman of the Democratic National Committee, I might not be objective in this area. But I have seen enough of Presidential campaigns, campaigns of State committees, special committees, and national committees, to be able to attempt some very serious observations.

The office of the President of the United States is our Nation's highest public trust. It is the most important elective position in the world. The campaign for candidates for this office should be run by professionals, professionals of experience and ethics, of commonsense and common decency.

I know that the Democratic National Committee is staffed by such people, and I am sure that the Republican National Committee is staffed by people of equal professional and moral integrity.

In conclusion, I would like to point out that the Fair Campaign Practices Committee has called the 1972 Presidential campaign the dirtiest campaign in our country's history. Daily revelations, charges, and so-called explanations have exacerbated the public's confusion, suspicions, and distrust—giving rise to a truly ominous crisis in our Nation.

The integrity of the executive branch of Government has been tarnished and threatened as never before, and we can only hope that time and truth will reinstate the public's trust and confidence in government.

But if any political system is to remain viable, it must adapt and respond to changing environmental needs, and especially respond to breakdowns within government.

I personally believe that although Watergate represents the most glaring breakdown of government in our Nation's history, it illustrates the intrinsic strength and integrity of the American constitutional system of government—of our system of checks and balances and separation of powers. Where the executive branch failed, the judiciary, the Congress, and a vigorous and courageous free press succeeded in living up to their public trust and public responsibility.

It is incumbent upon all of us, and especially upon the Congress of the United States, to restore the people's faith, trust, and confidence in the Government which serves them. One mechanism to start restoring such faith and confidence would be the enactment of S. 372. These reforms are long overdue; this is obvious. But the past is the past, and we must aim our activities and efforts to making a better and

stronger America. Our failures in the past must not obstruct our commitment to the future.

I trust the Congress will take appropriate action. Thank you very much.

Mr. Chairman, I would like to add that one of the things I think that came up, very quickly, in the questions that you and Senator Cannon were posing to the preceding witness was not just a question of criminal conduct or even ethics in the conduct of elections. I submit to you that when we talk about the electoral process as being the basic part of our democratic system, that what really is the bottom line is whether or not a voter goes to the polls with the true option, with the true freedom of choice, and I suggest that when we have the vast discrepancies in spending that are afforded under our present laws, and which we have seen repeated over and over again, not just in 1972, that the voter does not have that freedom of choice; that what happens is that he is inundated by one candidate and very quickly then becomes the only candidate whose name those that are not interested enough to be reading constantly about the political system—that is a name that they remember.

I would strongly support limitation provisions of S. 372, and I would urge that those who say it is not effective, and unenforceable—I respectfully suggest that those of us who run for public office know that our opposition is always going to be watching what we are doing, and the press has demonstrated in 1973 and the latter stages of 1972, that they will be seeking the long way toward trying to maintain the enforcement of these laws.

Senator PELL. Thank you very much.

One point I would take some exception to—when the Fair Campaign Practices Committee called the 1972 Presidential campaign the dirtiest campaign in our country's history. I think in the last 50 or 75 years we've had pretty bad practices and we don't want to return to that.

Mr. PATERSON. Senator, I have taught both at the City and State University of New York, Fordham University, a private Catholic university, in history and political science. During the last campaign a lot of people were questioning the statement made by Senator McGovern that this was the dirtiest campaign and that there were violations the likes of which had never been seen before. Many people would question that one.

But I would suggest, Senator, when you take a look back—and I'm familiar with the Blaine campaign and what they did to Grover Cleveland, and even going back to Thomas Jefferson, that the underlying aspect of this campaign that made it so dirty was not the name calling; it was the effective use of money and criminal conduct to determine what the voters would be doing.

I didn't use that term with little thought. I went back and went over some of my books, checked the history, and it came out with the fact that the effectiveness of the dirtiness of this campaign far exceeded anything in our history.

Mr. PELL. We appreciate your view.

I wonder if you could enlarge a little bit on the problems you encountered, the committee has encountered, in complying with the disclosure provisions of the present Federal law, because the purpose of this hearing is to try to see how we can refine the present legislation

to make it easier to be operative rather than inoperative, as is the case at times.

Mr. PATERSON. Senator, I wouldn't be qualified—I couldn't respond to that.

Senator PELL. Filing dates, periods, or anything of that sort, where we could meet the purposes of the act and still make it simpler.

Mr. SEIGEL. As of this date we haven't encountered any violations—the Democratic committee hasn't encountered any violations——

Senator PELL. I'm not talking about violations. I'm talking about making the act easier in its administration.

Mr. PATERSON. Let me submit to you that during the Democratic campaign of Senator McGovern last year there were problems that were encountered, and his campaign committee was cited for violations. But primarily it was of a technical nature. That suggests it was new legislation, it was a new system under which we were functioning. Whenever we have a new system, there are going to be violations because of unfamiliarity.

I don't think at this time we would be prepared to recommend something, but I will check with our treasurer, who did have experience with it, and with the men who were working on it, and maybe we can come up with some recommendations we could submit to the committee.

Senator PELL. If so, we would like it within the next week.

Mr. PATERSON. Yes, definitely.

Senator PELL. I defer to the chairman of the full committee.

Senator CANNON. Would you desire to make any comment on some of the issues we raised with the Attorney General this morning, or the representative from the Attorney General's office?

Mr. PATERSON. Senator Cannon, I think the issues that were raised almost answer themselves. I certainly find Senate Joint Resolution 110 is a very interesting piece of legislation. I would have to concur with the point of view that you expressed earlier, that we would not even have seen that had we not seen the problems associated with Watergate coming to the front in public view at this time.

Our committee does not oppose Senate Joint Resolution 110. As a matter of fact, we support it. But we don't see that that should be used as a basis for blocking S. 372, because as you so rightly pointed out, this is action that the American people are demanding now, and I don't think it's ill-considered or ill-appropriate.

I would suggest the experts on this question are the men who are sitting in Congress, who have had to go through the experience of campaigning with laws. They know what the violations have been and are probably familiar with them better than anybody else.

I think we have to get a response immediately.

Senator CANNON. You heard the Attorney General express concern on the constitutionality of giving powers to an election commission that we would establish.

In light of that doubt, do you think it wise to go ahead with the election commission in any event?

Mr. PATERSON. I would like to get his answers as to specifically why it's unconstitutional, Senator, because we have had in the history of this country, not just federally, but in the States—and while they still have to operate under the Constitution, we have had special commissions which have been given powers.

One of the ways it can be done is to have the Attorney General deputizing a commission member, a commissioner, to give him the authority for criminal prosecution. The other way—this is just off the top of my head, in listening to Mr. Dixon as he testified—but another way it could be done, you could refer the criminal prosecution back to the Justice Department. But I would prefer to keep it as independent as possible. I think some deputizing of powers might be an area in which a solution could be found, if it's true that can't be done constitutionally.

Senator CANNON. We heard yesterday, I believe, the figure of 4,900 violations having been reported so far, and many of those are of a technical nature.

In line with Senator Pell's line of questioning to you, I am wondering if the committee could review its experience with the reporting requirements and would have any suggestions to make to us as to how those could be changed without affecting the basic objectives of the law, so that the reporting could be made more simplified or made understandable or easier to handle, without getting ourselves in a position where we would not be achieving the desired objective.

Mr. PATERSON. We'll submit that, sir, definitely within a week.

Senator CANNON. Thank you.

Senator PELL. Thank you.

Mr. PATERSON. A point Mr. Seigel just made, actually the treasurers of the campaign committees would probably be the persons in the best positions. What I will do personally is contact the treasurer of the campaign committee of Senator McGovern and get his recommendations and submit them to you.

Senator CANNON. Thank you.

Senator PELL. On a somewhat different subject, before you go, Mr. Paterson, there is another idea I have concerning the financing of the regular committees. I do believe it has merit.

I have often wondered if it wouldn't be a good idea if committees were encouraged to develop capital funds of their own in some kind of a trust, whereby they would be prevented from using capital but only income. Say members of both parties who died without heirs and for one reason or another wanted to leave money to those committees, they could be encouraged to do it. In the course of 25 or 50 years, they would build up a regular income.

I know I have tried to encourage this to the Democratic National Committee for 20 years now. I just wonder if you think this has merit.

Mr. PATERSON. Senator, I certainly think it has merit. We have all seen organizations that have raised money in that form.

Senator PELL. I have tried to persuade any chairman or any treasurer, or any lawyers, any counsel, to the Democratic committee to do this for about 20 years, and maybe some day we'll do it. We might find it wouldn't be much but their successors would be benefited by it.

Mr. PATERSON. As you mentioned, the question of using the national committees as a central agency, so to speak, there have been complaints that some have made—I read some of the testimony given before Senator Pastore's committee, that this may not be applicable, in that some people might be treated pretty much as outsiders and not given a fair shake.

I might suggest—I certainly know it's true of the Democratic Na-

tional Committee, and I'm sure it's true of the Republican National Committee as well, that these are rather representative bodies, with representation from across the country. I am quite sure the people who would be in charge in these committees would be very sensitive to the reaction of the committee members. I don't believe that that charge really has the kind of weight that some would like to give it.

I think the national committee officers and members themselves are going to be very leery about trying to exclude anybody if they're given this authority.

Senator PELL. Thank you very much.

Our next witness is Mr. Bernard Shanley, vice chairman, Republican National Committee.

STATEMENT OF BERNARD M. SHANLEY, VICE CHAIRMAN, REPUBLICAN NATIONAL COMMITTEE

Mr. SHANLEY. First may I say I appreciate this opportunity to give the views of the Republican Party to this committee.

Mr. Chairman, my name is Bernard M. Shanley of Bernardsville, N.J. I am vice chairman of the Republican National Committee. When I am not spending time on matters pertaining to the Republican Party, I am a practicing attorney with the firm of Shanley and Fisher in Newark, N.J., and Washington, D.C.

As I understand it, S. 372 calls for repeal of the equal time provision in respect to candidates for the Office of President and Vice President. I further understand that the bill imposes an overall limit upon campaign expenditures in Federal elections. The recommended limitation as set forth in the bill—25 cents times the voting age population in the geographical area in which the election for Federal office sought is held—constitutes a major amendment to the Federal Election Campaign Act of 1971.

The bill also creates an independent Federal Election Commission to monitor and enforce the campaign spending laws. As a general rule, we support the concept of one supervisory official to do the job.

The bill also requires approval of Presidential campaign expenditures in excess of $100 by the candidate's national committee. We support this provision.

With respect to the repeal of the equal time provision in respect to candidates for the Office of President and Vice President, I could not support repeal of this provision unless it applied to all Federal candidates.

With respect to the limit on campaign expenditures, I can't see how this limitation could be regulated. There would need to be extensive definition of what constitutes "campaign spending." Taken to its logical conclusion, this limitation would apply to cab fares, meals, and even tips. It appears to me that monitoring this spending would be impractical if not crippling.

Another problem which could arise would be in the case of an incumbent running for reelection. The temptation would be great to write off campaign expenditures as "official business." Members of Congress are funded for visits to their districts, and these free trips could well be used to evade the spending limit. Needless to say, this could be a strong disadvantage for the challenger.

In any spending limit, it must be clearly defined what period of time this limit covers—primary, general election, or both. This has become a significant problem under the present law and should be avoided in future legislation.

Limitation on broadcast media is sensible, and perhaps limitations on nonbroadcast media could also be applied. A limit on overall spending, however, appears to me to be unenforceable.

In connection with Senate Joint Resolution 110, which I understand would create a special nonpartisan commission to study election and campaign practices, I strongly support the concept of this commission. I am particularly pleased that the President has included the heads of both parties among its members.

In my view, there is clearly room for basic reform. I understand that Chairman George Bush intends to use his role on this commission as a conduit of Republican thinking all across the country. He will particularly solicit the views of Members of the House and Senate, and of all Republicans as well. Then he will see that these views are presented to the commission for consideration.

We have two basic convictions. First, that our system is basically a sound one, basically the best.

Second, that there is room for improvement. When there are violations of decent practice, some people will say, "Oh, well, what do we expect from politicians." Our view is that the overwhelming number of those involved in our political system are honest, decent people. The proposed Commission has a chance to prove that by making recommendations that will ferret out the few who would corrupt that system.

I believe that our object should be to set standards that are workable and practical and not create laws that would lead to the same type of political corruption we have had in the past. Morals can't be legislated.

I am proud to say that I have been involved in one way or another in politics for more than 20 years. I think it is important for every citizen to do all that he can do to understand the intricacies of our political system.

I will be glad to try to answer any questions you may have. Thank you.

Senator PELL. Thank you very much, Mr. Shanley.

Incidentally, would you introduce your associate?

Mr. SHANLEY. I'm sorry. This is Mr. Baer.

Senator PELL. What would be your view of the idea that all expenditures should be approved by one separate committee?

Mr. SHANLEY. I'm in favor of it, Senator Pell, primarily because I have been through it myself. Oftentimes, as Senator Cannon just pointed out, someone who has a different philosophy from the candidate will expend very large sums of money to make a viewpoint felt, which may do more damage than help to the candidate himself.

It seems to me the candidate ought to have the right to control his own election, and certainly the funds are a part of it.

Senator PELL. I defer at this time to the chairman.

Senator CANNON. Do you think that in that type of situation the person who wanted to be heard on his own views, either for or against a candidate, could legally be prohibited by law from doing so?

Mr. SHANLEY. Senator Cannon, that's a very good question. Frankly, putting on my legal hat for the moment, I'm not so sure it would be

constitutional that anybody, it seems to me, any citizen probably has the right to spend money if he wants to do so. But I don't think it should be charged against the candidate.

Senator CANNON. He may not be for either candidate, but may be particularly opposed to one candidate's views——

Mr. SHANLEY. I think he could be legally prohibited from charging it to the candidate, one or the other, or both. But I don't know that he could be legally prohibited from stating his views at his own expense.

Senator CANNON. On a 25-cent limit, have you reviewed that to see whether you believe it's too high, too low? It has been pointed out to me in some of the State contests that 25 cents a vote would be considerably higher apparently than the expenditures are at the present time.

Mr. SHANLEY. My personal view is, Senator Cannon, that any limit of that sort—25, 50, whatever it may be, or 15 cents or 5—is a mistake. Because you've got a totally different situation, as you have in my State of New Jersey, or New York City, where spending problems are totally different.

I have been to some extent in the financial end of party work in my own State for some years, and certainly I have had some experience in that field. The limitation question is a very dubious one, because first of all, in my book it leads to the eventual violation of the law because, as we all know, the Hatch Act has been honored by its breaches, and primarily because people, when they had a limitation, or if they had—if they didn't want to indicate they were spending that much money, they could use special committees to do it.

But in many ways it's a great mistake. But today the big spending, as we all know, in campaigns is the media. This has some way got to be cut down. But you're not going to do it, I don't believe, by cutting down the amount of spending that anybody can use in a campaign, and I don't think it's practical. I certainly hope that has been proven.

Senator CANNON. Thank you very much.

Senator PELL. I would like to compliment you on one thought here, which I think is so valid. You say that "morals can't be legislated," and that "Our object should be to set standards that are workable and practical and not create laws that would lead to the same type of political corruption we have had in the past."

I completely agree with you. It is one of the very real problems that worries me in all this legislation we are considering.

I'm not sure if new and more legislation is needed. It is a higher set of ethics and honoring the laws that are already on the books.

I was wondering what your reaction was to that.

Mr. SHANLEY. I feel very strongly, too, Senator Pell, on this question, because I have been through it and I have seen it, as all of us have.

I think the whole danger to limitation, the whole danger in trying to set a figure of 25 cents or whatever it may be, is completely impractical. I think the whole problem is full disclosure.

We have in New Jersey just passed a very, very strong disclosure bill, so it's out in the open. The cash contributions are not prohibited under our bill, but perhaps they should be. In any event, anything over $100 or more must be disclosed and must be presented to the public.

So what we have done is give out periodically to the press a complete

list of all people, all donations and so forth, on a complete disclosure basis. This is a simple thing and I think the simple things are the things that can be best enforced and the most effective.

The more we get involved, as we did with the Hatch Act, which is a disaster, as we all know, the more the chances are and the better the chances are of evading the law.

Senator PELL. What do you see as the problems of the present law of 1971—which we operated under during the last election, and which we are trying to refine and make simpler. Do you have any suggestions?

Mr. SHANLEY. One is a personal one. I feel one of the things that should be done is to do away with cash contributions.

Senator PELL. No cash at all above what figure?

Mr. SHANLEY. Full disclosure on amounts above $99, to make it practical, and this can be done without, to me, a great deal of monitoring.

The difficulty, as I see it, with the dollar deductions and so forth, is it's very costly and is ineffective and will never be done properly and effectively.

Senator PELL. I'm sorry, which dollar? Are you talking about the checkoff? Are you talking about the $25 deduction——

Mr. SHANLEY. I was talking about both, really.

Senator PELL. The checkoff would be effective if Senator Long's suggestion—and I believe he has a commitment from the Treasury Department—that it be on the front page of the IRS form, should be carried out.

Mr. SHANLEY. I think the monitoring is one of the biggest problems we've got in amending these laws. I think the main thing is to—I think it has been proven out in the last campaign that a lot of these things are nonproductive.

Senator PELL. In other words, you would have no cash floating around anywhere more than $100, no contribution more than $100?

Mr. SHANLEY. That's my personal view. I'm sure the chairman would support it. I feel it's a simple way, it seems to me, to eliminate the possibility of major corruption.

Senator PELL. I think you're right, because then the money is always in check form and can be tracked down.

There are several questions I have here that the Republican side of the committee wanted me to ask:

First, what problems do you foresee in the enforcement of a limit on total contributions? And can you be specific?

Mr. SHANLEY. I think there are all kinds of problems, Senator Pell. I think you've got the problem of what are expenditures, which I covered in my statement; you've got all kinds of things involved here—meals, fares, travel, trips, everything gets involved in what is an expenditure.

I just don't think it is even possible to monitor this. So it seems to me it makes it completely impractical. I think the harder it is to monitor expenditures, for instance, I think the easier it is to have corruption. That's the reason I oppose it.

Senator PELL. How do you feel about limitations on individual contributions for a candidate?

Mr. SHANLEY. I don't see any point to it. I think it is becoming completely nonproductive for a man to give a tremendous amount of money, because I think he puts himself immediately in a position

where whoever the candidate is, after election he is not going to produce what the contributor might have wanted had he been corrupt and wanted something he shouldn't have had. It isn't practical because it's going to be nonproductive.

Senator PELL. Well, Mr. Stone contributed a large amount to this administration, and he might well be appointed to the Court of St. James. It would be perfectly legal and within the rules of the game as it has been for many years in this country. Maybe it's not in the best interests nationally.

Mr. SHANLEY. We do know, Senator Pell, it has happened and it made it very difficult for somebody to be confirmed by the committee of the Senate.

Senator PELL. Only when they were overcharged, overpaid. [Laughter.]

Mr. SHANLEY. That's true, too.

Senator PELL. This has nothing to do with one administration or another.

Mr. SHANLEY. That's correct.

Senator PELL. Do you feel that candidates ought to have one central campaign committee to report receipts and disbursements?

Mr. SHANLEY. To report what?

Senator PELL. You know, to get away from all the problems we have at the other end of the corridor, the Watergate hearings, do you believe the candidates ought to have one central campaign committee?

Mr. SHANLEY. We feel so strongly about this. In the first place, and I'm sure you agree with me, that the national committee should run the campaign and the Democratic National Committee should run theirs.

I think part of our problems have been again a fractionation of the power and fractionation of responsibility, which is even more important.

For instance, if in the next campaign we were running the show on the national committee, where it should be run, and where we have the capability and expertise to do it, then the responsibility is pinpointed.

We are very proud of Chairman Bush, as you know, and with the responsibility there and in the committee to run this, to be completely responsible, these things aren't going to happen.

Senator PELL. A final question on this question of funding. What do you think of the idea of both committees setting up a trust fund, with the trustees being the chairmen of the respective subcommittees?

Mr. SHANLEY. Frankly, I never heard of it before, Senator Pell, but I think it's a great idea. I wish it would have happened to me when I ran for the U.S. Senate. I would have been a lot richer man, and I'm not rich now, I can assure you. Or if there would have been a prohibition against candidates paying off their debts, I would have enjoyed that, too. [Laughter.]

Senator PELL. Thank you very much.

Mr. SHANLEY. Thank you. We appreciate this opportunity.

Senator PELL. Our next witness—Is Mr. Valeo, Mr. Hughes, or Mr. Thompson here? [No response.]

Then our next witness on the list is Mr. Hemenway, who is here. We will hear him a little out of order.

Mr. Hemenway is the national director of the National Committee for an Effective Congress, Mrs. Susan King, the Washington director, is with him.

STATEMENT OF RUSSELL D. HEMENWAY, NATIONAL DIRECTOR, NATIONAL COMMITTEE FOR AN EFFECTIVE CONGRESS, ACCOMPANIED BY MRS. SUSAN B. KING, WASHINGTON DIRECTOR

Mr. HEMENWAY. Thank you very much, Senator Pell.

First of all I would like to say that during the long history of the testimony that you and Senator Cannon have taken, the full Rules Committee and the Commerce Committee have taken, this administration has never sent its Attorney General up to testify on matters that are probably as important as any this country faces.

I was surprised that on this occasion Attorney General Richardson did not come up to testify before you, not only to answer the questions which you put to him in your very excellent and recent letter, but to give the Government's position on why they are seeking a new Federal commission to study electoral reform.

As Senator Cannon said this morning, most of these issues have been commissioned to death. We wonder why it is necessary to discuss questions like the Federal Elections Commission when this past election has shown it is so important that we establish one immediately. I would like to say that before we begin our testimony.

We are, of course, delighted to be here again and thank you for your invitation to testify today. Both Susan King and myself are very happy to be here.

I think it is safe to say that the atmosphere now is a little different, and the prospects for substantive reform much greater, than they were when we appeared earlier this year.

Unfortunately, it is usually an ugly scandal that provides the catalyst for reform. The seriousness of the Watergate allegations and of the pattern of political perversion, corruption, and sabotage which seems to be emerging have left us with disturbing questions about our entire political process.

Now is the time to face those questions—all of them—and to consider some long-range answers. While it is necessary to avoid the pitfalls of responding solely to the specifics of Watergate, we have, the NCEC thinks, the opportunity for a real public dialog and important innovative reforms right now.

The NCEC's statement before your committee in April, and before the Commerce Committee in March, is a matter of public record, so I will not go into detail again here today. I would only repeat what this organization believes, and I think you agree, is our common goal: an open, competitive electoral process. This implies active citizen participation and a political arena to which all interested, qualified candidates have access, and in which merit, rather than money, is the determining factor.

The NCEC's views on S. 372, as originally introduced, are again a matter of record. It is our opinion that the amendment adopted by the Commerce Committee—the creation of an independent Federal Elections Commission—is the most important, indeed, an indispensable addition to the bill.

Full disclosure of campaign financing, and easy public access to this information, is essential to a healthy electoral process. It becomes clearer every day that the tentacles of the Watergate affair could not and would not have reached as far and wide as they apparently did had the days before April 7, 1972, not been shrouded in secrecy. The best way to eliminate such secrecy and assure the full flow of information to the voters is to centralize reporting in one agency, strongly mandated and fully equipped to do this job.

Secondly, while our proper concern should be fair and uniform application of campaign laws, the current situation leaves us wondering if there will be any enforcement at all. The reluctance of the Justice Department to move on scores of certified violations over the past 12 months is, we think, a clear demonstration of the need for a commission as independent as possible, insulated from political pressures, vested with full investigative and prosecutorial powers. It should be directed and staffed by the most able people we can find.

We would also call for more severe penalties than are provided in the current law or in the bill now before you, and for greater clarification of individual responsibility under the law. I must say it is a bit ludicrous, Mr. Chairman, to see a Presidential election committee fined $2,000 for a violation involving a contribution of at least $200,000, and no committee personnel held responsible for the illegal transaction.

Beyond that, the NCEC has supported repeal of the section 315 "equal time" requirements for Presidential and Vice Presidential candidates. Also, we are not opposed to seeing overall limits placed on candidate spending so long as the limits are truly reasonable and do not become a boon for incumbents who want to be sure that their less-well-known challengers are unable to wage an effective campaign. We urge the committee to carefully consider whether the limits proposed by S. 372 meet this test of reasonableness or need further adjustment along the lines of the recent proposal of Senator Abourezk.

Thus, we support S. 372, particularly the Federal Elections Commission, Mr. Chairman, and will do whatever we as a citizens' organization can to see it enacted as quickly as possible. But we also hope that this is only the beginning of a long line of overdue reforms.

Among the bills which are pending before this committee, for example, are several which would require full financial disclosure by Members of Congress and other high Government officials. As you may know, the NCEC recently released its annual analysis of the outside business activities reported by Members of the House. We found 117 of the 363 nonfreshmen Members reporting outside affiliations, positions, or income, not counting mere shareholdings.

Under the rather severe limitations of the House reporting requirement, the public is unable to determine the actual monetary value of any of these interests and we know next to nothing about the outside activities of Senators.

The NCEC believes that the business dealings of elected officials are a proper concern of the American people. We support legislation which would require such disclosure—and we think that congressional action should begin in its own backyard.

Also before this committee are a number of bills proposing various approaches to public financing of Federal elections. We believe this to be one of the most important issues before Congress today, before the American people today, perhaps the most important.

For us to let public discussion become focused solely on the high cost of campaigns and ways to limit candidate spending is to beg the real issue. What is more serious is the disproportionate influence which the large "fat cat" and special interest contributor has on the entire process, and the resulting disadvantage this means to the average citizen and candidate who can't hope to match this kind of money.

What we are seeing is a serious distortion of the one-man/one-vote concept, which becomes more and more severe as campaign costs rise.

The ultimate solution, the National Committee for Effective Congress believes, is to establish an adequate floor in the campaign budget by providing some form of public subsidy for all qualified candidates for Federal office, and by limiting the amount of money individuals can contribute.

We do not pretend today to have arrived at a precise answer to this complex but terribly important problem, and it may be that no one yet has that answer. But it is surely time that we all begin to try to find it.

We hope that the committee will approve S. 372, and as soon as that work is completed, turn its able and full attention to the Hart bill, S. 1103, the Mondale bill, the Mathias-Stevenson bill, and the numerous other public financing proposals.

Senator Pell, for many years, in testifying before the Congress on questions of electoral reform, the NCEC has warned about the subversion of our democratic system by money. We have now witnessed the perversion and corruption beyond our wildest fears. I urge this committee to act as quickly as possible, because I don't think the American public will wait very long for answers from the Congress.

Senator Pell. What is your view, Mr. Hemenway, with regard to the establishment of an overall spending limitation? You say you do not disagree with it, but could this not give an unfair advantage to an incumbent, because sometimes you could have an incumbent who has done his homework well, in the sense of being around the county fairs, the clambakes, when necessary, but maybe he has lost his creativity or his true legislative worth. And here's another man coming along, utterly unknown, how does he gain enough exposure for the people to make a fair choice?

Mr. Hemenway. We have always raised this question when we have talked about overall limits, Senator. Obviously we would oppose any legislation, including campaign limitations that did not allow a challenger to wage a competitive race with an incumbent.

We think the limitations in the Pastore bill, as we have examined them, are probably reasonable, as long as you consider—as I have suggested in my testimony—the Abourezk proposal, which we think will erase some of the inequities of very large, geographically large, States.

Senator Pell. It helps Alaska but not Rhode Island.

Mr. Hemenway. Well, Alaska always throws off these formulas, and Senator Abourezk has made special provision for that. But you're absolutely right. By all means, don't report out a bill with limitations that will prevent a challenger from making a reasonable race. This would be a terrible subversion of the system. Incumbents have always liked limitations.

Senator Pell. I would defer at this point to the chairman of the full committee.

Senator CANNON. Bearing in mind your last statement, I'm a little reluctant to raise the issue that I was going to raise, where you said incumbents always liked limitations. I personally do like limitations, but my question is whether of not the limitations in the bill at the present time, the 25 cents formula plus the minimum for the smaller States, whether that, in fact, isn't too high.

I look at the two largest States, California and New York. California is $3.5 million. That seems like an awful lot of money to spend to elect a man to the Senate. In the State of New York it is $2.2 million, roughly. Again, that's and awful lot of money, even though those are big States and they have bigger problems than others.

But take some of the medium-sized States. Take Kentucky, $551,000, a half a million dollars. For Louisiana, almost $600,000. My own State, because of the minimum there, would be $175,000 minimum. Personally, I think that's too high. I would like to see that minimum $150,000 or something along in there.

So my question is whether this figure should be 20 cents per person rather than 25 which is now in the formula.

Have you taken a look at other figures, or——

Mr. HEMENWAY. The maximum amounts to which you have just referred are not out of line with some campaigns that have been waged recently in California and New York, even in Kentucky, or even in Nevada.

Senator CANNON. But that's just my point. Too much money has been spent in many of these campaigns. I spent more money than I think I should have spent in my last campaign. But you have to pace yourself based on what your opponent is doing.

I know we have seen some of the news articles—I think there was one that said Texas had over $12 million in expenditures listed in the primary. Well, that's entirely too much. This formula would give Texas about $2 million, you see. So my question was whether we ought to really study it in terms of what we ought to be doing, rather than in terms of what we have been doing in the past.

Mr. HEMENWAY. Senator Cannon, you are a national figure, someone probably known to everyone in the State of Nevada, and you really don't have to spend too much. But if you're just entering the political arena and totally unknown, you must make yourself known to the voters. Sometimes it's necessary to spend money.

I don't think we should talk necessarily about too much money, but a fair amount of money. And what is fair for a well-known incumbent is not fair for an unknown challenger.

Senator CANNON. I agree with you on that. But again——

Mr. HEMENWAY. With all due respect, I would caution you about setting that limit too low. Dropping it to 20 percent might be a mistake in some States, as you have suggested.

Senator CANNON. In other words, if we dropped it to 20 cents, in effect, we would be reducing it about 20 percent, where it relates to the voter figures.

Mr. HEMENWAY. Yes.

Senator CANNON. Thank you very much.

Senator PELL. Mr. Hemenway, I am curious about why you inquired of all the House Members and not the Senate Members.

Mr. HEMENWAY. There is no information available in the Senate. All you are required to list in the Senate is the outside income you

receive as honoraria. In the House, the requirements are a little broader. Members have to list their outside assets, income, and professional associations.

So we have done an analysis of all the outside activities of Members of the House of Representatives.

Senator PELL. You have analyzed what is already filed? You have not made a new survey?

Mr. HEMENWAY. We have—that's right. We just completed that last week. I think Members filed in April.

Senator PELL. I thought you made a survey.

Mr. HEMENWAY. Yes; we did. That was published last week. It got a great deal of visibility nationally.

Senator PELL. It's a survey from the records——

Mr. HEMENWAY. From the official records. If we did that in the Senate, all we would be able to show is what you received from certain speaking engagements.

Senator CANNON. Could you give us a copy of that survey for our record?

Mr. HEMENWAY. I would be very happy to.

[The material referred to above appears as exhibit 3 in appendix II, p. 327.]

Senator PELL. Do you think Members of Congress should have no outside earnings?

Mr. HEMENWAY. No; we have never said that, Senator. We just think it's in the public interest that the electorate know what activities Members of Congress are engaged in. We have never called for Members of Congress divesting themselves of their outside activities.

Senator PELL. No, no. I can see some reason why it would be advantageous.

Mr. HEMENWAY. Many Members of Congress, like yourself, Senator, during campaigns, make full disclosures of all their outside earnings.

Senator PELL. Reluctantly, because of the pressures and exigencies of the campaign. It's an invasion of my privacy.

Mr. HEMENWAY. It's a very healthy thing. [Laughter.]

Mr. HEMENWAY. You should be commended for it.

Senator CANNON. I may say that on several occasions I have sponsored full disclosure bills relating not only to members of the legislative body but the judicial and executive branches for all persons on the policy levels. I recall in one instance the bill was filibustered by one of my colleagues who supports, supposedly, a "full disclosure" law.

Mr. HEMENWAY. I think the climate is a little better for passing that kind of bill now, Senator.

Senator PELL. I think the climate has changed, you're right. And some sort of change in the public has come about.

One question is the business of filing reports. I was very struck by a conversation we had once, where you said we did not need a CPA to do the filing and reporting, and your group contributes to many, many candidates. I was wondering how you were able to do this, when individuals running, like myself, found themselves tied up in knots, very expensive knots, getting a regular accountant to keep all the records.

Mr. HEMENWAY. We have no difficulty at all. One girl, a clerk, handles it. We are involved in about 80 races, congressional races,

throughout the country. We also had to report to the secretaries of state in all the States in which we were involved. There were hundreds and hundreds of reports. There is a lot of paperwork.

But once it became routinized and established, the procedure, it went very smoothly.

I think that most candidates are frightened by the law on first reading. But once they begin to put down all their receipts as they come in, all of their contributions, and they are prepared in advance of the filing date. It's become a fairly routine matter.

As we testified before the Commerce Committee, in support of certain changes recommended by Mr. Hughes of the GAO, and by Secretary Valeo of the Senate, we think that can be changed to make reporting somewhat easier, without destroying the bill.

Senator PELL. I think some of the most important testimony to be furnished to us today will be that of Mr. Valeo, from the viewpoint of refining legislation and making it more comprehensive, easier and less overwhelming to a candidate, and particularly his treasurer, as they see these forms and the law.

Mr. HEMENWAY. The experience with the law, through one campaign, tells us one thing, and that is the Federal Elections Commission, which was in the original bill and didn't emerge in final passage, was probably the most important aspect of the bill. To properly administer the electoral laws, we have got to have a completely independent, nonpartisan, nonpolitical Federal Elections Commission.

Senator PELL. I would agree with you.

How do we handle the question for the House? As you know, I think there were only two adverse votes in the Senate on this concept the last time around. I would hope perhaps the climate will have changed when the bill gets to the House this time.

Mr. HEMENWAY. I hope so, too.

Senator PELL. Thank you.

Speaking of Mr. Valeo, he is now here with Mr. Potter, and maybe they can come forward. Excuse us for going out of order.

I would add at this time that the Department of Justice has just now delivered a reply to my letter of May 7, and it's a reasonably responsive reply. It couldn't have been written this quickly, so it must have been drafted before but wasn't made available, I guess, to the Justice witness.

So I ask unanimous consent to put it in the record with a copy of my letter of May 7 to the Attorney General, and the reply dated June 7, from Joseph Snead, Deputy Attorney General, with its enclosures.

I would like to state now that my remarks concerning the failure of the Department of Justice to respond earlier to my request for information were in no way intended as a personal affront to Mr. Dixon. I realize that he is here from the Office of Legal Counsel, to testify on S. 372, and that it was not his personal responsibility to prepare the Justice Department's answer to my letter. I may also say that my remarks would not have been so strong had the Department of Justice's letter been submitted to me a few hours earlier. That letter will be included in the record at an appropriate place and I do believe that it was reasonably responsive to the request which I submitted on May 7 to the Attorney General-designate.

[The letters referred to above and material subsequently received by the committee from the Department of Justice appears as exhibit 4 in appendix II of these hearings, pp. 335–347.]

Mr. Valeo, as you just heard, we welcome you before this subcommittee with the specific suggestions that we mentioned we needed when you last appeared before us, as to how we can simplify the operations and make the law more effective for you.

STATEMENT OF FRANCIS VALEO, SECRETARY OF THE SENATE, ACCOMPANIED BY ORLANDO B. POTTER, CONSULTANT TO THE SECRETARY OF THE SENATE

Mr. VALEO. Thank you very much, Mr. Chairman. I appreciate this opportunity to appear again before your committee, this time to comment on S. 372 as it has been reported by the Committee on Commerce, and on Senate Joint Resolution 110. I shall be much more brief on this occasion than I was on the last.

You will recall, Mr. Chairman, that on April 12, 1973, I submitted in conjunction with my testimony a detailed statement to the committee. Set forth therein were a number of technical and perfecting changes in the Federal Election Campaign Act of 1971 as it now stands.

It is my understanding that the committee staff is working in conjunction with Mr. Orlando Potter of my office to frame these recommendations into amendments to the legislation. In my judgment, these amendments will move the law in the direction of more effective control and disclosure of Federal campaign funding, and hopefully, will simplify some of the problems of complying with the law. I shall not reiterate my previous testimony and will only say that I see no reason to alter it in substance.

Turning to S. 372, I have previously expressed my support for a limitation on campaign spending. I reiterate that support today. S. 372 also contains, however, a proposal to create a Federal Election Commission in the executive branch with commissioners appointed by the President for 15-year terms.

The bill assigns to the commissioners full authority over the supervision and enforcement of the campaign financing laws. Since our experience with Federal legislation in this field is still limited, I would also expect that the interpretations of the commission are likely to have a substantial quasi-legislative effect on the evolution of the law itself.

In this latter connection, it seems to me that the commission is likely to overshadow what ought to be a continuing congressional concern, input and initiative into the evolution of the law until such time as the financing of Federal political campaigns assumes a satisfactory form. That would be, in my judgment, regrettable.

In the first place, I see no urgency in moving away abruptly from the system established last year for the disclosure and supervision of campaign financing. It has, at least, in those aspects involving disclosure, worked far better than most observers anticipated and there is no reason to assume that progress in the control of campaign spending will be more satisfactory under a regulatory agency.

The Nation's experience with regulatory commissions, whether on

the Federal or State level, has not been a consistently satisfactory one. They are not panaceas. They have not been without their share of corruption, arbitrariness, and indifference to the public interest.

In the circumstances, it has seemed to me preferable that the Congress, at this time, build on the progress which it has already brought about under the Federal Election Campaign Act of 1971. In lieu of an appointed election commission in the executive branch, therefore, I reiterate my suggestion that the committee consider making statutory provision which would mandate the closest collaboration among the three existing supervisory officers. This arrangement could act to simplify present procedures and to ease the burdens of reporting on the participating public.

Accordingly, I am submitting for the consideration of the committee, in lieu of section 8 of S. 372, a new subsection (e) to section 308 of the Federal Election Campaign Act. This proposed subsection (e) provides that the three present supervisory officers shall constitute a joint board to coordinate implementation of the act.

If it is the judgment of the committee, moreover, that the situation requires that special enforcement powers proposed in the Commerce Committee's version of S. 372, consideration might be given to placing some aspects of these powers with the joint board of supervisors. In addition, the suggestions of Senators Bayh, Abourezk, Brooke and Clark on enforcement which are contained in S. 1766, which is also in your committee, might also be examined closely.

If the committee chooses in its wisdom to stay with the concept of an appointed regulatory commission in the executive branch, as proposed in the Commerce Committee's version, I would most respectfully suggest certain minimal safeguards against ineffectiveness, unresponsiveness, or corruption in the commission.

One, the size of the proposed commission should be reduced fom nine members to seven, or five.

Second, the term of the members should be reduced from 15 years to not more than five, and adequate provision should be made for prompt removal of members for due cause.

Three, in lieu of the certification procedure in the proposed section 104(f) on page 9 of S. 372, it would be my suggestion that provision be made for the candidate to certify on a regular basis to the supervisory officer, or commission—and not to the supplier of goods and services—that he had not exceeded his expenditure limitation. This would obviate the necessity of what would otherwise be a blizzard of separate certification papers.

to have a substantial quasi-legislative effect on the evolution of the

Turning to Senate Joint Resolution 110, which has been introduced by the joint leadership and others, on request of the President, I have little comment, Mr. Chairman, other than to note that while the objectives of the proposed study commission are certainly laudable, the enactment of the resolution should in no way detract from the several constructive electoral measures which are already well advanced in your committee.

There are some significant technical points in Senate Joint Resolution 110—that is, the President's proposal—which would not appear to be entirely satisfactory from the Senate's point of view. These were summarized, I believe, in a letter of the Majority Leader to Senator Cannon. I subscribe fully to the contents of that letter with which I am familiar.

In particular, as an elected officer of the Senate, I must state my strongest misgivings as to section 7(b), which authorizes the study commission to "require" information from Congress but not from the Presidency, and which states in mandatory terms that Congress "shall cooperate" with the commission to the extent permitted by law.

This provision would appear to contravene rule XXX of the Senate, which prohibits the withdrawal of documents of the Senate without leave of the Senate, and which in conjunction with other rules, places the official records of the Senate in the custody of its elected Secretary.

Rule XXX, in turn, derives from article I, section 5, of the Constitution which vests in each House of Congress the power to make its own rules.

So I would urge this committee, most respectfully, to consider the language of Senate Joint Resolution 110 very closely in this respect, and see to it that it does not contravene the constitutional prerogatives of the Senate. I should be glad to make the Senate Parliamentarian available to you for that purpose if you so desire.

Finally, I might also recommend that you consider reducing the number of appointees to the temporary commission from private life, as provided in section 5(iii) from nine to eight, of whom six shall be from the general public and no more than three of the six from the same political party. This would have the effect of assuring a numerical partisan balance in the temporary commission.

This concludes my statement, Mr. Chairman, and I will be happy to try to answer any questions that you have.

May I first, Mr. Chairman, submit for consideration a proposed change in section 308 of the bill that is presently before your committee which suggests the establishment of a joint board in lieu of a commission?

Senator PELL. This joint board is basically what we have now—a troika—with the same people on it.

Mr. VALEO. That is correct, sir. The only difference that would result from this amendment is that it would require us to cooperate, and it would insure collaboration, so to speak, by a majority vote of the three in the design of compliance forms and enforcement practices. They would be uniform for election to the House, Senate, and the Presidency.

Senator PELL. Because, as of now, the practice is slightly different, between the House and Senate, just because you reach your own rules and regulations.

I notice in the letter we got from the Justice Department, I think there are 5,000 apparent violations, that were sent to the Justice Department, and you sent over 200 presumably of a more serious nature. This is the question, and I agree with you, the law should be more uniform in application.

Mr. VALEO. Yes, sir. That would be one of the main purposes of this proposed amendment.

Senator PELL. Senator Cannon?

Senator CANNON. No questions.

Senator PELL. In connection with the idea of the commission, I gather you can live with the commission, and you think the com-

mission can take these functions over if, as you point out, in its wisdom the Congress moved ahead—

Mr. VALEO. If that were to happen, then, of course, we would turn over our papers to the commission. We would then remove ourselves from this function entirely.

Senator PELL. Are there any other suggestions of a technical nature, besides those you have made here, that would smooth out the operation? Do you think the dates for reporting for instance, are accurate, or should we have a change in requirement to make sure reports and statements are received by a certain date, either by you or the local secretary of state?

Mr. VALEO. I understand such a suggestion had been advanced. I find that a very interesting one. If, by some chance, a cutoff for contributions in any campaign would occur at some specified time substantially before the election, that would certainly make the job of reporting much more easier and probably much more accurate. That certainly deserves careful study.

Senator PELL. I understand Mr. Potter and the committee staff are already working together on that.

Mr. VALEO. That's correct, sir, and I believe someone from the General Accounting Office is working with them.

Senator PELL. Thank you very much, indeed, Mr. Valeo and Mr. Potter. Welcome back to this room, Mr. Potter.

Our next witness is Mr. Phillip S. Hughes, Director, Office of Federal Elections.

STATEMENT OF PHILLIP S. HUGHES, DIRECTOR, OFFICE OF FEDERAL ELECTIONS, GENERAL ACCOUNTING OFFICE

Mr. HUGHES. Thank you, Mr. Chairman.

Senator PELL. It's nice to see you again, Mr. Hughes.

Mr. HUGHES. I'm glad to have a chance to be back, Mr. Chairman. I have a rather short statement, and I would like to read it, if I might.

We do appreciate having the opportunity to present the views of the General Accounting Office on the subject of campaign finance legislation to the Senate Committee on Rules and Administration.

Since I last testified on April 12, 1973, before your Subcommittee on Privileges and Elections, the Committee on Commerce has favorably reported S. 372, and the reported bill has been referred to your committee.

The Commerce Committee has adopted an overall spending limitation for Federal candidates, depending for enforcement of the limitation on a requirement that suppliers of all goods and services used in a campaign must obtain a certification signed by the candidate in writing. Our administrative experience with the existing law has convinced us that certification is a questionable tool even when the only limitations are on media usage. Accordingly, we would like to take this opportunity to again express our concern about these provisions.

A limitation on total expenditures would be extremely difficult to enforce under any circumstances, in our opinion. Reports under the present law show that expenditures for campaign purposes cover a tremendous range of items, are very substantial in volume, and occur

in extremely diverse circumstances and geographic locations. We recognize, however, that this committee and the Congress must pass upon the broad policy question of whether to impose an overall limitation on campaign spending.

If you decide in favor of an overall limitation, we urge consideration of alternatives to the certification approach for the following reasons:

First, a certification approach enforces the limitation by prohibiting vendors from selling "anything of value" which may be used on behalf of a candidate without first obtaining a certification signed by the candidate or his authorized agent.

This inappropriately, in our judgment, places the enforcement burden on the vendor. We believe this burden should properly be on the candidate and his campaign organization, not on independent suppliers of goods and services.

Allowing the seller to obtain a "disclaimer" from the purchaser does not solve the problem for, in many cases, the seller will have no idea whether a purchase is for a campaign purpose or for another business or personal purpose. For example, how is a hotel, an airline, a stationery store, or a lessor of office space going to know the purpose for which their goods or services or property are being used?

Second, expenditures made by persons or organizations outside the candidate's organization cannot be related to a candidate's limitation. From our experience in 1972, a considerable amount of unauthorized spending for the media occurred without certification. Obviously, much more would be possible if the limitation is broadened.

How is a candidate to allow for and account for such unauthorized spending? Can he ever be guilty of "willfully and knowingly" violating the limitation, as provided in the penalty section, because of such spending?

Third, broadening the coverage from media advertising, as at present, to all expenditures—as proposed in S. 372—greatly increases the constitutional problems involved in requiring third parties to obtain the candidate's approval before spending funds.

So, we have some alternative ways to limit campaign spending:

First, an alternative way to limit campaign spending and, in addition, accomplish other desirable objectives, is by public financing of Federal campaigns. We believe public financing proposals before the Congress merit very careful consideration. Public financing of campaigns presents difficult administrative problems also, but we believe these can be solved and would be pleased to assist in this effort. Public Law 92–178, the Presidential Election Campaign Act, is a substantial step in this direction, of course. Additional public finance legislation would require change in this existing law.

A second alternative is a limitation with the candidate specifically responsible for control. If the goal is to impose a limitation on spending privately raised funds, the simplest method is to require the candidate to control the spending on his behalf by specifically making the candidate responsible for setting up proper controls and staying within his limitation and making penalties apply to the candidate if he overspends. This would put the burden on the spender, not the supplier. The same limitation should, of course, apply to the aggregate amount a candidate could collect.

Under both the present act and S. 372, as reported, the unauthorized spender is not subject to criminal penalties if the supplier neglects to demand written authority. One alternative is to impose a flat ban on unauthorized spending. While this approach involves some of the same constitutional questions as the certification procedure, such a provision would place responsibility for compliance where it should rest—on the spender.

However, we believe a better approach to any expenditure limitation is to restrict it to amounts spent or authorized, directly or indirectly, by the candidate or by those under his control. This would avoid the constitutional problems inherent in giving the candidate a veto power over freedom of expression, as well as eliminate the certification requirement for all campaign purchases.

In order to prevent evasion, a stiff penalty should be provided for any candidate who attempts to conceal spending by others on his behalf. Also, individuals and committees making independent campaign expenditures would be subject to full disclosure requirements and would have to report all contributions received and expenditures made.

In any event, the period during which time the limitation applies should be clearly and precisely defined.

A third alternative is a limitation on individual contributions. A strict limitation on individual contributions to or for the benefit of any Federal candidate would tend to limit overall spending and at the same time beneficially broaden the base of candidate support. We suggest $3,000 per election as an appropriate maximum, applicable to the contributor's immediate family as well as the contributor.

Within any total limitation there should be a limitation on authorized spending for radio and television. The Congress' concern in 1970 and 1971 over excessive campaign spending for broadcast advertising and the specter of the TV "blitz" was one of the primary reasons for enactment of the present communications media limitation. Retaining a limit on broadcast spending and dropping any separate limitation on newspapers, magazines, outdoor advertising, or telephones, would reduce the chance of successful constitutional attack and, at the same time, would have a significant restraining effect on campaign cost.

Some comments now about organizational structure. We are not seeking any change in the present organization which divides responsibility among three supervisory officers. If, however, the committee is considering an independent commission of the sort proposed in several bills, I believe the best structure would be a Federal Elections Commission composed of seven members: the Comptroller General, two appointed by the President, two selected by the Speaker and minority leader of the House of Representatives, respectively, and two selected by the President pro tempore of the Senate and the minority leader respectively.

The appointed members might serve for 6-year staggered terms, subject to removal only for cause by joint resolution of Congress after notice and hearing. I believe no member of the Commission should be a Member of Congress or an officer or employee of the Congress. The members could elect a chairman and a vice chairman from among their members to serve for terms of 2 years each.

This structure contemplates a part-time commission and a full-time executive director and staff, with additional assistance provided by the GAO during preelection and postelection periods. The Commission should have the authority to subpena witnesses and documents. It should also have the authority to impose civil fines on violators and to institute civil actions for injunctive relief, as well as to present evidence of apparent criminal violations to a Federal grand jury, either through the appropriate U.S. Attorney's Office or by a special prosecutor designated by the Commission.

If I might interpolate, Mr. Chairman, we have had some concern that the forms of commissions proposed in the legislation generally have placed the Commission in the executive branch of the Government. We are under the impression that this is done for constitutional reasons, because of constitutional language requiring that enforcement of laws take place within the executive.

We are not at all certain that the Commission necessarily has to be considered to be in the executive branch in order to have effective enforcement powers, including the authority to prosecute. The precedents, to the contrary, in our judgment, are not clearly applicable to this kind of proposal because of the especially broad dominion over elections which the Constitution gives to the Congress.

We have not as yet developed a brief on this point that I could present this morning, but if this is a matter of interest to the committee, we are doing legal research on the subject and would certainly be glad to furnish that to the committee for consideration later on. It is an important point, in our judgment.

In testimony before the Subcommittee on Communications, Committee on Commerce and the Subcommittee on Privileges and Elections of this committee, we made some additional suggestions for legislative change which we believe are available to this committee and its staff. We will be pleased to provide any further information on any of these that the committee may wish.

In addition, we are working on draft legislation recommendations, that is, the specific language of the regulations, which we will make available to the committee staff if you wish. We have been working actively with your staff, and with Mr. Valeo's office, on this.

We do not intend the draft that we have developed as a final answer in any sense, but rather as an assistance to the committee and its staff in its deliberations on this very important subject.

We wish also, incidentally, to feel free to modify some provisions of the draft as further experience and study may suggest.

Thank you, Mr. Chairman, and members of the committee, for this opportunity. We will be glad to assist and cooperate with you in any way we can.

Senator PELL. Thank you very much, indeed.

Incidentally, in your suggestion for the various appointments to the Commission, isn't the Comptroller General an arm of the Congress himself, or an officer and employee of the Congress? What would be his legal status?

Mr. HUGHES. We obviously did not regard him so in a direct sense. The General Accounting Office is clearly part of the legislative branch, as distinguished from the executive branch, and that obviously does aline him to some extent. We did not feel that should bar him from participation on the Commission.

Senator PELL. Senator Cannon?

Senator CANNON. Thank you very much. Your statement has been very helpful. If you'll give us that draft when you work it up, I think that will be helpful.

Mr. HUGHES. The legislative draft, sir?

Senator CANNON. Yes.

Mr. HUGHES. On the constitutional question, is that something we should pursue, the question of the place of the Commission, or is that something we're wasting our time on?

Senator CANNON. I think it would be helpful if we had something on that, because you heard the Attorney General's position this morning—he seemed to feel quite strongly that it might raise a grave constitutional question.

Mr. HUGHES. That, of course, is the traditional Department of Justice position. I think in the area of elections, where Congress has special authorities, it is at least questionable.

Senator CANNON. Something from a legal standpoint on that point would be helpful to us, because if we decide to go ahead in any event, it would certainly be well for us to have some legal support.

Mr. HUGHES. We'll try to develop something that will be helpful.

Senator PELL. Also we would be very grateful for the specific suggestions that you would care to make, and are making, with regard to our present law.

What do you think with regard to the reporting requirements? This is something that concerns me. Do you think it should be when the report is received by you, or when it's actually mailed?

Mr. HUGHES. I think it depends on the date set, Mr. Chairman. I think either date can work. The mails are a problem in some circumstances, but I think it's easy to overstate that problem.

I think whatever date is set should take cognizance of the mailing time, one way or the other.

Senator PELL. Or the local secretary of state, it could be either/or.

Mr. HUGHES. Possibly. The measure of mailing time is not necessarily distance in these days. I happen to have some experience with this, and it takes longer to get mail from Calvert County to Montgomery County sometimes than it does from Washington, D.C., to San Francisco. I'm not sure of the reasons for that; I'm not sure they're permanent reasons. But it certainly is true now.

I think any date set must be set on a rather approximate rule-of-thumb basis, and due allowance made for mailing time on an average basis.

Our concern is more with the schedule for reports. We think there could be some improvements in the timing of submission of reports that would in no way reduce the disclosure opportunity, but which would greatly simplify the reporting scheduling and make it much easier for the committees to understand and comply.

The present arrangements are quite difficult. The quarterly reports aren't quite quarterly. The preelection reports, particularly in the Presidential area, where there are many primaries, drove some of the committees wild. We had one committee, for example, which elected to report daily rather than to try and comply with the primary dates, because they were so confusing.

Senator CANNON. I would comment on that mailing problem. We have a long, well-established body of law that uses the date of mailing

rather than the date of receipt. I think we would be imposing a very unrealistic obligation on the candidate if we had him assume the responsibility as to when that was received, particularly in light of the mail problem.

I have the situation out in my State where one of our neighboring towns is 50 miles, less than 50 miles away, and yet the mail goes about 2,000 miles to get there.

The filing at the State capital with the secretary of state, too, is difficult in some of the larger States, where distances are great. For example, in my home State, from my hometown to the State capital is 350 miles. It isn't simply a matter of going and handing it to someone.

Mr. HUGHES. Yes. I see no problem with that, Senator, from our perspective.

I think, too, if some of the proposals for change in the reporting schedule are adopted, the crucialness of mailing date becomes less important. We, frankly, have found the 5- and 15-day reports—particularly the 5-day reports—of very limited value, because of the problem of getting them in and analyzing them in time to do any good.

Senator CANNON. In this draft that you're working on will you address that, the reporting and periodic reports as well?

Mr. HUGHES. Yes, we will. We have adopted, in general, some of the provisions of the Scott-Mathias bill.

Senator PELL. I wanted to touch for a moment on this question of overseas gifts. There was an article in the Washington Post this morning on this.

Do you consider there should be any differentiation between gifts from foreign nationals as opposed to American nationals?

Mr. HUGHES. The short answer is "yes," Mr. Chairman. I think for all of the reasons that we were concerned here, and the Chilians were concerned with the ITT business, "what's sauce for the goose is sauce for the gander."

I would think there should be restrictions on giving by foreign nationals. It seems to me the present law does need clarification.

You may or may not recall that we made two referrals to the Department of Justice on foreign national contributions, one to the McGovern campaign and one to the Nixon campaign. Justice felt that neither one was a violation of present law.

We have under consideration two others, but are advised that Justice, at least informally, reviewed both of those, and has said they were not violations.

Senator PELL. Why would there be any violation at all if a citizen of Mexico chose to give a thousand dollars to a candidate of his choice?

Mr. HUGHES. Whether there should be or not, of course, is——

Senator PELL. But it's not against the law now.

Mr. HUGHES. I think it depends on how you read the law. We had thought, from initial reading of the statute, that it was a flat prohibition against contributions by foreign nationals. The Department of Justice, referring to other statutes, has said, in effect, that in order to violate the law the foreign contributor must be an agent of a foreign principal. I'm not clear what an "agent of a foreign principal" is or can be, and I think that needs clarification.

Senator PELL. It needs clarification, but I think the record should be very clear that the present law—actually cited here is a man in

Greece who contributed some money, I forget how much, $15,000 I think it was. That's a lot of money for anybody to contribute. I'm not defending that.

But as long as it's public knowledge, and he's doing it for himself and not as an agent for anybody else, it is not against the law as it is written today; isn't that correct?

Mr. HUGHES. That's my understanding of what the Department of Justice says. What the Congress intended, I'm not sure.

It seems to me, Senator—if I can express a personal opinion here—if the Greek gentleman——

Senator PELL. I'm not talking about whether it should be against the law. I'm talking about what the law reads today.

Mr. HUGHES. The Greek gentleman you referred to is a Greek citizen—I think the facts are not in dispute—and his company happens to have a contract with the U.S. Government.

Is he an agent of the company when he makes a contribution to a political campaign in the United States? I don't know that.

Senator PELL. No more than his opposite number, an officer of Standard Oil in the United States.

Mr. HUGHES. But his company is a foreign company. You know, I think the question of intent needs clarification here, particularly where the donor is a contractor of the U.S. Government.

Senator PELL. I think what we have to look at here is to get away from—maybe it's because I'm a nonlawyer——

Mr. HUGHES. So am I.

Senator PELL. I'm trying to look at it from the objectives involved. The important thing is, what is the purpose for the contribution. And if it's well known, if it's a matter of public record, the usual reason anybody makes a large contribution is either an expression of gratitude or hope. [Laughter.]

And it would apply equally to a man in Greece as it would to a fellow in Philadelphia. If you decide that a man in Greece should not be able to do it, fine. I think what's really wrong is when it's done covertly.

I think there were a great many dollars used in elections outside the United States—maybe it's in the national interest—but the people were upset because of the secrecy. If it were done openly, I think it would insure the defeat of the candidate or the party we're backing if the Italians, for example, had known how much we were pouring into the Christian Democrats. It would insure their defeat.

The important thing is, it would be a matter of record—unless we wanted to change the law in this regard.

Mr. HUGHES. I guess I've already made it clear that I think we should change the law. For example, the simple fact of verifying the contribution is much more difficult with this gentleman than it is with his counterpart who is in the United States and a U.S. citizen.

Senator PELL. Let me put the argument another way: I'm an American businessman living in England, and there is some fighting going on about some zoning variances and it concerns me where I'm living, and I decide Candidate Jones of the Conservative Party could represent my interests better on the city council and I decide to make a contribution to him. I don't see why I should be prohibited as an American from doing that, do you?

Mr. HUGHES. Yes, I do see some problems.

Senator PELL. Maybe as you say, if Congress in its wisdom should decide——

Mr. HUGHES. There are difficult questions of degree here. One of the cases we referred to Justice, simply because it was a first one, was a British citizen who simply paid some expenses for a fund-raising event. It was small, a matter of $100, $200 or $250. Now, that's a marginal case, quite clearly.

Another of the cases involved a Hong Kong Chinese, a contribution of several thousand dollars. It was a direct contribution, not the assemblage of a party or anything of that sort, but a direct, sizable contribution. That moves us a little further, one way or the other, in the spectrum. I think the Greek gentleman, whose name defeats me, is still further up or down the spectrum, and so it goes.

At some point, if the donor is the Prime Minister of Britain or whatever, it seems to me the problem gets really acute.

Senator PELL. Don't you think that as it becomes a matter of record it assures a disadvantage for the candidate, so that when any foreign government or foreign people interfere in the elections, it always goes the other way?

Mr. HUGHES. I think the disclosure helps in any circumstances, and particularly in the circumstances we have been discussing. It helps to make clear what is going on and it gives the voters a chance to evaluate that.

Senator PELL. Thank you very much.

Senator CANNON. I would comment on that. I read that act and it does say "whoever is an agent of a foreign principal." It would seem to me, then, we should determine whether they are agents and you would have to go to the Foreign Agency Registration Act, and if they're not required to register, then within the meaning of the law they perhaps would not come within the purview of the act.

Mr. HUGHES. I would certainly urge clarification of the congressional intent, and we will do our best to administer the statute.

Senator PELL. I would ask another theoretical question here. What about the American citizen who is a lawyer for Covington & Burling, let's say, a very respectable law firm, and he is also registered as a foreign agent for the Government of Ecuador and he wants to contribute to somebody in his capacity as an individual——

Mr. HUGHES. He may do that.

Senator PELL. Simply because he is registered as an agent he would be prohibited from contributing under that interpretation.

Senator CANNON. If he was doing it either for or on behalf of such foreign—doing it himself, that's something else. But if he's doing it for or on behalf of a foreign principal, even though the foreign principal himself could make a contribution, it would be in violation of the law.

Senator PELL. What's important here is whether you're the agent or the principal, I think. It doesn't matter if you're foreign or American. I think this is what we have lost sight of. If you're the agent, you can't do it; if you're the principal, there's nothing against it at all.

Mr. HUGHES. I think that is slicing the baloney pretty thin, but—— [Laughter.]

Senator PELL. I'm a nonlawyer, so I'm getting in deep waters here.

[Material subsequently received by the committee from the General Accounting Office appears as exhibit 5 in appendix II, pp. 348–355.]

Is Mr. Wertheimer or Professor Ferman here? If not, the committee will temporarily recess for about 10 minutes. One of them should appear.

[A short recess was taken.]

Senator PELL. The committee will come to order.

Mr. Fred Wertheimer, director of legislative activities for Common Cause, and Mr. Kenneth J. Guido, director of litigation, Common Cause.

I notice you have a rather long statement, and out of mercy to the committee, which did recess for your convenience, maybe it would be better to digest this—if you could please digest this.

Mr. WERTHEIMER. Yes. I was just going to give you parts of it and ask that the whole statement be submitted for the record.

STATEMENT OF FRED WERTHEIMER, DIRECTOR, LEGISLATIVE ACTIVITIES, COMMON CAUSE, ACCOMPANIED BY KENNETH J. GUIDO, JR., DIRECTOR OF LITIGATION, COMMON CAUSE

Mr. WERTHEIMER. We would like to thank you and the committee for the opportunity to appear here today. In the month of April Mr. Guido and I were here before you to discuss this same topic.

We have tried to briefly summarize in the testimony areas that we have covered before, and to focus on some new areas that have come up.

At the outset I would like to state that Common Cause supports a fundamental change in the present method of financing elections. We believe that public financing of Federal elections is essential to restoring integrity to our system of representative government. Central to our position is the view that there is a basic need to spread the base of financial support in this country from the select few individuals and groups that presently provide it to all of the citizenry.

Senator Hart's public finance bill pending before this committee provides an excellent vehicle for consideration of the public financing concept. As we said in April, we believe the Rules Committee can provide an invaluable service by scheduling hearings on the public financing concept. We note in this regard the recent resolution unanimously adopted by the Senate democratic caucus calling for prompt hearings on the public financing issue.

Pending fundamental reform, we recognize that it is crucial to improve and strengthen the existing campaign finance laws, particularly in light of the defects demonstrated by the 1972 elections. In this regard immediate action is called for.

We do not believe that a bipartisan commission is needed. John Gardner, chairman of Common Cause, said in a recent statement: "What is needed today is action, not a study commission that can only serve to stifle action." Particularly in the area of campaign finance, we believe the proper forum now is the Congress.

We find the most important recommendation set forth in S. 372 to be the creation of an independent Federal Election Commission.

The next most critical change, in our view, is one not presently covered by S. 372. It is the need for strict limitations on the size of private campaign contributions.

It is our view that the ultimate success or failure of the 1971 law directly depends on the establishment of a strong and independent oversight and enforcement body. It is essential, furthermore, that this agency have its own subpoena powers and its own power to directly initiate civil or criminal proceedings.

S. 372 appears to give the commission these key tools for enforcement, and it is vital that they be maintained in the bill if the commission is to successfully carry out its mandate.

It should be clearly recognized that there is no constitutional barrier to Congress setting up this institution with its own powers to prosecute criminal actions.

Now, I understand this question has come up at the hearings today. Mr. Guido, our director of litigation, would like to comment on it, and we would offer to submit to this committee a brief outlining the issue and supporting the viewpoint that such a commission would, in fact, be constitutional.

Senator PELL. We would welcome such a brief.

Mr. GUIDO. At this time, Senator, I only have one comment, and that is that the Justice Department apparently has taken the position that an agency of the character proposed in this bill cannot be empowered to initiate and prosecute criminal cases.

We disagree with that position. We researched the issue with regard to the appointment of an independent prosecutor to prosecute the Watergate case. We read article II very carefully and discovered it gives the executive branch only the authority to enforce the laws as written by the Congress.

We also discovered the Legislative Reorganization Act and the structure of the executive branch allows the President to study the efficiency of Government operations and to propose plans for restructuring the executive branch, but specifically says that the Congress has 60 days within which to disapprove of those plans, clearly giving Congress the authority to structure the executive branch.

We also discovered an opinion by Attorney General Cushing, in 1854, which I would just like to read into the record at this point. It says: "The Constitution does not specify the subordinate, ministerial or administrative functionaries, by whose agency or counsels the details of the public business are to be transacted. It recognizes the existence of such official agents and advisers, in saying that the President 'may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices'; and these officers are again recognized by the Constitution in the clause which vests the appointment of certain inferior officers 'in the heads of departments'; and it leaves the number and organization of these departments to be determined by Congress."

That's the sixth opinion of the Attorney General, 326 and 327 (1854).

Senator, we are prepared to submit a memorandum on this subject. We believe the Justice Department has erroneously interpreted the Constitution, and that the Justice Department's position primarily is that the Attorney General has had the authority to enforce the criminal laws historically, and should maintain those functions.

We believe the history of nonenforcement by the Attorney General's Office of the campaign finance laws makes it imperative, as a matter

of policy, that enforcement be removed from the hands of the Attorney General.

Senator PELL. Thank you. And could this brief be submitted within the ensuing week?

Mr. GUIDO. Yes, I believe it could.

Mr. WERTHEIMER. Senator, we go on to cite a number of recommended changes in S. 372 with respect to the Elections Commission. Let me briefly summarize them.

We support the concept of representation on the Commission based on two appointed by the President, two appointed by the Speaker of the House, in consultation with the House majority and minority leaders, two by the President pro tempore of the Senate, in consultation with the Senate majority and minority leaders, and a statutory role for the head of GAO.

As Mr. Guido has just outlined, we are extremely concerned about the Justice Department having any role in the Commission, because of its past history of total lack of enforcement in campaign finance laws.

This committee is familiar with the fact that pending under the present law are 4,900 complaints that were sent to the Justice Department. They sat on them without doing one thing or another, as far as the public was ever able to find out.

We think S. 372 has some technical but critical deficiencies in the scope of the powers it gives the Commission, and would ask the committee to look at, in particular, section 309(a)(7), which leaves out enforcement jurisdiction over one of the key titles of the 1971 law.

We would also ask the committee to perhaps leave open the funding question, rather than setting the $2.5 million figure because it may be premature to be able to determine how much the Commission might need. It seems to us it might need more than that.

S. 372 takes no action with regard to revising the penalties and sanctions, and we would like to comment on that.

Of particular concern is the fact that the present system of financing elections is designed to completely insulate the candidate from legal responsibility for his campaign finances. The result is that candidates invariably disassociate themselves publicly from their campaign finances, despite the fact that these activities play a critical role in their political lives.

The campaign finance laws, we believe, must allow for and require candidates to assume legal responsibility for their political finance activities. We would propose the 1971 act be changed to require that candidates jointly share the legal responsibility with their campaign treasurers and fund-raising committees for the periodic disclosure reports and other obligations imposed by the act. In addition, we would urge adoption of the potential sanctions for candidates provided by the Florida campaign finance law.

In respect to the criminal sanctions, we think they should be broadened and civil sanctions should be provided as an alternative, including fines up to $100,000. We believe this would give those who have the responsibility for enforcing the law much greater flexibility and would make the law more effective in terms of its deterrent effects.

S. 372 focuses on establishing overall spending limits for Presidential and congressional races. In so doing, it diverts attention, we be-

lieve, from a far more important kind of restriction—limits on the size of private campaign contributions.

We support the concept of overall spending limits. But we believe that far more essential to eliminating the corruptive role of money in politics is the need to control the size of gifts from individuals and interest groups.

If the overall spending limits set forth in S. 372 had been in effect during 1972, they would have had little impact on the elections. For example, under S. 372 President Nixon and Senator McGovern would have been free to spend a total of $69.8 million each, $34.9 million each in the primary and general elections. The totals actually spent in 1972 were approximately $46 million by President Nixon and $36 million by Senator McGovern.

We have just completed, furthermore, an analysis of the 1972 Senate figures. They show that the 66 major party candidates—33 Democrats, 33 Republicans—who ran in the November election spent a total of approximately $25.7 million in 1972. Under S. 372 these same 66 candidates would have been free in 1972 to spend a total of some $73.8 million, $36.9 million in the primary and again in the general——

Senator PELL. Is this analysis available to put in the record?

Mr. WERTHEIMER. Senator, the overall totals are presently available. We have sent copies of our analysis to Senators and other interested parties, asking for their comments. We don't want to do anything on an individual basis until we receive all of our comments back.

Senator PELL. I might add you sent them to me. That was absolutely correct.

Mr. WERTHEIMER. Of these 66 candidates, furthermore, only six candidates spent more than the combined total allowable in their State for a primary and general election, and they were all from the smallest States in the country.

Under S. 372, as presently drafted, all of the huge contributions of 1972—the million dollar contributions, the $100,000 contributions, the $10,000 contributions—would be free to take place again.

Any kind of reasonable contributions limitation, on the other hand, would have drastically revised the financing of the 1972 elections. It would have forced a vitally needed broadening of the fundamental base for our elections, an action that simply won't occur as the result of S. 372.

In addition, the consistently disproportionate distribution of funds between challengers and incumbents is a far more serious problem today than the total amounts being spent.

For example, our Senate figures show that in the 25 races where incumbents ran in November, they had average expenditures of some $491,000. Their 25 major party challengers on the other hand had average expenditures of $239,000, less than half that of the incumbents.

A totally different picture existed in those five Senate races where no incumbent was involved from the outset. In those races the average spending of major party candidates was just about equal. The five Republican candidates spent an average of some $488,000, while the five Democratic candidates spent an average of some $452,000.

The total figures for the 33 races show that the 33 winners spent an average of some $510,000, while their losing major party opponents spent an average of $268,000.

Invariably, whenever contribution and spending limits are proposed, the issue of their constitutionality is raised. It is our strong belief that such limitations are not in violation of any constitutional rights. In fact, they serve, in our opinion, to enhance rather than diminish the first amendment protections provided for our citizens.

We have prepared a detailed legal memorandum on this subject. The memorandum was prepared by David Kendall of our staff, who last year clerked for Justice Byron White of the Supreme Court. We would like to ask the committee for permission to insert it in the record.

Senator PELL. Without objection, so ordered.

Mr. WERTHEIMER. The proposal we support for public financing of Federal elections would allow maximum private individual contributions of $250 for a congressional race and $500 for a Presidential race.

Until such a public financing system can be enacted, we believe Congress should enact maximum contribution limits of no more than $1,000 for congressional races and $2,500 for the Presidential election. The limits should specifically cover amounts given by an individual and his immediate family. They should also specifically cover the entire course of an election and not allow separate maximum gifts for both a primary and then the general election.

The contribution limits, further, should clearly cover gifts from political committees, and all subsidiaries and affiliates should be included within the scope of the political committee's maximum limits. Any efforts to secretly earmark contributions through conduit committees must be forcefully dealt with, as envisioned by the 1971 act.

We note the near unanimous opinion that the only possible way to administer and enforce an overall spending limit is to require each candidate to establish a single central campaign committee for purposes of bookkeeping and legal responsibility.

The central campaign committee is also vitally needed in order to improve the operation and effectiveness of the disclosure laws. We believe that the requirement of a central campaign committee is one of the most important changes that can be made in the 1971 act and strongly urge the committee to recommend its enactment.

We have commented on the problems we see with the overall limits for the Senate side. We would like to point out a reverse problem on the House side.

S. 372 would provide a maximum spending limit for most House races of $90,000 for the primary and $90,000 more for the general elections. The appropriateness of these limits, in terms of providing challengers a fair chance to compete, relates directly to whether present incumbent abuses and unfair political advantages are curbed.

Such problems as the widespread misuse of the franking privilege for political purposes, the use of Government staff for campaign purposes, and the extraordinary access to radio and TV available to all incumbents who are not "formally" declared candidates must be dealt with forcefully. Otherwise, it is by no means clear that any overall spending limit can be justified for the House of Representatives.

We also would like to point out that the manner in which "candidates" is presently defined in S. 372 leaves a large period of time available for spending not covered by the overall limit. That is be-

cause the candidate is defined in the very formal sense and is associated with the equal time provisions and not in terms of the broader sense associated with the disclosure provisions.

We believe the potential loophole created by these definitions would appear to be most advantageous to incumbents. They are in a position to raise and spend early money much easier than their challengers who have difficult times raising funds at any point.

One possible solution is to extend the more realistic definition of "candidate" used in title III to cover all cases where the term is used in campaign finance law.

Senator Pell, I would be very happy to submit the rest of my statement for the record.

I would like, however, to make one point with respect to the issue of filing periods. We have supported the idea that the periodic filing reports be moved back 1 month. We have differed with those who support the idea for a 10-day preelection report, because of the very short time that leaves for being able to combine, analyze, and get the information out.

We are very concerned about the issue raised by the Secretary of the Senate, about the possibility of defining the word "file" to mean put in the mail on the date it is due. If that was done, and combined with a 10-day filing report, those reports would be meaningless in terms of getting the information out before the election.

If this committee is to recommend a 10-day filing report, a preelection filing report, we would strongly urge that you specifically state that a report, in order to be filed 10 days before the election, must be either in the supervisory offices at that time, or else mailed, registered mail, airmail, a period of 4 days prior thereto.

Unless that kind of assurance is provided, those reports due in 10 days will not get in in time for anyone to be able to go over them and get them out to the public.

Thank you very much, Senator.

Senator PELL. As you know, the report is filed with the secretary of state, as well as with the supervisory officers. It's very often the rule that one will be available promptly if the other one is not.

Mr. WERTHEIMER. Possibly, but we also have to deal with the problem of the mails, no matter where the report is going, and problems that some secretary of state offices have had in handling the reports.

As you will note in our testimony, and others, we would urge a modest financial support for secretaries of state so they would be able to process these things.

Senator PELL. One general, philosophical question that I was going to raise with Professor Ferman—but he will be filing his statement rather than being here himself—it comes from an article he wrote in the American University Law Review.

He points out that in the last 15 years not more than 15 percent of the challengers to incumbent Senators, nor more than 8 percent of the challengers to incumbent Representatives, have been successful. To me, that was a very startling statistic. In other words, 92 percent of the incumbent Congressmen are assured reelection, and 85 percent of the sitting Senators that run again will be reelected.

It's a much higher figure than I expected to be the case.

Won't limitations on spending amounts increase this assuredness of the incumbent to remain in office even to a further degree?

Mr. WERTHEIMER. We are very concerned, Senator Pell, about the problem you raise.

Senator PELL. I'm delighted, but I'm an incumbent.

Mr. WERTHEIMER. The problem you raise, the fact of the matter is that most races in this country are financially uncontested races. Challengers do not get the finance to adequately present their cases—and I know you can cite your cases where it's the opposite situation—but I'm afraid it's not the general rule.

We believe the answer to dealing with this question really is to establish a system of public financing, which provides everyone who demonstrates threshold capacity and visibility as a candidate a fair chance to present their case.

Now, an overall spending limit on contributions play a major part of any public financing bill. The fact of the matter is that under present circumstances, the financial situation does not provide support for challengers. They are not going to get it under the present system.

We believe particularly that the corruptive role of large contributions must be dealt with at this time, and that, in particular, individual contribution limits are highly necessary.

Senator PELL. But is it good in your view that 85 percent of these Senators and 92 percent of the Congressmen, as a matter of form, should be reelected?

Mr. WERTHEIMER. No, it is not, Senator; and we believe a major reason for that is the way campaign financing runs in this country today. That is why we believe a system of subsidy would, in effect, present challengers with at least an opportunity to present their cases and make a viable race.

Senator PELL. In other words, public finances.

Mr. WERTHEIMER. Yes.

Senator PELL. But then should there be a limitation—if we don't have public financing, should there be a limitation on the amounts a candidate should be able to spend? How else would a new candidate be able to acquire the——

Mr. WERTHEIMER. We think these limitations are a major step toward public financing, and you raised the question of how else a challenger is going to be able to raise the money. They're not raising it now. There are very few cases where they can. We believe that other incentives should be provided, including tax incentives, to help all candidates raise funds and to encourage people to take part in this system.

The fact of the matter is that most of the larger contributions are raised by incumbents, not by challengers. We now have an overall limitation on indivdual candidates financing their own race. The statistics will very heavily demonstrate that most of the larger contributions are raised by incumbents and not the challengers.

Senator PELL. On another subject, I congratulate your common cause. I'm proud to say I'm a member.

I noticed you secured from the Committee to Re-Elect the President a commitment for the filing of their contributions before April 7, because of the suit you filed in this regard. I think this is great.

Mr. WERTHEIMER. We haven't really secured it yet, Senator.

Senator PELL. I read in the paper——

Mr. WERTHEIMER. Could you comment on that, Ken?

Mr. GUIDO. Senator, the motion that was filed requested a stay of all proceedings in the litigation pending against the Finance Com-

mittee To Re-Elect the President. That motion was bootstrapped into a motion to dismiss the Common Cause suit with prejudice, which means that Common Cause, in effect, would lose that suit in exchange for the filing of a report containing the information required by the Corrupt Practices Act without prejudice to the claim that the committee has no obligation to file that report.

So, in effect, it's a voluntary filing or disclosure in exchange for a dismissal of the Common Cause lawsuit.

The experience I have had as one of the attorneys in that case, with opposing counsel and with the defendants in the case, is such that there is a need for a great deal of assurances that any report that's filed is totally accurate.

We have already discovered that a document detailing contributions has been in existence for a long period of time and was not brought to our attention. We have found that document and it is being delivered to us.

The motion is based on the premise it would take time to construct those documents. We would hope they would reveal all contributions and all expenditures prior to April 7. We don't think that motion is the appropriate vehicle, however.

Senator PELL. As a matter of law, isn't there a 2-year requirement for retention of the records, even under the old law?

Mr. GUIDO. That's correct. We have been told the records were destroyed, when in fact——

Senator PELL. That's an illegal act itself, isn't it?

Mr. GUIDO. Yes. Mr. Sloan indicated he destroyed records pertaining to cash expenditures and contributions when he testified before the Watergate Committee, as well as when he testified in the depositions in the *Common Cause* case. He indicated, however, there was a document in existence dealing with contributions. It had all cash contributions and stock contributions and check contributions. It was in existence when he left the committee offices in July of 1972.

Senator PELL. Now I come to another question which I know you know interests me individually.

Why is it you're not going after the various—is it too much of an effort to do it—going after the various congressional and Senate pre-April 7 contributions with the same vigor you have been going after the national—in other words, you have your attorneys in the different States, you have a lot of "do good" believers, you could have some of them use their energy to file similar suits to what you have done in Washington in all the different State capitals.

Mr. GUIDO. There is a shortcoming in that. The loophole in the Corrupt Practices Act was a provision that said a committee had to be organized for the purpose of influencing the outcome of the general election in two or more States to be covered. Many Senate and House candidates have created their own committees, and as a consequence, those committees are only organized for the purpose of influencing the outcome of the election in one State. That was a pretty big loophole. It wasn't big enough to drive the Finance Committee To Re-Elect the President through, however.

Senator PELL. I must say, you've got a very valid point there. So there is no law that can compel any candidate for the Senate or House that did not file their contributions before April 7?

Mr. GUIDO. We researched that question very carefully, Senator. We concluded there were very few situations, if any, where we could proceed. We didn't have enough facts to base a suit in those few situations either.

Senator PELL. Is there any way I could persuade you to energize your public opinion pressures in this regard? Public opinion is very effective. You know, speaking very specifically to my own election, my opponent's reason for not disclosing was that friends of his and mine both contributed, and I would love to see who the friends of both of us were who contributed, and I would love to see if there is any relationship between any other source of funds.

You know, you pick up the newspaper every day, and there is reference to all the problems in the last election. I think it would be very helpful across the country, if there were voluntary disclosures made.

I don't know if your group is pushing in that direction.

Mr. WERTHEIMER. You know, Senator, we undertook a program throughout 1972 in trying to accomplish voluntary disclosures——

Senator PELL. You weren't very forceful in my State, sir, but I wish you would be.

Mr. WERTHEIMER. There were disclosures, a number of them in your State.

Senator PELL. Not with regard to contributions accepted by me. I assure you, it had nothing to do with persuasions. I wish you had been more vigorous.

Mr. WERTHEIMER. Yes, Senator, and in regard to that, I would like to point out a serious problem you have raised here with respect to the 1974 and 1976 elections.

Actually, unless the law and the definition of "political committee" and "candidate" is cleared up, there is a chance that some people may be confused into believing that they are going to be able to raise large sums of money during 1973 and start off with large sums of cash on hand in 1974, and maybe even 1976.

So we face the potential and the aura of an April 7, 1974, and an April 7, 1976, unless some very important changes are made in the law.

In this regard, Mr. Hughes of the GAO has submitted what we think are some very good definitions for political committees which would go a long way toward clearing this up.

Senator PELL. We'll do our best to try to plug that loophole.

Another question in connection with the activities at the other end of the corridor—where the press attention is substantially larger than at the empty press table I see here—[laughter] where your efforts to get them to disclose where all the cash went before April 7, that could show up in some of the hard-fought House and Senate races, could it not, as it showed up through your efforts when Mr. Mills received his $25,000? There is nothing wrong with Mr. Mills. I think that was a tragedy and a terrible thing. He did nothing immoral or wrong. He was a victim of this whole affair.

Mr. GUIDO. It is our understanding that although new money shows up every day with regard to the operations of that committee, so we can't be certain about how much money we are talking about, but——

Senator PELL. I would like to find out how many little black bags went around to what States.

Mr. WERTHEIMER. So would we, sir.

Mr. GUIDO. At this point in time we have only discovered the Mills

cash contribution. We are also told by Mr. Sloan that that was the only cash distribution of contributions that was made.

Senator PELL. I think Mr. Sloan has shown himself completely honorable and honest.

Mr. GUIDO. But there may have been transactions he was not aware of, Senator. There may have been transactions, cash transactions, that were handled by other individuals that never passed through Mr. Sloan.

Senator PELL. Well, just keep sniffing.

[The written statement of Mr. Wertheimer follows. Additional material submitted for the hearing record by Common Cause appears as exhibit 6 in appendix II of these hearings, p. 356.]

STATEMENT OF FRED WERTHEIMER, DIRECTOR OF LEGISLATIVE ACTIVITIES; ACCOMPANIED BY KENNETH J. GUIDO, JR., DIRECTOR OF LITIGATION, COMMON CAUSE

Mr. Chairman, I would like to thank you and the other members of the Committee for providing Common Cause with the opportunity to testify this morning. I am Fred Wertheimer, Director of Legislative Activities for Common Cause and I am accompanied by Kenneth V. Guido, Jr., our Director of Litigation and Associate General Counsel.

On April 12 of this year I appeared with Mr. Guido before this Committee's Privileges and Elections Subcommittee to testify on the need for campaign finance reform.

Since the Committee already has that testimony available, I will try not to repeat it except where relevant portions may be appropriate.

At the outset let me state that Common Cause supports a fundamental change in the present method of financing elections. We believe that public financing of federal elections is essential to restoring integrity to our system of representative government. Central to our position is the view that the exceedingly narrow financial base for our political campaigns must be vastly broadened to encompass all of our citizens instead of just a select few.

The corruptive role of money in politics, exercised through the vehicle of the campaign contribution, has been vividly demonstrated during the past year as never before. It constitutes the most dangerous kind of challenge to the strength and vitality of our nation.

The necessary response to that challenge, we believe, is public financing. The historic Federal Election Campaign Act of 1971 has played a crucial role in providing information about our campaign finance system and the abuses associated with it. But disclosure laws can never and will never successfully eliminate the root evils of political financing. We must move beyond this.

Senator Hart's public finance bill pending before this Committee provides an excellent vehicle for consideration of this vital subject. As we said in April, we believe the Rules Committee can provide an invaluable service by scheduling hearings on the public financing concept. We note in this regard the recent resolution unanimously adopted by the Senate Democratic Caucus calling for prompt hearings on the public financing issue.

Pending fundamental reform we recognize that it is crucial to improve and strengthen the existing campaign finance laws, particularly in light of the defects demonstrated by the 1972 elections. In this regard immediate action is called for. We do not believe that a bipartisan commission is needed. John Gardner, Chairman of Common Cause said in a recent statement, "What is needed today is action, not a study commission that can only serve to stifle action." We find the most important recommendation set forth in S. 372 to be the creation of an independent federal election commission. The next most critical change, in our view, is one not presently covered by S. 372. It is the need for strict limitations on the size of private campaign contributions.

FEDERAL ELECTIONS COMMISSION

It is our view that the ultimate success or failure of the 1971 law directly depends on the establishment of a strong and independent oversight and enforcement body. It is essential furthermore that this agency have its own subpoena powers and its own power to directly initiate civil or criminal proceed-

ings. S. 372 appears to give the commission these key tools for enforcement and it is vital that they be maintained in the bill if the commission is to successfully carry out its mandate. It should be clearly recognized that there is no constitutional barrier to Congress setting up this institution with its own powers to prosecute criminal actions.

We would like to propose for consideration by this Committee the following changes in S. 372 regarding the elections commission.

(1) *Representation on the Commission.*—S. 372 presently provides for a 9 member commission appointed by the President, confirmed by the Senate for 15 year terms. We would recommend as a better alternative a 7 member commission with 2 members selected by the President, 2 selected by the Speaker of the House in consultation with the House Majority and Minority Leaders, 2 selected by the President Pro Tem of the Senate in consultation with the Senate Majority and Minority Leaders and the Comptroller General as a statutory member.

In this way each of the key governmental institutions uniquely involved with this law would play a role in the selection process. The GAO furthermore has done an outstanding job on campaign finances under the leadership of Comptroller General Elmer Staats and Philip Hughes, head of the Federal Elections Office, and it would continue to play a key role in the new agency.

In addition we believe the 15 year terms are too long and we would recommend they be shortened to 7 year terms for all but the GAO representative on the Commission.

(2) *Role of the Justice Department.*—S. 372 presently authorizes the use of GAO and Justice Department facilities and personnel by the Commission "to the fullest extent practicable." As I just stated we believe that GAO has done an excellent job and their personnel and facilities should play a key role in the new Commission. They have solid experience and can provide important institutional support for the agency.

On the other hand, the record of the Justice Department in enforcing campaign finance laws is atrocious. The Department's record of consistent non-enforcement has gone on for decades. For example, the Corrupt Practices Act of 1925 was never enforced in its history against a member of Congress.

We believe that any major involvement by the Justice Department would seriously jeopardize the effectiveness of the new Commission and that specific safeguards are needed to prevent this from happening. We recommend, therefore, that the new Commission be specifically given primary jurisdiction for enforcing campaign finance laws. In addition, specific language should establish that any use by the Commission of Justice Department personnel, including FBI personnel, will take place solely at the discretion of and under the control of the new Commission.

(3) *Critical Deficiency in Scope of Commission's Enforcement Powers.*—S. 372 as presently drafted does not give the Commission powers to enforce *any* of the campaign finance laws covered by the 1971 Federal Election Campaign Act. This is a critical shortcoming which should be corrected. Section 309(a)(7) of S. 372 for example gives the Commission powers to enforce Title I and III *only*. It leaves out Title II of the campaign finance law which covers such things as the prohibition against donations by corporations and labor unions, the prohibition against donations by government contractors and other key restrictions. Title II should be added to Section 309(a)(7).

Another ambiguity exists in Section 310 (d) (1) of S. 372. As does the present law, this Section sets forth a citizen complaint procedure, a procedure for the Commission to investigate complaints and an enforcement procedure whereby if violations are found the Commission or the Justice Department "shall institute civil action for relief." The citizen complaint procedure as well as the authority for civil actions, however, is limited in this provision only to violations of Title III, the disclosure provisions. This Section should be amended to make clear that citizens can file complaints, and the Commission can bring civil actions, including injunctive actions, regarding violations of *any* of the provisions of the campaign finance law.

We urge that this Committee make specifically clear in S. 372 that the election commission will have full powers to enforce both civilly and criminally *all* campaign finance laws presently in effect or to be enacted in the future.

(4) *Funding.*—S. 372 presently contains an annual authorization of $2.5 million for the new commission. We believe this may not be anywhere near enough and urge that the funding question be left open in the authorization bill for further determination.

Penalties and Sanctions

S. 372 takes no action with regard to revising the penalities and sanctions provided under the Federal Election Campaign Act. Key changes are needed, however, in order to make the Act more meaningful and increase its effectiveness.

(a) *Candidate Legal Responsibilities.*—Of particular concern is the fact that the present system of financing elections is designed to completely insulate the candidate from legal responsibility for his campaign finances. The result is that candidates invariably disassociate themselves publicly from their campaign finances despite the fact that these activities play a critical role in their political lives. The campaign finance laws, we believe, must allow for and require candidates to assume legal responsibility for their political finance activities. We would propose the 1971 Act be changed to require that candidates jointly share the legal responsibility with their campaign treasurers and fund raising committees for the periodic disclosure reports and other obligations imposed by the Act. In addition, we would urge adoption of the potential sanctions for candidates provided by the Florida campaign finance law. The Florida law expressly provides for disqualification, removal from office or impeachment, whichever may be appropriate, as possible sanctions for any candidate nominated or elected who has knowingly violated the law. The Supreme Court decisions in *Powell v. McCormack* and *Roudebush v. Hartke* establish guidelines for the imposition of such sanctions. The Congress clearly has the authority to provide for the removal of candidates from the ballot, prohibition from certification and disqualification from holding future office, for violations of the campaign finance law. In addition the Congress has the authority to impeach a President and each House has the authority to exclude members for violation of the campaign finance laws.

(b) *Criminal and Civil Sanctions.*—The law presently provides for varying criminal penalties ranging from up to $1000 and one year in jail for violations of the disclosure provisions to up to $5000 and 5 years in jail for violating the communications media provisions. There is a clear cut need, however, for a much broader range of sanctions.

We recommend that the law be amended to allow maximum criminal penalties up to $100,000 and 5 years in jail for the violation of any of the campaign finance law provisions. In addition, the alternative of maximum civil fines up to $100,000 for any violation of the campaign finance laws should be created. The establishment of this range of sanctions would provide enforcement authorities with much greater flexibility in carrying out their mandate. It would create a much stronger deterrent capacity and provide more effective tools for punishing violators. As noted earlier, S. 372 should also make clear that the Commission can enforce *all* campaign finance laws and that it can bring civil injunctive actions with regard to all provisions of the Act.

Limitations and Prohibitions

S. 372 focuses on establishing overall spending limits for Presidential and Congressional races. In so doing it diverts attention, we believe, from a far more important kind of restriction—limits on the size of private campaign contributions.

We support the concept of overall spending limits. But we believe that far more essential to eliminating the corruptive role of money in politics is the need to control the size of gifts from individuals and interest groups.

If the overall spending limits set forth in S. 372 had been in effect during 1972 they would have had little impact on the elections. For example under S. 372 President Nixon and Senator McGovern would have been free to spend a total of $69.8 million *each* ($34.9 million each in the primary and $34.9 million each in the general election). The totals actually spent in 1972 were approximately $46 million by President Nixon and $36 million by Senator McGovern.

We have just completed, furthermore, an analysis of the 1972 Senate figures. They show that the 66 major party candidates (33 Democrats, 33 Republicans) who ran in the November election spent a total of approximately $25.7 million in 1972 (with some $8.7 million being spent on the communications media). Under S. 372 these same 66 candidates would have been free in 1972 to spend a total of some $73.8 million ($36.9 million in the primary and again in the general), almost three times the amount actually spent. Of these 66 candidates, furthermore, only 6 candidates spent more than the combined total allowable in their State for a primary and general election; and they were all from the smallest states in the country. Under S. 372 as presently drafted all of the huge contributions of 1972—the million dollar contributions, the hundred thousand

dollar contributions, the ten thousand dollar contributions—would be free to take place again.

Any kind of reasonable contributions limitation, on the other hand, would have drastically revised the financing of the 1972 elections. It would have forced a vitally needed broadening of the fundamental base for our elections, an action that simply won't occur as the result of S. 372.

In addition the consistently disproportionate distribution of funds between challenges and incumbents is a far more serious problem today than the total amounts being spent.

For example, our Senate figures show that in the 25 races where incumbents ran in November they had average expenditures of some $491,000. Their 25 major party challengers on the other hand had average expenditures of $239,000, less than half that of the incumbents.

A totally different picture existed in those 5 Senate races where no incumbent was involved from the outset. In those races the average spending of major party candidates was just about equal. The 5 Republican candidates spent an average of some $488,000, while the 5 Democratic candidates spent an average of some $452,000.

The total figures for the 33 races show that the 33 winners spent an average of some $510,000 while their losing major party opponents spent an average of $268,000.

Invariably, whenever contribution and spending limits are proposed, the issue of their constitutionality is raised. It is our strong belief that such limitations are not in violation of any constitutional rights; in fact they serve, in our opinion, to enhance rather than diminish the First Amendment protections provided for our citizens. We have prepared a detailed legal memorandum on this subject. The memorandum was prepared by David Kendall, on our staff, who last year clerked for Justice Byron White of the Supreme Court. We would like to ask the Committee for permission to insert it in the record at the conclusion of my statement.

(1) *Individual Contributions Limits.*—The proposal we support for public financing of federal elections would allow maximum private individual contributions of $250 for a Congressional race and $500 for a Presidential race. Until such a public financing system can be enacted, we believe Congress should enact maximum contribution limits of no more than $1000 for Congressional races and $2500 for the Presidential election. The limits should specifically cover amounts given by an individual and his immediate family similar to the present limits on candidate giving. They should also specifically cover the entire course of an election and not allow separate maximum gifts for both a primary and then the general election. The contribution limits, further, should clearly cover gifts from political committees, and all subsidiaries and affiliates should be included within the scope of the political committee's maximum limits. Any efforts to secretly earmark contributions through conduit committees must be forcefully dealt with, as envisioned by the 1971 Act.

For purposes of implementing this restriction, as well as for other important reasons, a provision should be enacted that no campaign funds can be raised by a political committee on behalf of a candidate without his express authorization.

(2) *Overall Spending Limit.*—We note at the outset the near unanimous opinion that the only possible way to administer and enforce an overall spending limit is to require each candidate to establish a single central campaign committee for purposes of bookkeeping and legal responsibility. The central campaign committee also is vitally needed in order to improve the operation and effectiveness of the disclosure laws. We believe that the requirement of a central campaign committee is one of the most important changes that can be made in the 1971 Act and strongly urge the Committee to recommend its enactment.

Spending limits in our view make the most sense when they are part of an overall public financing program as opposed to just existing on their own. In any event, an overall spending limit must be set at a high enough figure to allow challengers a fair chance to present their case against traditionally better known incumbents.

In the case of S. 372, the limits for the Senate, particularly for the large states, are too high to be relevant for the foreseeable future. For example, in New York a Senate candidate could spend $3.2 million in the primary and again in general election for a total of $6.4 million; in Ohio the maximum would be $1.8 million in each election for a total of $3.6 million, and in Texas it would be $1.9 million in each for a total of $3.8 million.

With regard to the House limits just the opposite kind of problem exists. S. 372 would provide a maximum spending limit for most House races of $90,000 for

the primary and $90,000 more for the general elections. The appropriateness of these limits in terms of providing challengers a fair chance to compete, relates directly to whether present incumbent abuses and unfair political advantages are curbed. Such problems as the widespread misuse of the franking privilege for political purposes, the use of government staff for campaign purposes and the extraordinary access to radio and TV available to all incumbents who are not "formally" declared candidates must be dealt with forcefully. Otherwise, it is by no means clear that any overall spending limit can be justified for the House of Representatives.

We also would like to point out that the manner in which "candidates" is presently defined in S. 372 leaves a large period of time available for spending not covered by the overall limit.

Thus for purposes of the disclosure provisions of Title III a person becomes a "candidate" whenever he starts raising funds or whenever funds are being raised on his behalf. But for purposes of the overall spending limit, an individual would not become a "candidate" until he formerly qualifies to be a candidate. Any money spent prior to his "formal qualification" would not be subject to the overall spending limit. In the case of the Presidential race, the cutoff date is no earlier than Januuary 1 of the election year.

The potential loophole created by these definitions would appear to be most advantageous to incumbents. They are in a position to raise and spend early money much easier than their challengers who have difficult times raising funds at any point. One possible solution is to extend the more realistic definition of "candidate" used in Title III to cover all cases where the term is used in campaign finance law.

(3) *Bar on Cash Transactions.*—We believe that an important deterrent to secret campaign finance activities can be established by making all cash transactions during the course of political campaigns illegal, exempting transactions of $100 or less.

In light of the history of illegal and evasive transactions associated with the use of cash in political campaigns, we believe there is simply no justification for permitting cash to be used during the course of a campaign. We strongly urge this committee to recommend a ban on cash transactions. While such a prohibition is not going to stop every instance of abuse, it will certainly help to bring under control the sordid practices associated with cash transactions in political campaigns.

(4) *Bar on Accepting Contributions Without Proper Information.*—The requirement to list a contributor's occupation and principal place of business is one of the most important provisions of the disclosure law. Compliance with this provision has been mixed at best. Simple steps can be taken however to assure full compliance. We would recommend a provision requiring a candidate to return within five days any contribution of more than $100 which is not accompanied by the contributor's occupation and principal place of business. Similarly we believe that candidates should be barred from accepting anonymous contributions and required instead to turn them over to the oversight agency where they can be used to meet administrative costs.

(5) *Approval of Presidential Expenditures.*—S. 372 would require a Presidential candidate to obtain approval from his National Committee for every expenditure in excess of $100. We recognize that this provision comes in response, among other things, to the abuses surrounding the Watergate affair. We further recognize that it correctly represents an attempt to centralize the responsibility for Presidential campaign finances. However we believe this approach is the wrong method for accomplishing these goals and is fraught with problems.

We believe that the creation of a central campaign committee for each candidate is the best method for centralizing responsibility. In addition and most importantly, we believe that each Presidential candidate as the leader of his party is fully entitled to ultimate control over his own campaign finances. To deprive the candidate of this power could leave him severely handicapped at crucial times because of differences with national party officials.

(6) *Prohibition on the Use of Campaign Funds for Noncampaign Purposes.*—People who make contributions to political campaigns do so with the expectation that the money is being given for use in that particular campaign. Yet there appears to be a good bit of confusion on the part of the recipients as to what uses can be made of these funds if they are not spent on the campaign. Leftover campaign funds wind up being used for other purposes such as being transferred into office accounts to pay for office expenses.

We believe any such actions to be an improper use of campaign funds. We ask

the Committee to enact a specific restriction prohibiting campaign funds raised on behalf of a candidate from being used for anything other than the candidate's campaigns. Extra funds could be saved for future elections, or else turned over to the Commission for administrative costs.

(7) *Ban on Bank Loans.*—It is our view that the decision in the 1971 Act to permit banks to make loans for political purposes was a serious mistake which should be corrected. We urge that banks be specifically prohibited from making such loans.

(8) *Prohibition of Contributions by Government Contractors.*—The 1971 Act specifically prohibits direct or indirect campaign contributions from government contractors. It sets the highest possible standard of conduct for those who are in a business and profit relationship with the government and in so doing helps to insure the integrity of the government contractor process. We believe this standard is extremely important and that it should in no way be amended.

(9) *Limit on Candidate Contributions.*—There appears to be a need for clarification of the restriction on the amount that a candidate and his immediate family can contribute to his own campaign. The ambiguity rests on whether the restriction applies separately to a primary and a general election or whether it applies on an overall basis. We urge the Committee to affirm that the restriction constitutes an overall limitation and the candidate is not free to spend the maximum amount on a primary and then again on the general election.

Communications Media

(1) *Repeal of the Equal Provision.*—S. 372 would repeal the equal time provision only for Presidential races. We agree with the position set forth in the Scott-Mathias bill (S. 1094) that it should be repealed for Congressional races as well. The theory underlying the repeal in S. 372 is that the equal time provision acts as a deterrent to free time from TV networks and to debates between major candidates. The same theory applies for Congressional races and a full repeal could provide the opportunity for much greater TV access for Congressional candidates and for more meaningful presentations of viewpoints. With repeal of the equal time provision, the fairness doctrine still stands as a bar to unequal treatment for candidates of a like stature.

Assuming the repeal does result in greater free TV time, this would help significantly to relieve a major campaign cost. Alternatively the whole issue of automatic free time for candidates can be given consideration. As GAO has pointed out, furthermore, to repeal the equal time provision for the Presidency and not for Congress would allow substantial amounts of free broadcast time for Presidential candidates, thus increasing their overall spending limits, while providing no such benefit to Congressional candidates.

(2) *The Definition of "Candidate" for Purposes of the Equal Time Provision.*—The present system whereby the equal time provision applies only when an individual is a "declared candidate" has created enormous political advantages for incumbents. It has led to incumbents waiting to the last possible moment to formerly declare their candidacy, in order to hold on the tremendous radio and TV access to constitutents they have built up through local public service programs.

The definition of candidate set forth in title III of the 1971 law, as mentioned earlier, is a much more realistic determination of actual candidacy. If the equal time provision is not repealed for Congressional races, we urge a change in the definition of "candidate" to incorporate the definition set forth in the Title III disclosure provisions of the campaign finance law.

SCOPE AND COVERAGE OF THE ACT

(1) *Definition of "political committee".*—There appears to be confusion on the part of some people today regarding who must file reports and at what point. It is our belief that the present law clearly requires political committees to register and file periodic reports wherever the committees are dealing with more than $1000 in a calendar year which may be used in connection with a candidacy. As noted earlier specific steps can be taken to help clarify this situation for those who may misunderstand it by requiring each candidate to have a single central campaign committee, and also by providing that no funds can be raised by a political committee on behalf of a candidate without his express written authorization. In addition we urge this committee to adopt the changes in the definition of "political committee" proposed by Phillip Hughes in his testimony before the Privileges and Elections Subcommittee on April 12, 1973.

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It is vital we believe for all candidates to fully understand that the present campaign finance law will not allow them to start off their campaigns in 1974 with substantial amounts of unidentified "cash on hand" raised during the previous year.

(2) *Filing Periods.*—As noted in our earlier testimony we support moving the periodic reports back one month to April, July and October. We also support requiring a final 15 day pre-election report combined with telegraph notification within 24 hours of all individual contributions and expenditures of $1000 or more during the last uncovered days of the election. We have taken this position instead of supporting the 10 day pre-election report because of the great difficulties that exist in obtaining, analyzing and publicly distributing campaign finance data in such a short period of time.

If however a 10 day pre-election report is adopted, it is absolutely vital to establish a procedure that all but guarantees that the report will be received by no later than the date it is due. The Secretary of the Senate has raised the idea of defining "file" to mean a report placed in the mail on the same day it is due. Such a definition would be disastrous and serve to make meaningless the requirement for a 10 day pre-election report. The information contained in such reports simply would not reach the public in any meaningful way prior to the election.

We urge this Committee to specifically define "file" to mean a report that is on hand in the supervisory office on the date it is due or alternatively is postmarked 4 days before the date due and sent registered air mail.

(3) *Pooling of contributions.*—In a number of situations campaign contributions have been raised in concert from a number of individuals and then delivered as, in effect, a group contribution. It is quite clear that these actions constitute the creation of a political committee for purposes of the 1971 Act. Yet the various groups involved have not been registering under the Act. We urge this Committee to make clear that the 1971 Act envisioned all fund raising activities taken in concert which deal with more than $1000 to be registered as a political committee.

(4) *State filings.*—The requirement for candidates to file duplicate copies of their federal reports at state capitols has been of enormous importance in helping to publicly disseminate campaign finance information. We urge the Committee not only to support continuation of this key provision, but also to create a modest fund from which financial assistance can be made available to Secretaries of State to assist them in carrying out this key function.

(5) *Debts and Obligations.*—We support two changes in this area. First we believe that candidates should be required to report personal debts and obligations incurred with regard to political campaigns in the same manner that political committees are presently required to report. Under the law now candidates are exempted from providing this information. Second, we support the provision in the Scott-Mathias bill which would require that when debts are compromised, information has to be reported as to the amount of money or consideration for which the debt was extinguished or a statement as to the circumstances under which the debt was cancelled.

MISCELLANEOUS

There are two key areas which do not fall within this Committee's jurisdiction but to which we would like to briefly refer because of their importance to campaign finances.

(1) *The Franking Privilege.*—The potential for abuse of the franking privilege constitutes an extremely serious problem in the campaign finance area. Recent legislation passed by the House has only increased this problem since it would legitimize and actually encourage the political abuse of the frank. The high cost of political mailings makes quite clear that the franking privilege can constitute an enormous political advantage for incumbents. We urge that the Senate reject the House passed bill and instead reaffirm the illegality of spending public funds for what are basically private purposes. In addition, we believe the Senate should give consideration to creating a new form of franking privilege that would be available for campaign purposes to incumbents and to challengers on an alike basis.

(2) *Taxes.*—The tax laws in our view were clearly distorted for political purposes during the past elections. First, despite the ruling of the IRS, we believe it is clear that individuals cannot legally evade the gift tax provisions by splitting up their contribution to a candidate among a series of committees supporting that candidate. We oppose, furthermore, the provision in the Scott-

Mathias bill which would repeal the gift tax for political contributions. What this repeal would do is to create an increased incentive for large individual contributions at a time when our goal should be to sharply restrict them.

The capital gains tax provisions were also evaded in our view by political committees accepting stock gifts and not treating their sale as taxable transactions. We believe that the tax laws in fact require those transactions to be treated as taxable and call upon the IRS to take appropriate steps to enforce the law. One way of dealing with this problem is to prohibit stocks and other appreciable property from being given as campaign contributions.

Finally, we believe it is vital to encourage small contributions and would urge therefore that the maximum tax credit for political gifts be increased from $12.50 per taxpayer to $50 per taxpayer. Such action would constitute an important incentive for increasing the role of all Americans in the political financing process.

CONCLUSION

We believe many important improvements can be made in the Federal Election Campaign Act of 1971 and have attempted to outline a number of them today. The highest priorities, we believe, include the creation of an independent elections commission and the establishment of strict limitations on the size of private campaign contributions. Most important in our view, however, is the need for creating a new system for financing political campaigns. We urge this Committee and Congress to begin as soon as possible a full scale consideration of the public financing concept.

Senator PELL. If there are no more witnesses, the committee will now stand in recess, subject to the call of the Chair.

[Whereupon, at 1:45 p.m., the committee was adjourned.]

[Statements received by the committee for the hearing record from persons that could not testify at the hearing follow:]

STATEMENT OF IRVING FERMAN, PROFESSOR OF LAW, HOWARD UNIVERSITY LAW SCHOOL

My name is Irving Ferman. I am a professor of Law at Howard University Law School. Last year, I conducted a study at the Law School on the Constitutional Issues involved in the Federal Elections Campaign Act of 1971, which was published in 22 American Law Review 1, a copy of which I offer for the record as a fuller supplement to my brief remarks this afternoon. [The article referred to appears as exhibit 7 in appendix II, p. 369.]

Because of the pressure of the witness schedule, I would like to confine my remarks to the provision in S. 372 placing a total limitation on all expenditures by or on behalf of a candidate for Federal elective office.

Senator Pastore is to be congratulated for the depth of his interest in and the magnificent leadership he has given to the campaign reform movement dedicated to generate greater public faith and trust in public officials too often marred by the taint of corruptible campaign contributions. He has committed himself to a task which must be pursued if we are to preserve the purity of the election process.

Now as to the problem of the First Amendment and the ceiling on campaign expenditures:

A campaign expenditure enables the candidate to communicate his message to the voters. That a citizen has a first amendment right of expression is clear, but when that citizen dons the role of a candidate, his interest in expression and its exercise differs somewhat from that of the private citizen. A candidate is actually the leader of a voluntary political association; at the least, he is the association's representative to the public, and therefore has the right to subsume within his freedom of expression the funds accumulated by the association and spent to further his candidacy. This is distinguished from a union leader or corporate director's freedom of expression in that their positions do not include permission of the members of their "association" to express political views or expend the association's funds for a particular candidacy. Thus, in *Pipefitter's Local Union No. 562* v. *United States*, the Supreme Court required that a union establish a voluntary association for political expenditures rather than use previously collected union funds to promote a candidate. A candidate, as the representative of a political association, does not suffer a loss of first amendment protection because of his role; rather the first amendment is par-

ticularly relevant when protecting an exercise of expression so vital to the institution of self-government.

As a means of communication, expenditures qualify as speech-plus and are protected by the first amendment. A candidate can not communicate by what is characterized as speech-plus forms of conduct such as picketing, boycotting, or mass demonstrations. In fact, an expenditure serves an even more important function in communicating the "speaker's message" than does typical speech-plus acts. For the campaigner deprived of the ability to expend funds also loses his ability to communicate, while the protester does not lose his ability to dissent merely because one form of conduct has been regulated away. A candidate without sufficient funds to expend is no longer a candidate. Such expenditures are the "sine qua non" not only of the candidate's expression via the media but also of the organizational costs of bringing a candidate into contact with the citizenry. In a political campaign, expenditures are indispensable to communication and thus closer to speech (on a continuum from speech to conduct) and more clearly within the first amendment protection of speech-plus than typical speech-plus conduct.

As envisioned by Congress, the limitations on expenditures are designed to protect the public interest in maintaining the purity of the electoral process by providing equal opportunity for all persons to serve as candidates, the modest as well as the wealthy. Additionally, it is intended that these limitations will generate a greater diversity of views, thus responding to the public need to hear a full debate of political issues. This public right is arguably satisfied if poor candidates and parties are provided an opportunity to enter the political process and campaign for their interests in a meaningful way. In Bullock v. Carter, the Supreme Court satisfied the need for minority representation in the political arena by invalidating primary election filing fees which were too high to permit poor groups to enter the primaries. This judicial action safeguards the rights of expression of all parties. It did not limit one candidate in order to serve another.

Political debate reaches its most pervasive and intense level in an election campaign, particularly for the presidency. The domination of a campaign by those with unlimited resources infects the election process which depends upon the expression of diverse views. Such dissent serves as a constant challenge to make more responsive the dominent powers in the political process. Limiting expenditures serves as a brake on the dominant group. It provides hope for access to the political process by the weaker minority interest which often represent dissenting views. At the same time, the limitation assures that those with dominant resources will not overwhelm those with limited resources. Couched in these terms, the governmental interest is derived from the same source as the constitutional interest in expenditures—both interests spring from the first amendment. The common source requires a different application for the ad hoc balancing test, for it works best when the governmental interest is detached from the constitutional interest. The balance is then between the governmental regulation and the constitutional interest. When both interest converge, the test really weighs the extent to which the regulation must infringe to the least possible extent on the constitutional interest while being necessary to effect the governmental interest, even though both interests have a constitutional foundation.

One requirement of the balancing formula is, "that the regulation operates equitably and with no undue advantage to any group or point of view." Generally, the built-in advantages of the incumbent will automatically require the expenditure of disproportionate sums by the challenger. These advantages are such that in the past fifteen years, not more than fifteen per cent of the challenges to incumbent senators nor eight per cent of the challenges to incumbent representatives have been successful. To place this advantage into the ad hoc balancing formula, Professor Ralph K. Winter emphasizes that a limitation on expenditures would likely operate inequitably against the challenger:

> We cannot always count on having men of good will and honest intent in office. Systematic regulation of political campaigns by Congress must inevitably lead to those in power regulating in favor of themselves. The reason the first amendment takes matters of political speech and political activity out of the legislative process is because we cannot rely on those in power to exercise that power in behalf of their political opponents.

The limitation also operates inequitably when one candidate is renown for reasons unrelated to political service. The candidate who has not had this affiliation must rely upon disproportionate expenditures to offset the advan-

tage. The best interests of the political process are served by allowing unlimited expenditures so that personalities are not the determinative issues in a campaign.

Since an expenditure is a form of expression, the regulation of that amount of expression beyond the limitation is in fact a prohibition of that amount of expression. The prohibited expression is of the same nature as the permitted expression, except that the governmental interest in regulation is asserted when the expression reaches a certain level. In Gregory v. Chicago, a group of protestors were arrested when the police were no longer able to protect them from attacks by irate home owners. The validity of the arrests was rejected because the expression of the protestors had not been effected by disorderly conduct. As the protestors paraded to City Hall through the business district, their expression was protected; but the police suppressed their expression just when, by redressing the Mayor at his house, it promised to become most effective. Although the governmental interest in public order has high priority, it cannot be accomplished by a regulation which operates in fact as a prohibition. To restrict an expenditure at the level at which it effects the communicative desire of the candidate is to prohibit the communication that a supplemental expenditure could promote. This directly violates the first amendment. Even though the limit set may seem reasonable in the light of current expenditures, the regulation still abridges the rights of those who are either able to spend more or are required to spend more in order to effectively communicate their message. To that extent, the balancing test would characterize the control as in the nature of a prohibition and therefore the "regulation" would be invalid.

STATEMENT OF HERBERT E. ALEXANDER, DIRECTOR, CITIZENS' RESEARCH FOUNDATION

I am happy to respond to the invitation of Senator Pell dated June 5, 1973, to testify on some considerations which bear on S. 372. My statement is my own and does not necessarily reflect the views of members of the Board of Trustees of the Citizen's Research Foundation, which as an organization does not take positions on public policy.

Public reporting of campaign and political finances consists of two elements: disclosure and publicity. Disclosure is only the first step; the larger purpose is to inform the public about sources of funds and categories of expenditures, ideally as completely as possible before an election. S. 372 would provide a remedy by establishing a Federal Elections Commission to replace the current unwieldy system in which there are three independent supervisory officers, the Comptroller General for receipts and expenditures data on campaigns for the Presidency, the Secretary of the Senate for campaigns for the Senate, and the Clerk of the House for campaigns for the House.

A succession of policy statements and reports of commission and task forces have recommended a single joint repository in the Federal Government to which political funds reports would be made. This was the recommendation of:

The President's Commission on Campaign Costs, *Financing Presidential Campaigns* (1962);

The Committee on Economic Development, *Financing a Better Election System* (1968);

The Twentieth Century Fund Task Force, *Electing Congress* (1970);

The Association of the Bar of the City of New York, *Congress and the Public Trust* (1970).

All these groups contained individuals bringing varied and extensive experience in political finance and its study, and all proposed the establishment of a single agency.

A major reason for creating a Federal Elections Commission is to isolate as much as possible from political pressures the functions of receiving, auditing, tabulating, publicizing and preserving the reports of political and campaign receipts and expenditures required by law. An agency that is neither part of the Executive nor the legislature, but a new one with a new mandate, would be an ideal means for building confidence in the administration of the political fund reporting system.

Now more than ever, in the aftermath of Watergate, the Commission should be established, and be provided with the subpoena and enforcement powers which the current Federal Election Campaign Act does not give the supervisory officers

now receiving the campaign fund statements. Under present law, investigations by the General Accounting Office—which was given responsibility for disclosure statements of receipts and expenditures of Presidential candidates and committees related to the Presidential campaigns—are subject to the cooperation of those being investigated, and findings of "apparent violations" are referred to the Justice Department for further investigation and possible prosecution. The G.A.O. has referred a number of violations to the Justice Department, some almost a year ago, but so few have been prosecuted that the Comptroller General was moved to urge on April 27, 1973, in the strongest terms "that the Attorney General take the initiative with regard to . . . reported violations of the Federal Election Campaign Act. . . ." A Federal Elections Commission empowered to pursue and prosecute directly cases based on its findings would be the best vehicle for desirable change.

The Justice Department has moved slowly, in part because the Department simply is not sufficiently staffed with experienced lawyers in the field of corrupt practices. But more important, the Attorney General is too often appointed as a reward for service in the most partisan of political roles, that of campaign manager. Thus was John Mitchell appointed as Attorney General by Nixon, Robert Kennedy by John Kennedy, Herbert Brownell by Eisenhower, and J. Howard McGrath by Truman. In such circumstances, almost any action toward politically sensitive prosecution will lead to political trouble. If the Attorney General prosecutes persons in his own party, he will be considered disloyal. If he prosecutes persons in the other party, he will be considered politically motivated and subject to retribution when the other party obtains power. In the interest of even-handed administration, the Justice Department should properly be relieved of its enforcement responsibilities in this area.

While the findings and referrals of the G.A.O. in the Presidential campaigns of 1972 have been widely acclaimed and considered fair and impartial, the G.A.O. is an arm of the Congress and thus is not the ideal choice for enforcement functions in cases involving candidates for the Senate and the House. Even more obviously, the Secretary of the Senate and the Clerk of the House are less suitable choices to enforce, or even to supervise, election finance laws, since those officers are elected in every new Congress by the majority members of each house and thus do not meet the test of independence and isolation from political pressures. Only an agency independent of both the executive and legislative branches could inspire total confidence in the public and command the greatest credibility.

A Federal Elections Commission would have responsibility for campaigns for all federal offices and should be required to make timely public reports on campaign funding before elections, as well as after. Under present law, this power is discretionary except for an annual report required long after the election is over; statutory requirements should be enacted to provide timely data. A Federal Elections Commission would combine information from campaigns for all federal offices in ways that would avoid the present duplications of information on spending by committees supporting candidates for more than one office, giving a truer picture of where political money comes from and where it goes. Despite the increased availability of data about sources of funds and items of expenditure since April 7, 1972, when the Federal Election Campaign Act went into effect, the annual tabulations of campaign spending information for 1972 will be unnecessarily confusing and duplicative because of the overlapping jurisdictions in reporting funds under the present law.

In addition to these custodial functions, a Federal Elections Commission would have the necessary powers to enforce the law, thereby reversing the lax attitudes which have led to too many sharp and corrupt practices evident in the past.

It is true that each House is the judge of its own members. A Federal Elections Commission would in no way interfere with the right of each House to judge its members; the data submitted to it would be readily available to the appropriate elections committees and to the membership of each House.

One additional consideration in determining an agency to receive the reports is that it should be one capable of employing modern electronic data processing equipment to assist in preparing and in publishing data and reports. It is not visionary to anticipate a time when pre-election reports can be made in uniform manner on a daily or weekly basis, through computer linkages, enabling a truly national up-to-the-minute system for reporting sources of political funds and categories of expenditures.

With reference to limitations on campaign expenditures provided for in S. 372, I refer the Committee to my statement of March 13, 1973, before the Subcommittee on Communications of the Senate Committee on Commerce. Briefly, my statement holds that comprehensive limitations are unenforceable and thus illusory. If limits are to be effectively enforced, they are probably unconstitutional because they give the candidate discretion to prohibit free speech. If limits are not effectively enforced, then they will breed disrespect for the law.

The provision in S. 372 which would put each party's national committee in sole charge of coordinating Presidential campaign contributions and receipts in the post-nomination period is, I think, very much worth trying. I have long been concerned about both the separation of financial and political functions in campaigns and the separation of candidates from their sponsoring parties in the general election period. Political parties are better instruments for financial accountability and responsibility than are the ad hoc candidate committees, and new thought should be given as to how to accomplish that end.

STATEMENT OF CHARLES CERF, WASHINGTON, D.C.

Now resident at 2232 Decatur Place, N.W., in Washington, D.C., I have been Assistant Treasurer of the McGovern for President Committee since July 1972. From March to July 1972 I was Controller of the Massachusetts McGovern for President Committee and was responsible for compliance with the Federal Election Campaign Act through that period. My national campaign responsibilities included establishment of a bookkeeping system for compliance with the Act and the Regulations, and liaison with treasurers of state McGovern committees to facilitate their compliance. I write here, however, only on my own behalf.

I was astonished to discover that among the fifteen distinguished witnesses before the Subcommittee on Privileges and Elections on June 6 and June 7 was, as far as I could tell, no one who had ever himself been responsible for compliance with the Federal Election Campaign Act by a political committee. Yet many of the problems caused by this law stem from its unworkable and impractical aspects. Some of the distinguished witnesses of last week, in fact, favor reform proposals which are flawed by vagueness or impracticality.

In this context I submit my own statement on campaign financing. I favor nearly all the reforms backed by Common Cause, as set forth in the comprehensive statement of Mr. Fred Wertheimer before the Subcommittee on June 7, and it may be assumed that my position on topics omitted from my statement is virtually identical with that of Common Cause. I do not believe in redundancy.

Expenditure limitations and public financing

Reform of campaign finances must begin with severe limitations on large individual contributions. This will have at least one of two consequences: public financing, or severely reduced campaign expenditures.

The fact is that all McGovern campaign expenditures were for one of two purposes: to aid communication between Senator McGovern and the electorate; and to raise funds to aid that communication. Expenditure reductions would simply have reduced communication; we would have distributed fewer issue statements, televised fewer of Senator McGovern's speeches, and so forth. Actually the cost of his entire campaign, including the pre-convention period, amounted to the cost of two months of Procter & Gamble's television advertising.

Senator Bill Brock's proposal for reduced campaign expenditures prohibits media spending except in the last five weeks before Election Day. This would have saved the McGovern campaign only $1.1 million, or about 3% of the total expenditures.

Professor Ferman has dealt eloquently with the constitutional problems of expenditure limitation. The Senate should be sensitive as well to the impracticalities: will it be illegal for a person to allow his telephone to be used for political purposes, unless he submits the bill to the campaign? Will it be illegal for persons to travel in support of a candidate unless the campaign pays the fare? Will it be illegal for a person to lend his car to a campaign? Will it be illegal for a person to buy and sell buttons and bumper stickers for profit? Any line delienating legal and illegal conduct will be self-evidently ridiculous.

Public financing formulas are hard to find. Formulas based on past election results are unfair to new parties and inapplicable to campaigns for party nominations (which are, surely, as important as general elections). Formulas based on eventual election results are more acceptable, but harder for the public to

understand. One effect of such formulas is that in primary elections they give an advantage to candidates with broad but shallow appeal—those who can get people to vote, but not to give. These candidates tend to be centrist, and may generate stronger appeal in the general election than more extremist candidates. A particular example from 1972: Senator Muskie's candidacy would not have suffered financial collapse so early.

One objective of election law reform is to broaden political participation. Let us, then, devise a system which encourages everyone to contribute to campaigns. For example, Senator Metcalf has proposed a voucher system similar to the present tax check-off system in principle, but more general in scope and more encouraging of participation. Equally acceptable, and less revolutionary, would be a "matching" formula, under which a candidate would apply for public funds each period in an amount determined by the amount of qualified (i.e. small) contributions received by his campaign since his previous application.

Limits on individual contributions

Limits should be different for House, Senate, and Presidential campaigns. Respectively, $200, $500, and $2,500 would be suitable limits for outright gifts. A single limit is absurd. No Presidential candidate could be influenced by a gift of $2500, but most Congressional lobbyists, to judge by their past gifts, consider such an amount more than sufficient.

Limits should be higher for loans than for gifts. Few non-incumbent candidates will be able to finance a broad (direct-mail) fund-raising program without loans from early believers. I suggest limits on loans of triple the limits on outright gifts, with the proviso that loans must be repaid in sufficient time to be reported as such in the last pre-election disclosure report.

Disclosure thresholds

Disclosure thresholds should also differ in House, Senate, and Presidential campaigns, for reasons as stated above. In addition, this year's $100 threshold resulted in disclosed lists thousands of names long from the McGovern for President Committee, amounting to empty paperwork for the campaign as well as for the GAO and for the public who read them. The only news from these computer-printed lists resulted from a key-punch error: a man whose zip code was 85291 (or so) was listed as donating $85,291 (or so). Meanwhile, there were contributors of $25,000 who had never met Senator McGovern, and of whom Senator McGovern has never heard.

It is true, of course, that disclosure serves other purposes than to answer the question about possible influences on the candidate. It is always interesting to know who favors the candidate enough to contribute. To this end, I favor disclosure thresholds of "$100 or more", "$250 or more", and "$1000 or more" for House, Senate, and Presidential campaigns. This opens the door for stringent enforcement of actual disclosure requirements such as occupation and principal place of business.

Social security numbers

It has been suggested, as an aid to enforcement of limits on individual donors, that they be identified by social security number. Presumably this will help identify donors with two or more addresses. But donor lists, presently arranged by zip code, can easily be rearranged into alphabetical order, from which duplications can be identified. Not even intentional violations would be hindered, for donors would merely state false social security numbers. Checking the accuracy of these numbers against Federal records would be very expensive, and Orwellian to boot.

Spouses of donors

Husbands and wives are separate individuals; they often have separate assets, and they often have political differences. If they are considered one individual for purposes of the limit on individual donations, it will be necessary, to enforce the law, to ask every donor for the name and address of his spouse. If this is not done, how will a treasurer identify spouses with differing surnames and/or addresses? Conversely, what should he conclude about two donors named Smith, of opposite gender, at the same address in New York City?

Not every donor will appreciate being asked that question. But the law already prohibits gifts to one's spouse, earmarked for a political contribution. We need no other stricture but enforcement of the law.

Ban on cash transactions

Certain types of transactions must be allowed. Small contributions—under $10—and button sales are obvious. Not so obvious are vendors who don't take checks. On the Sunday immediately preceding the 1972 Massachusetts Presidential primary, for example, Senator McGovern visited Springfield for a rally in a large hall. The landlord, it turned out at the last minute, would not accept a check except if certified, and the banks were closed.

There are logistical problems: if the amount of the expenditure cannot be known in advance, how can it be paid for if it occurs far from the campaign treasurer? Perhaps with a pre-signed, blank check? The cure is worse than the disease.

Allowing individuals to pay for campaign expenditures in cash, while they are reimbursed by check, defeats the original purpose of the ban on cash: to lay a plainer audit trail than under present law. (Present law requires the treasurer to obtain and keep receipts for expenditures over $10, and to keep accurate books, open to audit, on a current basis.)

It appears that the intention of those who propose a ban on cash transactions is to prevent transactions from occurring entirely outside the books, as apparently happened in the 1972 Nixon campaign. Sufficient to accomplish this purpose is a ban on cash *revenue* alone, for even CREEP must balance its books.

Single and central committee proposals

Certainly gift-tax committees should be eliminated. Geographical centralization, however, introduces a delay in reporting, caused by the delay in consolidating separate checking accounts or reports from up to 50 states.

Those who propose central committees wish primarily to centralize reporting of revenue. Revenue is easier to centralize than expenditures in any case. It would be possible to run a Presidential campaign with a central collection headquarters for revenue, while the central committee transferred funds to subsidiary committees (one, at most, per state). If the subsidiary committees were in addition limited to expenditures of $500 at a time, there would be very little opportunity for hanky-panky, while much time and effort would be saved in reporting.

Time of reports

The crucial date is the closing date of the last pre-election report, which should be as late as possible. (At present, it is 12 days before the election.) After this date, the committee prepares the report, it is transported to the supervisory officer, and it is analyzed by the public and its representatives. The objective of Congress should be to write laws which will minimize all three post-closing-date phases, and then to set the closing date as late as possible.

To minimize report preparation time, Congress should follow my recommendations (above) on raising disclosure thresholds. Thresholds for expenditure disclosure are also needlessly low for Presidential campaigns. And present law requires each expenditure to be itemized individually, while it is sometimes easier to consolidate expenditures to the same vendor (e.g. a telephone company). The law should allow the supervisory officer more leeway here in writing reasonable regulations.

To minimize transmittal time, the supervisory officer should be authorized to enter into contracts with major airlines for same-day transportation of reports from major airports to Dulles and National Airports on the day reports are due. This service is quite inexpensive and, I am sorry to say, both faster and more reliable than the Postal Service.

The time needed for public analysis is reduced almost to nothing by the sum of my recommendations thus far. At most it will involve consolidation of expenditure reports from about 60 committees (a national committee, 50 states, D.C., the territories, and other countries).

With these reforms, the closing date could in my opinion be as late as 8 days before the election, although 10 days might be preferable. In this case reports could be due 5 days before the election, as they are now.

Use of residual campaign funds

It should certainly be forbidden to use residual campaign funds for any purpose except future campaigns. Candidates should be allowed to donate these funds to the central (national) committee of their party. Congress should consider the question whether funds contributed to a candidate in his quest for one office should be usable for a campaign for a different office.

State filing

National Presidential campaign committees should be exempted from the requirements of filing duplicate reports in all states. The biggest McGovern for President report was over 3 feet thick, amounting to thousands of pages, and (so far as I know) remained unread outside of the District of Columbia.

I thank the Committee and its distinguished Chairman for giving me the opportunity to communicate on this most complex topic.

EXHIBIT 1A

93D CONGRESS
1ST SESSION

S. 372

[Report No. 93–170]

IN THE SENATE OF THE UNITED STATES

JANUARY 16, 1973

Mr. PASTORE (for himself and Mr. HOLLINGS) introduced the following bill; which was read twice and referred to the Committee on Commerce

JANUARY 23, 1973

Referred to the Committees on Commerce and Rules and Administration, jointly, with instructions

MAY 22, 1973

Reported by Mr. PASTORE, from the Committee on Commerce, with amendments; with instructions for the Committee on Rules and Administration to report within 30 days

A BILL

To amend the Communications Act of 1934 to relieve broadcasters of the equal time requirement of section 315 with respect to presidential and vice presidential candidates and to amend the Campaign Communications Reform Act to provide a further limitation on expenditures in election campaigns for Federal elective office.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Election Campaign Act of 1973".

~~SEC. 2.~~ *SEC. 2. (a)* Section 315(a) of the Communications Act of 1934 (47 U.S.C. 315(a)) is amended by inserting after "public office" in the first sentence thereof the

following: ", other than the office of President or Vice President,".

(b) Section 315(b) of such Act (47 U.S.C. 315(b)) is amended by striking out "by any person" and inserting "by or on behalf of any person".

SEC. 3. (a) Section 102 (1) of the Campaign Communications Reform Act is amended to read as follows:

~~"(1) The term 'expenditure' means—~~

~~"(A) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a National or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, or those who volunteer to work on behalf of a candidate), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;~~

~~"(B) a contract, promise, or agreement, express or~~

~~implied, whether or not legally enforceable, to make any expenditure; and~~

~~"(C) a transfer of funds between political committees."~~

"(1) The term 'expenditure'—

"(A) means—

"(i) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of any election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President;

"(ii) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(iii) a transfer of funds between political committees; but

"(B) does not include (i) a loan of money by a National or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business; (ii) the services of those

who volunteer to work on behalf of a candidate; or (iii) communications by an established membership organization (not organized for purely political purposes) to its members, or by a corporation (not organized for purely political purposes) to its stockholders."

(b) Section 102(5) of the Campaign Communications Reform Act is amended by inserting the following before the period: ", as determined by the Bureau of the Census as of the 1st day of June of the year preceding the year of the election".

(c) Section 102(6) of the Campaign Communications Reform Act is amended to read as follows:

"(6) The term 'State' means each State of the United States, the District of Columbia, the territory of Guam, the Commonwealth of Puerto Rico, and the territory of the Virgin Islands."

(d) Section 102 of the Campaign Communications Reform Act is amended by adding at the end thereof the following new paragraph:

"(7) The term 'person' means an individual, partnership, committee, association, corporation, labor organization, or group of persons.

SEC. 4. Section 104 of the Campaign Communications Reform Act is amended to read as follows:

"LIMITATION ON EXPENDITURES

~~"SEC. 104. (a) No candidate (other than a candidate for presidential nomination) may make expenditures in connection with his campaign for nomination for election, or election, to a Federal office in excess of 25 cents multiplied by the voting age population (as certified under subsection (c)) of the geographical area in which the election for such office is held. The limitation on expenditures imposed by this subsection shall apply separately to each primary, primary run-off, general, and special election campaign in which a candidate participates.~~

"SEC. 104. (a)(1) No legally qualified candidate (other than a candidate for Presidential nomination) may make expenditures in connection with his campaign for nomination for election, or election, to Federal office in excess of the greater of—

"(A) 25 cents multiplied by the voting age population (as certified under subsection (e)) of the geographical area in which the election for such office is held, or

"(B) the maximum amount allowable under paragraph (2).

"(2) For purposes of paragraph (1), the maximum amount allowable under this paragraph is—

"(A) $175,000, if the Federal office sought is that of

Senator, Delegate, Resident Commissioner, or Representative from a State which is entitled to only one Representative; and

"(B) $90,000, if the Federal office sought is that of Representative from a State entitled to more than one Representative.

"(3) The limitation on expenditures imposed by this subsection shall apply separately to each primary, primary runoff, general, and special election campaign in which a candidate participates.

"(b) No candidate for presidential nomination may make expenditures in any State in connection with his campaign for such nomination in excess of the amount which a candidate for nomination for election as United States Senator from that State (or for election as Delegate ~~or Resident Commissioner~~ in the case of the District of Columbia ~~or the Commonwealth of Puerto Rico, respectively~~) might expend within the State in connection with his campaign for that nomination. For purposes of this subsection, an individual is a candidate for presidential nomination if he makes (or any other person makes on his behalf) an expenditure on behalf of his candidacy for any political party's nomination for election to the office of President. He shall be considered to be such a candidate during the period—

"(1) beginning on the date on which he (or such

other person) first makes an expenditure (or, if later, on January 1 of the year in which the election for the office of President is held), and

"(2) ending on the date on which such political party nominates a candidate for the office of President. For purposes of this title and of section 315 of the Communications Act of 1934, a candidate for presidential nomination (as determined under the preceding sentence) shall be considered a legally qualified candidate for public office.

"~~(c)~~ *(c)(1)* Expenditures made on behalf of any ~~candidate~~ *legally qualified candidate or candidate for presidential nomination* shall, for the purpose of this section, be deemed to have been expended by such candidate. Expenditures made on behalf of any candidate for the office of Vice President of the United States shall, for the purpose of this section, be deemed to have been made by the candidate for the office of President of the United States with whom he is running.

"(2) For purposes of paragraph (1) no expenditure in an amount not in excess of $100 made on behalf of a candidate by a person or persons acting independently of the candidate shall be deemed to have been made by such candidate unless the person making the expenditure is the candidate or his agent, or is a political committee or other person required,

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under section 304 or 305 of the Federal Election Campaign Act of 1971, to report that expenditure to the Federal Election Commission."

"(d) (1) For purposes of paragraph (2)—

"(A) The term 'price index' means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics.

"(B) The term 'base period' means the calendar year 1970.

"(2) At the beginning of each calendar year (commencing in 1974), as there becomes available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the ~~Attorney General~~ *Federal Election Commission* and publish in the Federal Register the per centum difference between the price index for the twelve months preceding the beginning of such calendar year and the price index for the base period. Each amount determined under subsection (a) *of this section* shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

"(e) Within sixty days after the date of enactment of *the Federal Election Campaign Act of 1973*, and during the first week of January 1974, and every subsequent year, the Secretary of Commerce shall certify to the ~~Comptroller~~

~~General~~ *Federal Election Commission* and publish in the Federal Register an estimate of the voting age population of each State and congressional district as of the 1st day of June next preceding the date of certification.

"(f) No person shall make any charge for services or products furnished to, or for the benefit of, any *legally qualified* candidate in connection with his campaign for nomination for election, or election, in an amount in excess of $100 unless the candidate (or a person specifically authorized by the candidate in writing to do so) certifies in writing to the person making the charge that the payment of that charge will not exceed the expenditure limitations set forth in this section.

"(g) The ~~Comptroller General~~ *Federal Election Commission* shall prescribe regulations under which any expenditure by a candidate for presidential nomination for use in two or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the number of persons in such State who can reasonably be expected to be reached by such expenditure."

SEC. 5. Section 105 of the Campaign Communications Reform Act is amended to read as follows:

"REGULATIONS

"SEC. 105. The ~~Comptroller General~~ *Federal Election Commission* shall prescribe such regulations as may be

necessary to carry out sections 102, 103(b), and 104 of this Act."

SEC. 6. Section 106 of the Campaign Communications Reform Act is amended to read as follows:

"PENALTIES

"SEC. 106. Whoever willfully and knowingly violates any provision of section 103(b) or 104 or any regulation under section 105 shall be punished by a fine of not more than $5,000 or by imprisonment of not more than five years, or both."

SEC. 7. Subsections (c), (d), (e), and (f) of section 315 of the Communications Act of 1934 are repealed and subsection (g) of such section is redesignated as subsection (c).

SEC. 8. (a) Title III of the Federal Election Campaign Act of 1971 (relating to disclosure of Federal campaign funds) is amended by redesignating sections 308 through 311 as sections 310 through 313, respectively, and by inserting after section 307 the following new sections:

"FEDERAL ELECTION COMMISSION

"SEC. 308. (a)(1) There is hereby established, as an independent establishment of the executive branch of the Government of the United States, a commission to be known as the Federal Election Commission, hereinafter referred to as the 'Commission.'

"(2) The Commission shall be composed of nine members who shall be appointed by the President and with the advice and consent of the Senate.

"(3) Except as provided in this paragraph, members of the Commission shall be appointed for terms of fifteen years each, ending at noon on the 30th day of April in each case. Of the members initially appointed under this section—

"(A) three shall be appointed for terms ending at noon on the thirtieth day of the fifth April beginning after the date of enactment of the Federal Election Campaign Act of 1973,

"(B) three shall be appointed for terms ending at noon on the thirtieth day of the tenth April beginning after the date of enactment of the Federal Election Campaign Act of 1973, and

"(C) three shall be appointed for terms ending at noon on the thirtieth day of the fifteenth April beginning after the date of enactment of the Federal Election Campaign Act of 1973.

"(4) Members shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment. Not more than five members of the Commission shall be affiliated with the same political party.

"(5) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be

appointed only for the unexpired term of the member he succeeds.

"(6) The Commission shall elect a Chairman and a Vice Chairman from among its members for such terms as the Commission determines appropriate. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman, or in the event of a vacancy in that office.

"(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and five members thereof shall constitute a quorum.

"(c) The Commission shall have an official seal which shall be judicially noticed.

"(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the money it has disbursed; and shall make such further reports on the matters within its jurisdiction and such recommendations for further legislation as may appear desirable.

"(e) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers in any State.

"(f) The Commission shall appoint a General Counsel and an Executive Director to serve at the pleasure of the

Commission. The General Counsel shall be the chief legal officer of the Commission. The Executive Director shall be responsible for the administrative operations of the Commission and shall perform such other duties as may be delegated or assigned to him from time to time by regulations or orders of the Commission. However, the Commission shall not delegate the making of regulations regarding elections to the Executive Director.

"(g) The Chairman of the Commission shall appoint and fix the compensation of such personnel as may be necessary to fulfill the duties of the Commission in accordance with the provisions of title 5, United States Code.

"(h) The Commission may obtain the services of experts and consultants in accordance with section 3109 of title 5, United States Code.

"(i) In carrying out its responsibilities under this title, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities, of the General Accounting Office and the Department of Justice. The Comptroller General and the Attorney General are authorized to make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

"POWERS OF COMMISSION

"SEC. 309. *(a) The Commission shall have the power—*

"(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine;

"(2) to administer oaths;

"(3) to require by subpena the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

"(4) in any proceeding or investigation to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

"(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

"(6) to accept gifts and voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes (31 U.S.C. 665(b));

"(7) to initiate (through civil proceedings for injunctive relief and through presentations to Federal grand juries), prosecute, defend, or appeal any court

action in the name of the Commission for the purpose of enforcing the provisions of title I and this title through its General Counsel; and

"(8) to delegate any of its functions or powers, other than the power to issue subpenas under paragraph (3), to any officer or employee of the Commission.

"(b) Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission, in case of refusal to obey a subpena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance therewith; and any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(c) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

"(d)(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

"(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have author-

ity to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress."

(b)(1) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(60) Members, Federal Election Commission (9)."

(2) Section 5315 of such title is amended by adding at the end thereof the following new paragraphs:

"(98) General Counsel, Federal Election Commission.

"(99) Executive Director, Federal Election Commission."

(c) Until the appointment and qualification of all the members of the Federal Election Commission and its General Counsel and until the transfer provided for in this subsection, the Comptroller General, the Secretary of the Senate, and the Clerk of the House of Representatives shall continue to carry out their responsibilities under title I and title III of the Federal Election Campaign Act of 1971 as such titles existed on the day before the date of enactment of this Act. Upon the appointment of all the members of the Commission and its General Counsel, the Comptroller General, the Secretary of

the Senate, and the Clerk of the House of Representatives shall meet with the Commission and arrange for the transfer, within thirty days after the date on which all such members and the General Counsel are appointed, of all records, documents, memorandums, and other papers associated with carrying out their responsibilities under title I and title III of the Federal Election Campaign Act of 1971.

. (d) Title III of the Federal Election Campaign Act of 1971 is amended by—

(1) amending section 301(g) (relating to definitions) to read as follows:

"(g) 'Commission' means the Federal Election Commission;";

(2) striking out "supervisory officer" in section 302(d) and inserting "Commission";

(3) amending section 302(f) (relating to organization of political committees) by—

(A) striking out "appropriate supervisory officer" in the quoted matter appearing in paragraph 1 and inserting "Federal Election Commission";

(B) striking out "supervisory officer" in subparagraphs (A) and (B) of paragraph (2) and inserting "Commission";

(C) striking out "which has filed a report with

him" in paragraph (2)(A) and inserting "which has filed a report with it";

(4) amending section 303 (relating to registration of political committees; statements) by—

(A) striking out "supervisory officer" each time it appears therein and inserting "Commission"; and

(B) striking out "he" in the second sentence of subsection (a) of such section and inserting "it";

(5) amending section 304 (relating to reports by political committees and candidates) by—

(A) striking out "appropriate supervisory officer" and "him" in the first sentence thereof and inserting "Commission" and "it", respectively; and

(B) striking out "supervisory officer" where it appears in the third sentence of subsection (a) and in paragraphs (12) and (13) of subsection (b), and inserting "Commission";

(6) striking out "supervisory officer" each place it appears in section 305 (relating to reports by other than political committees) and section 306 (relating to formal requirements respecting reports and statements) and inserting "Commission";

(7) striking out "Comptroller General of the United States" and "he" in section 307 (relating to reports on

convention financing) and inserting "Federal Election Commission" and "it", respectively;

(8) striking out "SUPERVISORY OFFICER" in the caption of section 310 (as redesignated by subsection (a) of this section) (relating to duties of the supervisory officer) and inserting "COMMISSION";

(9) striking out "supervisory officer" in section 310 (a) (as redesignated by subsection (a) of this section) the first time it appears and inserting "Commission";

(10) amending section 310(a) (as redesignated by subsection (a) of this section) by—

(A) striking out "him" in paragraph (1) and inserting "it";

(B) striking out "him" in paragraph (4) and inserting "it"; and

(C) striking out "he" each place it appears in paragraphs (7) and (9) and inserting "it".

(11) striking out "supervisory officer" in section 310(b) (as redesignated by subsection (a) of this subsection) and inserting "Commission";

(12) amending subsection (c) of section 310 (as redesignated by subsection (a) of this section) by—

(A) striking out "Comptroller General" each place it appears therein and inserting "Commission",

and striking "his" in the second sentence of such subsection and inserting "its"; and

(B) striking out the last sentence thereof;

(13) amending subsection (d)(1) of section 310 (as redesignated by subsection (a) of this section) by—

(A) striking out "supervisory officer" each place it appears therein and inserting "Commission";

(B) striking out "he" the first place it appears in the second sentence of such section and inserting "it"; and

(C) striking out "the Attorney General on behalf of the United States" and inserting "the Commission or the Attorney General on behalf of the United States"; and

(14) striking out "a supervisory officer" in section 311(a) (as redesignated by subsection (a) of this section) (relating to statements filed with State officers) and inserting "the Commission".

SEC. 9. (a) Title III of the Federal Election Campaign Act of 1971 is amended by adding at the end thereof the following new sections:

"APPROVAL OF PRESIDENTIAL CAMPAIGN EXPENDITURES BY NATIONAL COMMITTEE

"SEC. 314. (a) No expenditure in excess of $100 shall be made by or on behalf of any candidate who has received the nomination of his political party for President or Vice

President unless such expenditure has been specifically approved by the chairman or treasurer of that political party's national committee or the designated representative of that national committee in the State where the funds are to be expended.

"(b) Each national committee approving expenditures under subsection (a) shall register under section 303 as a political committee and report each expenditure it approves as if it had made that expenditure, together with the name and address of the person seeking approval and making the expenditure.

"(c) No political party shall have more than one national committee.

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 315. There are authorized to be appropriated to the Commission, for the purpose of carrying out its functions under title I and this title, not to exceed $2,500,000 for the fiscal year ending June 30, 1974, and not to exceed $2,500,000 for each fiscal year thereafter."

(b) Section 301 of the Federal Election Campaign Act of 1971 is amended by—

(1) striking out "and" after the semicolon in subsection (h),

(2) striking the period at the end of subsection (i) and inserting in lieu thereof "; and", and

(3) inserting at the end of such section the following new subsection:

"(j) 'national committee' means the duly constituted organization, which by virtue of the bylaws of a political party is responsible for the day-to-day operation of that political party at the national level, as determined by the Federal Election Commission."

SEC. 10. Section 403 of the Federal Election Campaign Act of 1971 is amended to read as follows:

"EFFECT ON STATE LAW

"SEC. 403. The provisions of this Act, and of regulations promulgated under this Act, supersede any provision of State law with which they conflict with respect to campaigns for nomination for election, or for election, to Federal office (as such term is defined in section 301(c))."

Amend the title so as to read: "A bill to amend the Communications Act of 1934 to relieve broadcasters of the equal time requirement of section 315 with respect to presidential and vice presidential candidates, to amend the Campaign Communications Reform Act to provide a further limitation on expenditures in election campaigns for Federal elective office, and for other purposes."

EXHIBIT 1B

93D CONGRESS
1ST SESSION

S. J. RES. 110

IN THE SENATE OF THE UNITED STATES

MAY 16, 1973

Mr. SCOTT of Pennsylvania (for himself, Mr. COOK, Mr. DOLE, Mr. GRIFFIN, and Mr. MANSFIELD) introduced the following joint resolution; which was read twice and referred to the Committee on Rules and Administration

JOINT RESOLUTION

To establish a nonpartisan commission on Federal election reform.

Whereas the strength of our democracy rests on the integrity of our political processes;

Whereas the confidence of the public in the integrity of those processes must be assured;

Whereas the Congress and the President recognize the need to establish an impartial commission to study the conduct of election campaigns and to make recommendations concerning future practices: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This resolution may be cited as the "Election Reform Commission Act of 1973".

II

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SEC. 2. There is hereby established an independent commission, to be known as the Nonpartisan Commission on Federal Election Reform (hereinafter referred to as the "Commission").

SEC. 3. The Commission shall—

(a) Conduct an extensive and exhaustive study of the practices engaged in by political parties and individuals in the course of Federal political campaigns, which might include, but would not be limited to, such matters as—

(i) the adequacy of procedures for the enforcement of existing laws relating to political campaigns and campaign financing;

(ii) the existing and alternative methods of financing political campaigns and limitations on campaign spending;

(iii) the review of Federal tax laws as they relate to the financing of political campaigns;

(iv) the purposes for which money is expended in political campaigns, such as development of campaign organizations, campaign advertising, voter registration, and polling;

(v) the methods and procedures by which candidates are nominated for Federal office by political parties;

(vi) the adequacy of safeguards against unethical,

disruptive, fraudulent, violent, or otherwise wrongful campaign tactics;

(vii) the interrelationship of Federal, State, and local campaigns, and of Federal, State, and local laws relating to campaigns and campaign financing;

(viii) the length of the period over which candidates are required to campaign for nomination and election to Federal office.

(b) Consider the advisability of changing the term of office of Members of the House of Representatives, or the Senate, or the President of the United States.

(c) Make recommendations for such legislation, constitutional amendment, or other reforms as its findings indicate, and in its judgment are desirable to revise and control the practices and procedures of political parties, organizations, and individuals participating in the Federal electoral process.

SEC. 4. The Commission shall consist of the following members:

(i) four Members of the Senate, two from each of the major political parties, appointed by the President of the Senate as recommended by the majority and minority leaders;

(ii) four Members of the House of Representatives,

two from each of the major political parties, appointed by the Speaker of the House of Representatives;

(iii) nine individuals from private life to be appointed by the President of the United States, two of whom shall be the respective chairmen of the national political parties having polled the highest and second highest vote pluralities in the last national election, and seven of whom shall be selected from the general public on the basis of their experience and expertise in public service or political science. No more than four of the seven selected from the general public shall be members of the same political party.

(iv) The Chairman and Vice Chairman shall be designated by the Commission from among the members of the Commission.

SEC. 5. (a) Members of Congress who are members of the Commission shall serve without compensation in addition to that received for their services as Members of Congress; but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(b) Each member of the Commission who is appointed by the President is entitled to pay at the daily equivalent of the annual rate of basic pay of level II of the Executive Schedule for each day he is engaged on the work of the Com-

mission, and is entitled to travel expenses, including a per diem allowance, in accordance with section 5703 (b) of title 5, United States Code.

SEC. 6. The Commission shall adopt rules of procedure to govern its proceedings. Vacancies on the Commission shall not affect the authority of the remaining members to continue with the Commission's activities, and shall be filled in the same manner as the original appointments.

SEC. 7. (a) The Commission, or any members thereof as authorized by the Commission, may conduct hearings anywhere in the United States or otherwise secure data and expressions of opinion pertinent to its study. In connection therewith the Commission is authorized to pay witnesses travel, lodging, and subsistence expenses.

(b) The Commission may require directly from the head of any Federal executive department or agency or from the Congress, available information which the Commission deems useful in the discharge of its duties. All Federal executive departments and agencies and the Congress shall cooperate with the Commission and furnish all information requested by the Commission to the extent permitted by law.

(c) The Commission may enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of

reports, and other activities necessary to the discharge of its duties.

(d) The Commission may delegate any of its functions to individual members of the Commission or to designated individuals on its staff and make such rules and regulations as are necessary for the conduct of its business, except as otherwise provided in this resolution.

SEC. 8. (a) The Commission may, without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service or to classification and General Schedule pay rates, appoint and fix the compensation of such additional personnel as may be necessary to carry out the functions of the Commission.

(b) The Commission may obtain services in accordance with section 3109 of title 5 of the United States Code, but at rates for individuals not to exceed the rate authorized for GS–18 under the General Schedule.

(c) Financial and administrative services (including those related to budgeting and accounting, financial reporting, personnel, and procurement) shall be provided the Commission by the General Services Administration, on a reimbursable basis, from funds of the Commission in such amounts as may be agreed upon by the Chairman of the Commission and the Administrator of General Services. The regulations of the General Services Administration for the

collection of indebtedness of personnel resulting from erroneous payments apply to the collection of erroneous payments made to or on behalf of a Commission employee, and regulations of that Administration for the administrative control of funds apply to appropriations of the Commission.

SEC. 9. (a) The Commission shall submit to the Congress and the President such interim reports and recommendations as it considers appropriate, and the Commission shall make a final report of the results of the study conducted by it pursuant to this resolution, together with its findings and such legislative proposals as it deems necessary or desirable, to the Congress and the President at the earliest practicable date, but no later than December 1, 1973.

(b) Ninety days after submission of its final report, as provided in subsection (a) above, the Commission shall cease to exist.

SEC. 10. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this resolution. Any money so appropriated shall remain available to the Commission until the date of its expiration, as fixed by section 9 (b).

EXHIBIT 2

STATEMENT OF ERWIN N. GRISWOLD, SOLICITOR GENERAL, DEPARTMENT OF JUSTICE, BEFORE THE SUBCOMMITTEE ON COMMERCE AND FINANCE OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, ON H.R. 5050

I appreciate the opportunity the Committee has provided for me to appear this morning to state the views of the Department of Justice on the provision in Section 101 of the bill that would authorize the Securities and Exchange Commission "to conduct in its own name and through its own attorneys litigation * * * in the United States * * * Supreme Court." The Department of Justice strongly opposes this provision.

I.—THE FUNCTIONS OF THE SOLICITOR GENERAL

On the basis of my close contact with and observation of the Office of the Solicitor General for more than 40 years, it is my opinion that permitting the Commission to handle its own Supreme Court litigation would be contrary to the best interests of both the federal government as the major litigant before the Supreme Court and of the Court itself. In order to explain the reasons for this conclusion, I think that it would be helpful at the outset to explain briefly the role of the Solicitor General in representing the federal government before the Supreme Court.

The position of Solicitor General was created in 1870, at the same time that the Department of Justice was established as an Executive Department. For more than 100 years the Solicitor General's chief responsibility has been representing the interests of the federal government before the Supreme Court. This authority stems from the provision creating the office in the 1870 statute (16 Stat. 162) and now contained in 28 U.S.C. 518(a), which provides that "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." The Solicitor General decides what cases the federal government should ask the Supreme Court to review, and what position the government should take when review is sought by the other side where the government prevailed in the lower courts, *i.e.*, whether it should oppose or agree to review. When cases are heard on the merits, the Solicitor General determines what position the government should take, and supervises and has the final authority over the brief that the government files. The Solicitor General also decides whether the government should file briefs *amicus curiae* in non-government cases in which the government may have an interest.

The office has a small staff (14 at the moment) of skilled lawyers. Most of the legal documents the government files in the Supreme Court are first prepared either in one of the operating divisions of the Department of Justice or by a regulatory agency. The function of the Office of the Solicitor General is primarily one of reviewing the drafts. In the course of such review, however, the briefs and other documents frequently are substantially revised and rewritten. In that process, of course, the lawyers in the office work closely with the lawyers from the operating divisions and the regulatory agencies. The documents which the Solicitor General and his staff review and revise include briefs on the merits, petitions for writs of certiorari and jurisdictional statements, briefs in opposition, and a wide variety of other legal documents, such as applications and oppositions to stay, applications for extensions of time, etc.

The Solicitor General also personally decides who is to argue government cases in the Supreme Court. The government presents oral argument in approximately 100 cases a year, which are roughly two-thirds of the total cases the Court hears. The Solicitor General traditionally argues the most important cases himself. Cases also are argued by members of his staff, by other lawyers in the Department, and, in the case of the regulatory agencies, usually by lawyers on the legal staffs of those agencies.

The volume of work the office handles is large. In the last Term of the Supreme Court, which ended in June 1972, the government filed 91 briefs on the merits (of which 9 were briefs *amicus curiae* in private cases in which the government had a substantial interest), 44 petitions for writs of certiorari, 11 jurisdictional statements, 1412 briefs in opposition to petitions for certiorari or motions to affirm (of which 20 were briefs *amicus curiae*). It also filed 229 miscellaneous legal papers.

II.—THE REASONS FOR CONTROL BY THE SOLICITOR GENERAL OF GOVERNMENT SUPREME COURT LITIGATION

For many years the control of all government litigation has been centralized in the Office of the Solicitor General. I would like to explain the reasons for this practice.

1. Such control insures that the government presents to the Supreme Court only those cases that meet the Court's own exacting standards for review. The Court grants review in only a small number of the cases presented to it. Over the past decade the number of cases it has reviewed has ranged from 7 to 10 percent. (This does not include *in forma pauperis* petitions, most of which are filed by prisoners themselves in their own handwriting, and only a few of which are granted.) In this period of increasing court congestion, and the Supreme Court's own concern over its rapidly mounting docket which makes it so difficult for the Court adequately to consider all the cases it is asked to review, it is particularly important that the Court have presented to it on behalf of the government only those cases that appear appropriate for the Court to review. The vast bulk of the private cases presented to the Court simply do not warrant review, either because the questions raised are not sufficiently important or the issues they assertedly present are not in fact involved in the case. The careful screening of cases by the Solicitor General before the Supreme Court is asked to review them prevents the presentation to the Supreme Court of many cases that it should not be asked to review. The effectiveness and soundness of this careful review by the Solicitor General is shown by the fact that, although the Court grants review in only 7 to 10 percent of the cases presented to it, it takes between 60 and 70 percent of the government's cases.

2. Control of government Supreme Court litigation is important to avoid inconsistencies or incompatibilities in the position the government takes before the Court. The same or closely-related legal issues may arise in cases involving different government agencies. Major questions of general administrative law may be presented in cases from any of the regulatory agencies. A Supreme Court decision on such an issue rendered in a case involving the Federal Power Commission, for example, is likely also to control the proceedings before the other agencies, such as the Securities and Exchange Commission and the National Labor Relations Board. Generally, there cannot be one rule of procedure for one agency and another rule for another.

It is important that the positions to be taken by a single agency on a question of general concern to the federal government and all of its agencies reflect the overall best interests of the entire federal government, and not just the interest of the particular agency in winning the particular case. For this reason, the Solicitor General customarily solicits the views of all the major regulatory agencies before he decides what position to take with respect to an issue that affects them all. If there were no such control of the agencies' litigation by the Solicitor General, a particular agency, by pressing its particular case in the Supreme Court, might produce a result that would redound to the overall detriment of the federal government.

There are two specific areas in which the problem of coordination and selecting the uniform position that is in the best interest of the federal government is particularly significant at this time. I refer to the substantial volume of litigation under both the Freedom of Information Act and the National Environmental Policy Act. These broad statutes cut across particular agencies and departments of the government, and the same question is likely to arise in litigation involving numerous segments of the government. The Department of Justice has an Intradepartmental Committee which acts as a coordinating group and clearing house for determining the litigation position and strategy the government should take as these many and difficult questions under the Freedom of Information Act arise. If each regulatory agency could present its own cases under these statutes to the Supreme Court without any centralized control and coordination of the

government's overall policies and positions under those Acts, the result, I fear, would border on the chaotic.

3. A related consideration is the importance of avoiding the litigation of significant legal issues that have government wide impact in a case which, because of its factual and procedural coloration, may be a poor vehicle for litigating the question. One of the major considerations the Solicitor General applies in deciding whether to ask the Supreme Court to hear a case is the suitability of the case as a vehicle for deciding the issue. Bad facts frequently color the Court's reaction to the legal issues, and it has been the experience of the office over many years that the government is ill-advised to litigate in the Supreme Court an important legal issue in a factual context in which the Court's sympathies are likely to be with the other side. The various regulator agencies, however, may not always see this broader picture, since they are understandably dismayed when a court of appeals has reversed one of their decisions where they believe that such action was unwarranted.

An example of this situation arose this past year in a case of the Securities and Exchange Commission involving the Freedom of Information Act. The Court of Appeals for the Second Circuit upheld the Commission's position that it was not required to produce certain material because the material was covered by an exemption in the Freedom of Information Act for investigatory files. *Frankel* v. *S.E.C.*, 460 F.2d 813. A petition for a writ of certiorari was filed which allowed that the decision of the Second Circuit was in conflict with a decision of the Court of Appeals for the District of Columbia Circuit. Upon receipt of the petition, the initial reaction of the Commission's lawyers, in informal discussion with a member of my staff, was that it would be appropriate for the Commission to acquiesce in the petition since this appeared to be a good case in which to obtain a Supreme Court decision on the meaning of that exemption.

The Department of Justice's Freedom of Information Act Committee reviewed the case, however, and on the basis of its broader experience in dealing with this exemption, concluded that this would be a poor case on its facts for a Supreme Court test of the exemption, and that the government's best overall interests would be served by opposing the petition. Upon careful analysis, it turned out that the decision of the Second Circuit was not in fact in conflict with that of the District of Columbia Circuit. Upon being advised of the Departments views, the Commission agreed that in the circumstances it would not be appropriate to acquiesce. The Solicitor General accordingly filed, on behalf of the Commission, a brief in opposition which argued that the decision of the Second Circuit was correct and that there was in fact no conflict. The Supreme Court denied certiorari. *Frankel* v. *S.E.C.*, certiorari denied, 409 U.S. 889.

This is the kind of case in which, if the Commission were handling its own Supreme Court litigation, it probably would have urged the Supreme Court to grant the petition. Had it done so, the Court could well have taken the case and there is a real danger that it would have decided against the Commission. The result would have been a damaging precedent not only for the Commission but for the entire government. That possibility was avoided as a result of the Solicitor Generals overall view and control of all government Supreme Court litigation.

4. Finally, the Solicitor General and his staff are able to bring to bear in the conduct of government Supreme Court litigation the skills, experience and knowledge that the office has gained over many years. I think that the high caliber of the professional work of the office is generally recognized by the bar and by the Court itself. Although the staff of the office naturally changes, there always have been a few career people who are repositories of skills and knowledge that they can pass on to the new members of the staff. Practice before the Supreme Court is a specialized field of the law, and the Office of the Solicitor General possesses an expertise in this field that is generally not had by the legal staffs of the regulatory agencies.

III.—VIEWS OF OTHERS CONCERNING THE DESIRABILITY OF CONTROL OF GOVERNMENT SUPREME COURT LITIGATION BY THE SOLICITOR GENERAL

The observations I have made above are based upon my experience in the Office of the Solicitor General, and on my observations of its role and function over a good many years. I believe, though, that these views are widely held by persons who are closely familiar with the professional work of the Solicitor Generals office.

In October, 1971, Congressman Moss wrote to the Chief Justice requesting his views "as to what effect there would be on the Courts work-load if the [Securities and Exchange] Commission were empowered to conduct its Supreme Court litigation independently of the Solicitor General's office." This letter, and the Chief Justice's reply were reprinted at pages 1809–1810 of Part 3 of the Subcommittees' Hearings on its Study of the Securities Industry. In response, the Chief Justice wrote that he had presented the matter to the Conference of the Justices. He said:

> It is the unanimous view of the Justices that it would be unwise to dilute the authority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies. It is very likely that there would be an increase in the work load of the Supreme Court if matters could be brought here without the concurrence of the Solicitor General. Even more important, perhaps, the Solicitor General exercises a highly important role in the selection of cases to be brought here in terms of the long-range public interest.

Another important observation has been made by Professor Louis Loss, the great authority on the Securities and Exchange Commission, and the general field of Securities Regulation. Professor Loss is himself a former high official of the Securities and Exchange Commission. He has pointed out that "the SEC, like the other 'independent' agencies, has benefitted from both the expertness and the prestige of the Solicitor General's office in Supreme Court litigation" (III Loss, *Securities Regulation* (2d ed.), p. 1881, fn. 16). As Professor Loss also records (*id.*), "In 1958 the Chairman testified that back through the 1951 term of the Supreme Court the Solicitor General had refused two formal requests to seek certiorari as compared with an average of two petitions filed with the Supreme Court each year by the SEC; that these refusals had not 'tended to impair the work of the Commission'; and that 'the existing practice works and seems adequately to protect the Supreme Court calendar.' Investigation of Regulatory Commissions and Agencies, *supra*, 1 Hearings at 188–89."

IV.—THE PRACTICE OF THE SOLICITOR GENERAL IN SEEKING SUPREME COURT REVIEW ON BEHALF OF REGULATORY AGENCIES AND AUTHORIZING THE AGENCIES TO REPRESENT THEMSELVES BEFORE THE COURT

The present proposal that the Securities and Exchange Commission should have control of its own Supreme Court litigation is not a novel one. From time to time bills have been introduced that would give similar authority either to particular agencies or to a group of agencies. A frequently voiced justification for such legislation is the refusal of the Solicitor General from time to time to authorize the filing of a petition for certiorari in a case that the agency wants to present to the Supreme Court.

When the Solicitor General declines to authorize the filing of a petition for certiorari by an agency, it is usually for one or more of the reasons that I have previously outlined, that is, (1) the position that the agency wants to take appears not in the best interests of the federal government overall, or (2) the legal question either is not in fact presented by the case or is presented in a poor setting, or (3) the issue does not appear, when viewed in the broader perspective of the government's overall litigation in the Supreme Court, to be sufficiently important to warrant asking the Supreme Court to decide it.

On rare occasions, the Solicitor General has declined himself to file a petition because of his conclusion that the legal arguments the agency wished to make were ones which he could not in good conscience support. In that situation, if the agency can demonstrate that the question is important to it, the customary practice has been for the Solicitor General himself not to sign the brief but to authorize the agency to represent itself. Those instances, fortunately, have been rare.

The Solicitor General also often authorizes the agency to represent itself where there is a disagreement between two agencies, or between an agency and an Executive Department, and the Solicitor General concludes that either the merits of the case or the best overall interests of the government require that he take the other side. Several examples of this occurred this past year.

In *United States* v. *Otter Tail Power Company*, decided February 22, 1973, a government civil antitrust suit in which I appeared for the United States, I authorized the Federal Power Commission to file a brief *amicus curiae* taking a position contrary to that of the United States. In *Federal Maritime Commis-*

sion v. *Seatrain Lines*, decided May 14, 1973, in which both the Maritime Commission and the United States were statutory parties to a suit to review a Commission order but took conflicting positions, I appeared for the United States and authorized the Commission to file its own petition (which the United States did not oppose) and its own brief on the merits. In *Gulf States Utilities Company* v. *Federal Power Commission*, decided May 14, 1973, which involved the question whether the Power Commission was required to consider antitrust issues in passing upon an application by a public utility to issue securities, I authorized the Commission to appear for itself, and I concurrently filed a brief *amicus curiae* on behalf of the United States disagreeing with the Commission.

I have prepared some statistics for the 10 years beginning with the 1963 Term of the Supreme Court showing the number of requests the various regulatory agencies have made that the Solicitor General seek Supreme Court review, the number of instances in which he has done so and has declined to do so, the number of cases the Supreme Court has taken, and the ultimate outcome. I will give the figures for each of these agencies. The last figures I shall give are those for the Securities and Exchange Commission, and I will then discuss specific cases of that agency.

The largest number of petitions for certiorari in the last 10 years has been filed on behalf of the National Labor Relations Board. The Solicitor General was requested 62 times in that period to file petitions. He filed 48 of them and declined to file 14. Of the 48 petitions he filed, 34 were granted, and one has not been acted on. The Board prevailed in 29 of those granted, lost 4, and one case has not been decided.

In the case of the Federal Trade Commission the Solicitor General was requested to file petitions in 28 cases; he did so in 18 and declined to do so in 10. The Court granted 14 of the 18 petitions, and the Commission prevailed in all of those.

The Solicitor General was requested to file 26 petitions on behalf of the Federal Power Commission. He authorized 24 of them: 21 of those filed were granted, and the Commission prevailed in 20 of those cases, although in some only in part; one case has not yet been heard and one has not been acted on.

The Solicitor General authorized one of three petitions he was requested to file on behalf of the Civil Aeronautics Board; the Court granted the petition but the Board lost on the merits.

The Solicitor General was requested to and did file one petition for certiorari for the Federal Communications Commission; the Court granted it and the Commission won the case. He also filed several joint petitions on behalf of the Federal Communications Commission and the United States in cases where both were statutory parties. One of those cases was *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, in which the Court upheld the Commission's "fairness" doctrine, which requires broadcasters fairly to present opposing views on public issues. Another was *Columbia Broadcasting System* v. *Democratic National Committee* (No. 71–863), in which the Court last week on May 29, 1973, upheld the position of the Federal Communications Commission that neither the Federal Communications Act nor the First Amendment requires broadcasters to accept non-commercial advertisements.

In the case of the Securities and Exchange Commission, the Solicitor General was requested eight times to file a petition for a writ of certiorari. He did so on six occasions; in all six cases the Court granted the petition and the Commission prevailed on the merits. In one of those cases, the *Medical Committee* case (*S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403), the Court held that the case had become moot and vacated the judgment of the court of appeals that was adverse to the Commission.

The foregoing statistics give only part of the picture of the role of the Solicitor General in representing the agencies before the Supreme Court. There have been many cases which the Court has heard on the application of persons challenging agency action, where the Solicitor General has vigorously and effectively defended the agency's position. In addition, he frequently argues the major agency cases himself. For example, I argued the *Columbia Broadcasting* case previously mentioned for the government. In 1967 I argued for the Securities and Exchange Commission—and won—the *National Securities* case (*S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453), which presented important questions concerning the applicability of the federal securities laws to the securities of insurance companies.

V.—SPECIFIC INSTANCES OF DISAGREEMENT AND ACCOMMODATIONS BETWEEN THE SOLICITOR GENERAL AND THE SECURITIES AND EXCHANGE COMMISSION

I will now discuss certain specific cases involving the Securities and Exchange Commission which have been handled by the Solicitor General's office over the past ten years.

One of the cases in which the Solicitor General declined to file a petition for certiorari on behalf of the Securities and Exchange Commission was the *Grayson-Robinson Stores* case in 1963 (*Grayson-Robinson Stores* v. *S.E.C.*, 320 F.2d 940 (C.A. 2d). The question there was whether the lower courts had correctly refused to dismiss a proceeding for an arrangement under Chapter XI of the Bankruptcy Act and to compel the company to resort to a reorganization under Chapter X. It was the conclusion of the staff lawyers in the Office and of the Solicitor General that that case did not present the issue in an appropriate context for Supreme Court review. The following year, in 1964, the Solicitor General did file a petition for the Commission on the same question in the *American Trailer Rentals* case (*S.E.C.* v. *American Trailer Rentals*, 379 U.S. 594) in which the Court granted the petition and upheld the Commission's position.

The other case in which the Solicitor General did not file a petition was *Klopp* v. *Securities and Exchange Commission* (427 F.2d 455), in which he declined to authorize an application for certiorari in November, 1970. That was a case in which the Court of Appeals for the Sixth Circuit had reversed a Commission decision that salesmen with a stock brokerage firm had engaged in fraudulent practices. I had no disagreement with the Commission that in reversing the agency decision the court of appeals had improperly itself undertaken to review the record *de novo* instead of testing the Commission's decision under the substantial evidence test. The question of the misapplication of the substantial evidence standard in a particular case, however, is not an issue that warrants Supreme Court review. This often appears when petitions are filed against the government in agency cases. Where the court of appeals has upheld an agency, the Supreme Court is frequently asked by private parties to review the decision, on the ground that the reviewing court misapplied the substantial evidence test. The government consistently and successfully opposes those petitions by taking the position that that issue is not of sufficient importance to warrant Supreme Court review. It would be anomalous for the government to take the contrary position merely because the agency had lost rather than won before the court of appeals. Moreover, we would not have fairly argued in that case that the decision involved anything more than a misapplication of settled principles, and I did not see how the government could properly ask the Court to review that narrow issue. Finally, the case itself was not a particularly attractive one which would likely appeal to the Court, since the victims of the fraud there were not old people or unsophisticated widows but were two young "swinging" traders who obviously knew what they were doing.

Another case I want to discuss is *Harwell* v. *Growth Programs, Inc.*, 451 F.2d 240, rehearing denied, 459 F.2d 461, in which the Commission requested me to file a brief *amicus curiae* in support of the petition for certiorari. As I have indicated, the Solicitor General's function in representing the government before the Supreme Court includes not only deciding whether to file a petition for certiorari but also deciding whether the government should file an *amicus* brief in a private case. The *Harwell* case was a private suit in which it was alleged that certain actions taken by the National Association of Securities Dealers violated the antitrust laws. Without a trial, the district court granted summary judgment for the defendants, holding that when the Association acted in its regulatory capacity under the supervision of the Securities and Exchange Commission, it is immune from antitrust suits. On appeal, the court of appeals reversed, on the ground that, under the circumstances, summary judgment without a trial was improper. In so doing, it expressly stated that it was not making any final determination of the legal issues in the case (451 F.2d at 242), and in its opinion on petition for rehearing it "reemphasize[d] that our decision is not intended to suggest the ultimate determination of the facts in this case or to intimate any opinion on the merits of plaintiffs' antitrust claim. Those determinations are for the district court" (459 F.2d at 462).

Although the petition for certiorari argued that the case presented important issues involving the reconciliation of the Securities Exchange Act and the antitrust laws, the fact was that those issues were not ripe for Supreme Court review at that time. The court of appeals had explicitly declined to decide any of the

issues on the merits; indeed, the National Association of Securities Dealers ultimately may prevail on those issues following the remand. Since the government frequently opposes a petition for certiorari filed against it on the ground that the questions presented are not ready for review because of a remand for further proceedings, it would have been inappropriate for the government to urge the Supreme Court to take the *Harwell* case to decide important issues that the court of appeals had declined to decide and that call for further findings and clarification by the district court before ultimate determination. Indeed, the court of appeals' decision in *Harwell* really involved no more than the application of a settled principle that summary judgment is not favored in complex antitrust litigation. See *Potter* v. *Columbia Broadcasting System*, 368 U.S. 464, 473; *United States* v. *Diebold, Inc.*, 369 U.S. 654.

In *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, the Solicitor General in September 1971 filed in the Supreme Court a "Brief for the United States and Brief for the Securities and Exchange Commission as Amicus Curiae." That brief (pp. 24–26, 51–68) fully set forth the views of the Commission, as is indicated by the fact that it was signed by the Commission's General Counsel, Associate General Counsel, Assistant General Counsel, and Special Counsel. The views of the Commission in the case were unrelated to the claims against the United States; they had to do, instead, with claims being made by the Affiliated Ute Citizens under the securities laws against other respondents in the case.

On September 23, 1971, the Solicitor General asked the Court to expand the time allotted for oral argument in the case to enable the government's argument to be presented separately from that of the other respondents. The Solicitor General's request pointed out that the government was "in substantial measure opposing both the petitioners [in their claims against the United States] and the non-government respondents [against whom claims were being made under the securities laws]," and accordingly stated that the Court should allot 30 minutes of argument to the petitioners, 30 minutes to the government, and 30 minutes to the non-government respondents. This would have enabled the government to present the Commissions' views in support of the petitioners orally as well as in writing. The Court decided instead to allot 40 minutes to the petitioners, 20 minutes to the government, and 20 minutes to the other respondents. 404 U.S. 816. The obvious intention of the Court's order was that all the arguments in support of the petitioners (including those supported by the government as *amicus curiae*) should be presented orally by petitioners' counsel rather than by the government, and that the government's role in the oral argument should be to respond to the claims made against the United States. Counsel for the government restricted his oral argument accordingly (in fairness to the other respondents), but did call the Court's attention to the fact that the government's brief supported (on behalf of the Securities and Exchange Commission) petitioners' claims against the non-government respondents. The Supreme Court's ultimate decision in the case upheld the position presented in the government's brief on behalf of the Commission (as well as the other contentions of the United States) in all respects. 406 U.S. 128.

A recent example of an accommodation between the Antitrust Division and the Securities and Exchange Commission occurred in *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 24 Cal. App. 3d 35. This is a private suit in which it was alleged, among other things, that certain aspects of a profit-sharing plan of Merrill Lynch violated the antitrust laws. Merrill Lynch filed a petition for certiorari to review an adverse decision of a California state appellate court. Before acting on the petition, the Supreme Court invited the Solicitor General to express the views of the United States. The United States filed an *amicus* memorandum which, while noting that the Antitrust Division and the Commission "are in disagreement over the basis upon which the Securities Exchange Act and the antitrust laws are to be reconciled with respect to Exchange practices subject to the regulatory jurisdiction of the Commission" (p. 8, fn. 6), nevertheless urged the Court to deny the petition. The memorandum was signed not only by myself but by the Assistant Attorney General in Charge of the Antitrust Division and the Acting General Counsel of the Commission. Despite the government's submission, the Supreme Court granted the petition for certiorari. 409 U.S. 1005. It has not yet been decided whether the Commission or the United States or both will file briefs on the merits.

For a general discussion of problems of this type, see Stern, "Inconsistency in Government Litigation," 64 Harv.L.Rev. 759 (1951).

One case in which the Solicitor General did not follow his customary practice of permitting the agency to file its own *amicus* brief when there was a dis-

agreement between it and the Department of Justice has been referred to. This was more than ten years ago, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, in the 1962 Term of the Supreme Court. That case presented difficult issues involving the reconciliation of the Securities Exchange Act of 1934 and the antitrust laws. The Antitrust Division of the Department of Justice and the Securities and Exchange Commission had differing views with respect to that question. The government was not a party to the case. Solicitor General Cox filed a comprehensive *amicus curiae* brief on behalf of the United States in which he discussed the relevant legal and policy considerations, and attempted to reconcile them in a way that he believed fairly took account of all the pertinent considerations. Although the brief ultimately concluded that the court of appeals had erred in holding that the petitioner's claims were not covered by the Sherman Act, the brief thoroughly, and I believe fairly, set forth the opposing arguments on both sides. I particularly invite the Committee's attention to the lengthy discussions at pages 32–43 of the brief in which the "pertinent public policy considerations" are set forth.

VI.—THE BROAD RANGE IMPLICATIONS OF AUTHORIZING THE SECURITIES AND EXCHANGE COMMISSION TO HANDLE ITS OWN LITIGATION BEFORE THE SUPREME COURT

The purpose of this statement has been to show that the Office of the Solicitor General not only has a long history in the management of the government's legal business before the Supreme Court, and a strong tradition, but also that it performs a substantial and useful function in the handling of important legal questions which come before the Court.

Many legal questions necessarily arise in the handling of the large and complicated operations of the government. Inevitably, the handling of many cases must, in the beginning, be dispersed among many agencies of the government. As a consequence, there is an inevitable tendency towards fractionating the handling of the government's legal business.

As cases proceed to the Supreme Court, however, there is an opportunity for coordination, and there is a real need for a professional legal office which is in a position to take an overall view of the government's interest. This view may be and often should be, broader than that of the individual agency involved.

Over the years, the Solicitor General's office has performed this function. It is a difficult and delicate task, and requires great care and skill on the part of the Solicitor General and his staff. The interested agency or agencies must be fully heard, and differing legal positions must be reconciled as far as possible. Generally speaking, it has been my observation and feeling that relations between the Solicitor General's office and other agencies of the government have been reasonably good over a long period of time, including the past several years.

In addition to the coordinating function, the Solicitor General's office also provides a large reservoir of experience, not only on the constitutional and other legal questions which come before the Supreme Court, but also in the intricate details of Supreme Court practice. In many cases within my observation, the Solicitor General's office has made important contributions to the handling of agency cases, and the record of the office on behalf of the agencies has been a good one.

If the Securities and Exchange Commission is given the authority to handle its own cases before the Supreme Court, the same privilege will be sought by other agencies of the government. If this is granted, the result will be a great subdividing of the government's legal business before the Supreme Court, and the government will speak with many voices before that Court. There is some reason to think that some of the voices may not be as effective as they might be, and the chances that the overall posture of the government before the Court may be impaired are not inconsiderable.

There is a further aspect to the problem. If the Securities and Exchange Commission, and other agencies of the government, are given the power to appear before the Supreme Court without the authority of the Solicitor General, presumably there will continue to be a Solicitor General's office. In this situation it will often seem appropriate to the Solicitor General to file a brief as *amicus curiae* in agency cases, either agreeing or disagreeing with the position of the agency. Thus, the basic effect of the change of procedure will be to increase the number of papers filed on behalf of the government before the Supreme Court. The Solicitor General's voice would still be heard. The net result might be that more cases were filed before the Court, but that a smaller proportion were heard there on

the merits. This might not be advantageous in the overall handling of the government's legal business.

Furthermore, authorizing the agencies to represent themselves before the Supreme Court would weaken the Solicitor General's effectiveness as the government's principal spokesman before the Court. At the present time, the Court knows that whenever the Solicitor General asks it to review a case, he is attesting that in his judgment the case meets the Court's standards for review. If agencies may present to the Court any case they wish, the likely result will be a subtle but nevertheless real diminution of the authority with which the Solicitor General can now speak for the government as the one person who has that authority. Thus, the consequence of permitting agencies to appear themselves could be a less sympathetic reception by the Court and a less effective presentation of the government's position in all of its litigation, non-agency as well as agency.

For the reasons given in this statement, the Department of Justice opposes the provision in Section 101 of H.R. 5050 which would authorize the Securities and Exchange Commission "to conduct in its own name and through its own attorneys litigation * * * in the United States * * * Supreme Court." In my view, this is an important matter, and I express the hope that the committee will not take a step which would amount to an impairment of one of the important offices in the professional legal sector of the government.

EXHIBIT 3

House Financial Disclosure Reports, by the National Committee for an Effective Congress—Analysis of 1972

The bi-partisan National Committee for an Effective Congress has conducted for the second year a thorough analysis of the financial disclosure reports which members of the U.S. House of Representatives are required to file with the Committee on Standards of Official Conduct (commonly referred to as the "Ethics Committee").

In accordance with House Rule 44, Representatives must report by April 30 of each year specified outside financial, business and professional affiliations. The Ethics Committee, in turn, must make certain portions of members' reports available to "responsible public inquiry." Notwithstanding the limitations on the information available for public inspection, these reports do permit some assessment of the scope and types of outside business activities and of the *potential* conflicts of interest which could arise from such activities.

This public information (without statement of actual dollar amount, which is delivered to the Committee in a separate sealed section) includes:

(1) Any management position (or ownership interest in excess of $5,000 market value) held in any business entity doing a substantial business with the federal government or subject to federal regulatory agencies, if the reporting member derived income of $1,000 or more therefrom in the preceding calendar year.

(2) Participation, in the capacity of an officer, partner, director, or advisor, in any professional organization from which the member received income of $1,000 or more in the preceding calendar year.

(3) (a) The source of any income for services rendered (other than from the U. S. Government) exceeding $5,000.

(b) Capital gains from a single source exceeding $5,000, except for the sale of a residence.

(c) Reimbursement of certain expenditures.

(d) Honoraria from a single source of $300 or more.

(4) Indebtedness of over $10,000 to a single creditor, subject to certain qualifications.

This year all members of the House had filed the required reports prior to, or within a few days of, the April 30 deadline. Moreover, at least 15 members, including two freshmen (Steelman, Tex., and Symms, Id.) and 13 others, voluntarily submitted information substantially more detailed than required. This included the attachment of income tax returns, complete statements of assets and liabilities, of net worth, or of income and public disclosure of the amounts and values which need be filed only in the non-public portion of the report.

Fairness requires that, in commenting on or analyzing these disclosure reports, a clear distinction be made between re-elected incumbents and House newcomers who took their seats in January. It is obvious that most of these new members had, and thus reported, some source of outside income prior to their election to Congress. To include this information in any overall tabulation would be to seriously distort the data. Similarly, in the case of outside affiliations which new members report as still existing as of the date of filing, it must be borne in mind that these members have had only a short time to divest themselves of past associations or even to come to firm conclusions as to whether and how to sever such links.

For this reason, the main body of this analysis is concerned *only with the associations reported by the 363 members of the 93rd Congress who also served in the 92nd Congress.*

After making such a distinction between freshman and non-freshman members, it obviously becomes much more difficult to draw any meaningful comparisons between NCEC's 1973 and 1972 findings, because the latter dealt with a non-election year and treated all members the same. For example, it would be erroneous to conclude that 1973 shows a significant reduction in outside activities by members. The NCEC count of the 93rd Congress is lower primarily because

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of the election defeat, retirement or death of 72 members of the 92nd Congress.

What is most important, the current reports show (as they did last year) that the overwhelming majority of non-freshman Congressmen (over two-thirds) have no professional or managerial business affiliations subject to the Rule 44 reporting requirements. Undoubtedly, many of these men and women have conscientiously and deliberately avoided any outside relationship which gives rise to real or potential conflicts of interest, or even to the appearance of such possible conflict. If this has meant financial hardship, it seems to have been more than offset by the desire to preserve the integrity of public office and to assure the freedom of independent judgment.

On the other hand, according to the NCEC tabulation, 117 non-freshman members maintained professional affiliations (primarily with law practices), managerial and similar positions, *direct* ownership or partnership interests, or received compensation for services outside their Congressional duties over calendar year 1972. The head count would rise substantially if mere share ownership in business corporations were included. We omitted this, however, in the belief that stockholdings without a management position pose a much lesser risk of conflict than do more active associations. (The exception would obviously be the case in which the holding represented a *de facto* controlling interest. This, however, cannot in any event be identified from the publicly available information).

Law practices—41

The largest number of affiliations with any single line of business again pertains to law practices. This springs from the fact that a majority of legislators come from the legal community, and frequently from private law practice. The NCEC has previously stated its conviction that as long as a Congressman retains his law office or a connection with a firm, the special interests of a client or prospective clients may, at a given point, be at variance with the broader public interest and may, however unconsciously, affect the member's judgment on issues or legislation.

Many members appear to share this view and have severed their associations with law practices, some immediately after election, others later in their Congressional service. In 1972, five Representatives withdrew from the practice of law. On the other hand, two non-freshman members now show legal affiliations where none were reported last year. With nine incumbents with such ties not returning to office in 1973, the total number of non-freshman Representatives with law practices drops to 41 from the 53 reported in 1972. (Among the 1973 freshmen, three withdrew from practice after election, while 19 others showed affiliations maintained as of the date of reporting.)

The legal profession has itself formally addressed this question of the interrelation between holding public office and the practice of law. In 1969 the American Bar Association included in its Code of Professional Responsibility a rule designed to bar attorneys elected to office from maintaining nominal or so-called "façade" practices. Under this Rule, a public official, including a member of Congress, must either withdraw his or her name entirely from any law practice or must "*actively* and *regularly* practice law as a member of the firm." Active practice is obviously incompatible with proper fulfillment of Congressional responsibilities. This ABA Rule, when adopted by a state bar and approved by that state's supreme court, as has occurred in almost all 50 states, becomes grounds for grievance proceedings and even disbarment. The NCEC has been unable to ascertain whether or not any such formal action has ever been taken under the Rule.

Banks, savings and loan, and other financial institutions—44

Financial institutions in which House members exercise some form of policy making function have traditionally ranked next to law practices in terms of the number involved.

The risk of conflict here appears particularly great because of the pervasive influence which financial institutions exert over the entire economy. Moreover, most financial institutions are subject to some form of federal regulation or supervision, e.g., the Federal Reserve Board, the Comptroller of the Currency, and, to a lesser extent, the Federal Deposit Insurance Corporation, in the case of national banks; the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation in the case of most savings and loan associations; and the SEC in the case of some other institutions. Thus the Congress frequently, if not continuously, has before it legislation pertaining to financial institutions or the government agencies charged with regulating them.

Perhaps because of this sensitive situation, the great majority of Representatives have never held or have resigned positions of responsibility with financial institutions. During the past year, three members apparently withdrew from directorships in such businesses, while one member now figures as a director in a bank and another in a savings and loan association which they did not report in 1972. In addition, there are four members who are directors of both a commercial bank and a savings and loan association, and one member reports directorships in two banks.

A total of 29 report serving as chairman, director, or officer in, or receiving compensation for other services from, banks and savings and loan associations. This is substantially fewer than the 37 reported last year, but the major reason is the retirement of six members who had such affiliations.

There are other organizations which can be broadly termed financial including insurance, title or mortgage companies, and insurance and real estate agencies. Seventeen non-freshman members report management positions, ownership or partnership interests in, or service income from such entities. This compares with 23 a year ago—a reduction of four being attributable to the retirement of the respective members. Multiple affiliations by Congressmen in this category seem to have disappeared, with two minor exceptions. The reason, at least in some cases, may be that these outside business interests became an uncomfortable political issue in the 1972 campaign.

Other businesses—52

Direct affiliations with businesses other than those discussed above include ownerships, partnerships, positions as officers or board members, or the performance of other compensated services in such enterprises as oil development, public utilities, publishing and broadcasting, real estate development and management, farms, and a variety of industrial enterprises.

Positions in these business categories are reported this year by 52 non-freshman members, compared with 1972's 65 (of whom 10 did not return to Congress). Ten of them show associations with more than one business in this broad group.

* * * * * * *

In developing an overall picture from the above, it must be borne in mind that the figures cited under various headings are not entirely additive but involve duplications. A considerable number of members report interests not only in more than one business within a particular category, but are also represented in more than one of the broad categories presented here. Elimination of these duplications leads to the finding that 117 of the 363 non-freshman members—or less than one-third—have outside business affiliations which they are required to report under House Rule 44.

New members—72

For the reasons stated earlier, outside interests shown by freshman members in their first reports to the Ethics Committee should not be judged by the same criteria, nor should the same conclusions, if any, be drawn from them. as in the case of members with longer service. The latter, in many instances, have maintained their outside interests over long years in Congress. Some have even acquired additional interests.

Nonetheless, for the record and as a basis for comparison in the future, it may be useful to list briefly the active associations reported by the new Representatives. It must be emphasized again that, in many cases, the items shown only reflect income received from reportable sources in 1972, before the member was seated in the House.

In addition to the 19 law practices already referred to, the new members showed the following:

Eight directorships or presidencies in banks and savings and loan associations (including one which was dropped at the end of 1972);

Three affiliations with other financial institutions (of which two reported only income from services);

Twenty four with ownership interests or other affiliations with, or income derived from, "other businesses" (of these, 9 report connections with more than one enterprise in this category).

The Senate

An analysis of professional and business associations of U.S. Senators, along the lines followed above, is not possible. The Senate financial disclosure requirements, which the NCEC has before described as "so limited as to preclude meaningful analysis," unfortunately remain unchanged. Public disclosure there is, in

effect, confined to the source and amount of any honorarium of $300 or more. This almost total lack of real public information, and the still inadequate, if fuller, reporting in the House is itself the strongest argument for early legislation requiring comprehensive financial disclosure by all members of Congress and their high level staff persons. The public is entitled to expect honesty in government. The way to assure it is to demand it.

APPENDIX

NCEC—Analysis of House Financial Reports, 93d Congress, Nonfreshman Members

1. LAW PRACTICES (41)

Leggett, 4th Calif.
Waldie, 14th Calif.
McFall, 15th Calif.
McCloskey, 17th Calif.
Hosmer, 32d Calif. ("wills and probates only")
Hanna, 34th Calif.
Giaimo, 3d Conn. ("Of Counsel")
Gibbons, 7th Fla.
Burke, 12th Fla. (lists "attorney's fees" in 3(a))
Pepper, 14th Fla.
Murphy, 2d Ill.
Roush, 4th Ind.
Dennis, 10th Ind. (Withdrew from partnership 1/1/71 but shows income from "occasional legal services")
Snyder, 4th Ky.
Donohue, 3d Mass.
Harrington, 6th Mass.
Cleveland, 2d N.H.
Sandman, 2d N.J.
Thompson, 4th N.J.
Rodino, 10th N.J.
Pike, 1st N.Y.
Grover, 2d N.Y.
Lent, 4th N.Y.
Wydler, 5th N.Y.
Addabbo, 7th N.Y.
Biaggi, 10th N.Y.
Podell, 13th N.Y.
*Carey, 15th N.Y. ("Law. Limitation Consultant on Carey Family Interests")
Badillo, 21st N.Y. ("Of Counsel")
*Robison, 27th N.Y. (1972 Income "Residuals")
McEwen, 30th N.Y.
Smith, Henry, 36th N.Y.
Keating, 1st Ohio
Harsha, 6th Ohio
Stanton, James, 20th Ohio
Stokes, 21st Ohio
Vanik, 22d Ohio
Eilberg, 4th Pa.
Coughlin, 13th Pa. ("Of counsel to former clients and personal clients . . .")
Gaydos, 20th Pa.
Johnson, Albert, 23d Pa. (handling of some small estates for friends or relatives)
St Germain, 1st R.I.
Mann, 4th S.C.

*Listed for information purposes only. Not included in totaling members with law practices or other affiliations, for reasons noted beside name.

2. BANKS (21)

Hammerschmidt, 3d Ark., Director
Chappell, 4th Fla., Director
Young, C. W., 6th Fla., Director
Price, 23d Ill., Director
Myers, 7th Ind., Vice-President and Director
Winn, 3d Kan., Director
Carter, 5th Ky., Director
Ruppe, 11th Mich., Director of 2 banks
Cleveland, 2d N.H., Officer and Director
Frelinghuysen, 5th N.J., Director
Goodling, 19th Pa., Director
McEwen, 30th N.Y., Director of 2 banks
Ashbrook, 17th Ohio, Director
Hays, 18th Ohio, Chairman of the Board
Camp, 6th Okla., Chairman of the Board
Morgan, 22d Pa., Director
Quillin, 1st Tenn., Director
Evins, 4th Tenn., Chairman of the Board
Brooks, 9th Tex., Chairman of the Board
Downing, 1st Va., Director
Broyhill, Joel, 10th Va., Director

3. SAVINGS AND LOAN ASSOCIATIONS (12)

Hammerschmidt, 3d Ark., Director
Holifield, 19th Calif., Director
Roybal, 30th Calif., Chairman of the Board
Pepper, 4th Fla., Director and Senior Vice-President
Derwinski, 4th Ill., President
Collier, 6th Ill., Director (elective)
Frelinghuysen, 5th N.J., Director
Grover, 2d N.Y., Director
Ashbrook, 17th Ohio, Director
Saylor, 12th Pa., (position not shown)
Duncan, 2d Tenn., President
Broyhill, Joel, 10th Va., Director

4. INSURANCE COMPANIES (6)

With officer reported:

Rhodes, 1st Ariz., Director and Vice-President
Conte, 1st Mass., Director
Montgomery, 3d Miss., Vice-President

Only income from services shown:

Peyser, 23d N.Y., various life insurance companies "first year and Renewal Income"
Kuykendall, 8th Tenn.
Brooks, 9th Tex.

5. INSURANCE AND REAL ESTATE AGENCIES (7)

Cotter, 1st Conn., partner "Rock Realty Co."
Rostenkowski, 8th Ill., service income from insurance agency
Snyder, 4th Ky., "realtor" (own name—2 offices)
O'Neill, 8th Mass., owner, real estate and insurance
Lujan, 1st N. Mex., own name, insurance and real estate
Green, 3d Pa., insurance brokerage
Quillen, 1st Tenn., 2 insurance agencies, service income

6. OTHER FINANCIAL INSTITUTIONS (TITLE COMPANIES, MUTUAL FUNDS OR FINANCE CORPORATIONS) (4)

Edwards, 9th Calif., President, title company
Mathias, 18th Calif., Director, ISI Growth Fund; Director, ISI Income Fund; Director, ISI Trust Fund
Anderson, 35th Calif., Director, Hawthorne Financial Corporation
Clark, Frank, 25th Pa., Director, Investor's Security Corporation

7. REAL ESTATE DEVELOPMENT, MANAGEMENT, ETC. (9)

Hanna, 34th Calif., Pacific Development Inc.
Anderson, 35th Calif., President, "Downtown Enterprises"
Fuqua, 2d Fla., Director, "Killeam Properties, Inc."
Stuckey, 8th Ga., Income for services from Stuckey Timberland, Inc.
Carter, 5th Ky., Development company (position not shown)
Preyer, 6th N.C., Director, Piedmont Management Co., Inc.
Whalen, 3d Ohio, Real estate investment company (position not shown)
Collins, 3d Tex., Partner Miles Woodall, Trustee (Land); Partner, Casa Grande Associates (Land)
Roberts, 4th Tex., Real estate development meat company

8. FARMS (14)

Mailliard, 6th Calif., ranch shown as capital gain from timber sales
Veysey, 43d Calif., ranch, owner
Bray, 6th Ind., 2 farms, owner; one-half interest in another
Dennis, 10th Ind., "deed"
Carter, 5th Ky., "deeds"
Quie, 1st Minn., owner
Zwach, 6th Minn., owner
Bergland, 7th Minn., owner, and "landlord"
*McCollister, 2d Nebr., "wife is owner," 2 farms
Fountain, 2d N.C., "standing rent"
Henderson, 3d N.C., partner, half ownership
Andrews, AL N. Dak., partner
Brown, 7th Ohio, partnership (only reported under (4))
Collins, 3d Tex., Wildbriar Farm, partner, 5 lots of farmland, sole owner
Archer, 7th Tex., apparently owner

9. OTHER BUSINESSES (35)

With office reported

Hammerschmidt, 3d Ark., "officer salary," lumber company
Teague, Charles, 13th Calif., Director, McKevett Corporation
Bell, 28th Calif., Chairman of Board, Bell Petroleum Co.
Hanna, 34th Calif., Ltd. Partner, Northern Front Enterprises; General Partner, Organic Chemical
*Grasso, 6th Conn., Remedial reading clinic (husband)
Landgrebe, 2d Ind., President, LMT; President, Land Terminals
Roy, 2d Kans., medical practice
O'Neill, 8th Mass., Director, hospital (stock corporation)
Ford, 5th Mich., Director, Rospatch Corporation
Vander Jagt, 9th Mich., partner in oil exploration
Ruppe, 11th Mich., President, "Woodlak Co."
Frelinghuysen, 5th N.J., partnership, 2 oil drilling and exploration companies
Pike, 1st N.Y., Director, L. I. Home
Murphy, John, 17th N.Y., Executive Vice-President and Director, American Chemosol Corporation
Hanley, 32d N.Y., funeral home

*Listed for information purposes only. Not included in totaling members with law practices or other affiliations, for reasons noted beside name.

Fountain, 2d N.C., Vice-President and General Counsel, broadcasting company
Brown, 7th Ohio, President, publishing company
Jarman, 5th Okla., "working interest in oil and gas runs"
Ware, 5th Pa., Chairman of the Board, 2 corporations; President, 1 corporation (apparently all public utilities)
Schneebeli, 17th Pa., Commissions as Distributor for Gulf Oil Corporation
Heinz, 18th Pa., "oil holdings" in 3 companies or wells
Morgan, 22d Pa., medical practice
Baker, 3d Tenn., President, Commercial Janitors, Inc.
Brooks, 9th Tex., Chairman of the Board, First of Groves Corporation
Robinson, 7th Va., Director, chemical company; Officer, cold storage company
Steiger, William, 6th Wis., Director, River Bend Water Company; Member of Board, Oshkosh Motor Lodge; Member of Board, Lutherans Home of Oshkosh
Roncalio, AL, Wyo., gold claims on Federal land

Other businesses—only income from services shown:

Mathias, 18th Calif., Sears, Roebuck and Co.
Holifield, 19th Calif., Chet Holifield Store for Men (family partnership)
Stuckey, 8th Ga., Atlantis, Inc.
Winn, 3d Kans., construction company
Gude, 8th Md., "A. Gude Sons, Inc." (plant nursery)
Diggs, 13th Mich., mortuary
McCollister, 2d Nebr., McCollister and Co., Resigned 9/1/72 but still reports income in 1972
Runnels, 2d N. Mex., Runco Acidizing and Fracturing Company
Quillen, 1st Tenn., Moore and Walker, Inc. (type of business not shown); Wofford Bros., Inc. (type of business not shown)

10. MULTIPLE LISTINGS (32)

Hammerschmidt, 3d Ark., 2, 3 & 9
Mathias, 18th Calif., 6 (3 times) & 9
Holifield, 19th Calif., 3 & 9
Hanna, 34th Calif., 1, 7 & 9 (twice)
Anderson, 35th Calif., 6 & 7
Pepper, 14th Fla., 1 & 3
Stuckey, 8th Ga., 7 & 9
Landgrebe, 2d Ind., 9 (twice)
Dennis, 10th Ind., 1 & 8
Winn, 3d Kans., 2 & 9
Snyder, 4th Ky., 1 & 5
Carter, 5th Ky., 2, 7 & 8
O'Neill, 8th Mass., 5 & 9
Ruppe, 11th Mich., 2 (twice) & 9
Cleveland, 2d N.H., 1 & 2
Frelinghuysen, 5th N.J., 2, 3 & 9 (2 companies)
Pike 1st N.Y., 1 & 9
Grover, 2d N.Y., 1 & 3
Peyser, 23d N.Y., 4 (income from various life insurance companies)
McEwen, 30th N.Y., 1 & 2 (twice)
Fountain, 2d N.C., 8 & 9
Brown, 7th Ohio, 8 & 9
Ashbrook, 17th Ohio, 2 & 3
Ware, 5th Pa., 9 (three times)
Heinz, 18th Pa., 9 (three oil holdings)
Morgan, 22d Pa., 2 & 9
Quillen, 1st Tenn., 2, 5 (twice) & 9 (twice)
Collins, 3d Tex., 7 (twice) and 8 (6 properties)
Brooks, 9th Tex., 2, 4 & 9
Robinson, 7th Va., 9 (twice)
Broyhill, 10th Va., 2 & 3
Steiger, 6th Wisc., 9 (three times)

11. LAW PRACTICES APPARENTLY DROPPED IN 1972 (5)

Erlenborn, 14th Ill.
Sebelips, 1st Kan.
Mazzolli, 3rd Ky.
Byron, 6th Md.
*Griffiths, 17 Mich. (formerly reported as "my husband's")
McDade, 10 Pa.

12. AFFILIATIONS (OTHER THAN LAW) APPARENTLY DROPPED IN 1972 (15)

Steiger, 3rd Ariz., income from advertising business
Hammerschmidt, 3rd Ark., partnership in investment co. (shown last year only in connection with a capital gain)
Holifield, 19th Cal., presidency of an investment co., directorship in escrow corp., directorship in "Chet Holifield"
Cotter, 1st Conn., oil well interest
Young, C. W., 6th Fla., ownership of insurance agency directorship in mortgage co.
Metcalfe, 1st Ill., directorship in bank
Collier, 6th Ill., partnership in insurance co.
Donohue, 3rd Mass., directorship in savings and loan association
Conyers, 1st Mich., income from "Conyers Ford," Mich.
Esch, 2d Mich., directorship in MP Pumps
Montgomery, 3d Miss., presidency of insurance agency
Rooney, 15th Pa., ownership of insurance agency and of real estate agency
Schneebeli, 17th Pa., directorship in bank
Fulton, 5th Tenn., limited partnership "Gaines Properties"
Mallary, AL, Vt., ownership of farm

13. SIGNIFICANT DISCLOSURE BEYOND REQUIREMENTS (13)

Udall, 2d Ariz., all outside income over $100, stock holdings with values, real estate and personal property for member and wife
Waldie, 14th Calif., income tax return and Part B
DuPont, AL., Del., Part B and income from holdings
Fascell, 15th Fla., income tax return
Gude, 8th Md., amounts of service income, capital gains and debts
Vander Jagt, 9th Mich., statement of net worth and income
Koch, 18th N.Y., statement of net worth and values of securities holdings
Broyhill, James, 10th N.C., stockholdings not subject to reporting
Mosher, 13th Ohio, Part B and income from holdings
Archer, 7th Tex., statement of assets and liabilities
Pickle, 10th Tex., land holdings in detail and income tax return
Zablocki, 4th Wis., income tax return
Steiger, 6th Wis., statement of assets, liabilities and income for member and wife

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*Listed for information purposes only.

EXHIBIT 4

U.S. SENATE,
SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS,
Washington, D.C., May 7, 1973.

Hon. ELLIOT L. RICHARDSON,
Attorney General-Designate,
Department of Justice,
Washington, D.C.

DEAR MR. RICHARDSON: The Federal Election Campaign Act of 1971, Public Law 92-225, which became effective April 7, 1972, directed supervisory officers named in Title III of the Act to report "apparent violations of law" to the appropriate law enforcement authorities.

To date, approximately 5,000 apparent violations of the Act have been referred to the Department of Justice for appropriate action. Some of those referrals concern primary elections and others pertain to the general election of 1972.

As Chairman of the Senate Subcommittee on Privileges and Elections which has oversight jurisdiction for the Senate over Federal election laws, I would appreciate receiving some data for the purpose of determining what amendments may be necessary or desirable to strengthen and improve existing law, or whether new law may be indicated.

As your earliest convenience, would you kindly furnish answers to the following questions:

1. How many "apparent violations" have been referred to the Department of Justice by a) the Secretary of the Senate, b) the Clerk of the House of Representatives, and c) by the Comptroller General?
2. Are the violations charged or chargeable against candidates, or political committees, or treasurers of political committees?
3. What actions has the Department taken to date against violators of the Act?
4. Against whom have complaints been lodged?
5. Beyond the obligations imposed upon the Department by the Federal Election Campaign Act, does the Department intend to initiate any actions against violators on its own initiative as the enforcement arm of the Federal Government?
6. How many cases are now in litigation or in the process of preparation for litigation?

The Federal Election Campaign Act of 1971 relies primarily upon timely, accurate, and full public disclosure for effectiveness, but the disclosure provisions of the Act will not fully be observed if they are not vigorously enforced.

Therefore, it is important to the Senate and to this Subcommittee to know the extent and manner in which the Department of Justice is moving against violators.

Your assistance in this matter will be sincerely appreciated.

Warm regards.

Sincerely,

CLAIBORNE PELL,
Chairman.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., June 7, 1973.

Hon. CLAIBORNE PELL,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your letter of May 7, 1973, addressed to the Attorney General Designate, concerning the enforcement of the Federal Election Campaign Act of 1971.

As you know, under the new law reports must be filed with designated supervisory officers by every candidate for the House of Representatives, the Senate and the Presidency and Vice Presidency, as well as by all political committees

supporting such candidates, fifteen and five days prior to primary and general elections, as well as at periodic intervals during the year.

Candidates for the House of Representatives and committees supporting such candidates are required to file these reports with the Clerk of the House of Representatives who in turn is authorized under the Act to refer "apparent violations" of the reporting obligations to the "appropriate law enforcement authorities." To date, the Clerk of the House has referred to the Attorney General over 5,000 such matters involving non-compliance with the reporting provisions of the Act arising out of the Congressional primary and general elections held last year. Of these cases over 200 involved candidates and committees which failed to file any of the reports required by the Act; the others involve candidates and committees who filed some of these reports but failed to file others; or the failure of candidates and committees to file reports with their respective Secretaries of State as required by the Act; and approximately 2,000 involve candidates and committees which filed all of the required reports but which filed one or more of them late from periods ranging from one day to several weeks. There is considerable duplication in these referrals, *e.g.*, a candidate who fails to file in the primary and general election is referred twice.

The Department of Justice had undertaken to send registered letters to each candidate and committee which has failed to file any of the required reports advising of the criminal penalties for non-compliance. This extraordinary notification procedure was prompted by the novelty of the reporting requirements and by the apparent confusion of many of the candidates and committees concerning their reporting obligations. Over 95% of the candidates and committees who received such letters have since substantially complied with the reporting requirements. Two cases have been successfully prosecuted, and two cases are pending. Copies of the press releases are attached hereto. Several more cases will be brought in the near future.

Candidates for the U.S. Senate and committees supporting such candidates are required to file their report with the Secretary of the Senate, who, like his counterpart in the House, is authorized under the Act to refer "apparent violations" of these reporting requirements to the "appropriate law enforcement authorities." Thus far this year the Secretary has referred over 200 matters to the Department of Justice which has followed the same notification procedure with respect to these Senatorial referrals that it followed in connection with the referrals from the Clerk of the House. We anticipate filing charges in at least one case soon.

Most of the cases referred to date relate to reporting violations arising out of the primary elections. It is anticipated that additional cases arising out of the general election will be received in the near future. Moreover, all three supervisory officers have informed us that they intend to conduct intensive audits of the reports that have been filed with them to determine whether any of these reports failed to disclose contributions and expenditures of a sufficient magnitude to warrant additional referrals to the Department. We also anticipate that these audits may develop new evidence concerning some of cases which have previously been referred but which have been tentatively closed on the ground that they presently reflect substantial compliance with the reporting provisions of the Act. In the event that such new evidence is uncovered and provided to the Department, the cases involved will be reopened.

Presidential and Vice Presidential candidates are required to file their reports with the Office of Federal Elections, General Accounting Office. To date that Office has referred over twenty matters to the Department.

There are enclosed copies of the press releases regarding actions taken to date by the Department. Within the past month the Department received two other referrals from the Office of Federal Elections, GAO, citing the Finance Committee to Re-Elect the President with still more apparent violations of the Federal Election Campaign Act. These two matters are under review and/or appropriate investigation. Four other matters referred by the GAO are also under active investigation by the Federal Bureau of Investigation.

There has been a vigorous attempt to interpret and enforce both the disclosure and spending limitation provisions of the new Federal Election Campaign Act, as well as the older criminal provisions of the Corrupt Practices Act. In addition to its enforcement responsibilities under the new campaign law, the Department of Justice has been supervising investigations of close to 200 alleged violations of the Federal election provisions of the Criminal Code. These investigations involve complaints ranging from vote fraud to prohibitions on corporations, labor organiza-

tions and Government contractors making political contributions to candidates for Federal Office. One notable instance in the vote fraud area is the successful prosecution of 31 individuals by the U.S. Attorney's Office in Chicago arising out of the Illinois primary. Forty more individuals remain to be tried.

I trust that this information will prove helpful to you.

Sincerely,

JOSEPH T. SNEED,
Deputy Attorney General.

[Press release from the Department of Justice, May 2, 1973]

The Department of Justice today charged the Finance Committee to Re-Elect the President with failing to make required reports and not maintaining records on a $200,000 contribution.

Attorney General Richard G. Kleindienst said a three-count criminal information was filed in U.S. District Court in Washington, D.C.

The first count of the information charged that the Committee, acting through its chairman. Maurice Stans, received a $200,000 contribution on April 10, 1972, three days after Federal Election Campaign Act of 1971 went into effect.

The information charged that the Committee, acting through Stans, failed to make a report within five days of the donation to its treasurer, Hugh P. Sloan, Jr., as required by the Act. The Act requires this report to be made and list the name and address of the contributor as well as his occupation and principal place of business.

The second count charged that the Committee, acting through Sloan, failed to keep records of the amount of the donation and the name, address, occupation and principal place of business of the contributor.

The third count charged that the Committee, acting through Sloan, failed to report the $200,000 contribution to the Office of Federal Elections of the General Accounting Office.

Although named in the information, neither Stans nor Sloan was charged.

Maximum penalty upon conviction for each count is $1,000.

[Press release from the Department of Justice, May 4, 1973]

A federal grand jury in Orlando, Florida, today indicated Donald H. Segretti on charges of publishing and distributing a letter during the Florida Democratic presidential primary campaign last year which failed to identify those responsible.

Attorney General Richard G. Kleindienst announced that the two-count indictment was returned in U.S. District Court in Orlando.

In addition to Segretti, 28, of Marina del Rey, California, the indictment also charged George A. Hearing of Tampa, Florida, in the same counts. Robert Melton Benz, 25, of Odessa, Florida, a freight company employee, was named as an unindicted co-conspirator. Benz is a former Republican campaign worker and former president of the Tampa, Florida, Young Republicans.

The Democratic primary election was held in Florida on March 14, 1972.

The first count of the indictment charged that Segretti and Hearing caused to be published and distributed a letter relating to a candidate seeking the presidency which did not contain the names of those responsible for its publication and distribution.

The second count of the indictment said that Segretti, Hearing, and Benz conspired to distribute the letter.

According to the conspiracy count, Segretti and Benz met on December 1, 1971, at a restaurant near Tampa, Florida, and discussed disruption of the campaigns of Democratic Senators Henry Jackson of Washington and Edmund Muskie of Maine. Segretti paid Benz $50 to disrupt those campaigns, according to one of the overt acts in the conspiracy count.

Other overt acts listed in the indictment said that on February 20, 1972, Segretti mailed a supply of Citizens For Muskie stationery to Benz and a letter containing the proposed contents of the letter which was to be distributed.

On February 25, 1972, the indictment said, Benz gave Hearing the proposed letter and stationary. Hearing mailed the letter on Citizens For Muskie stationary on March 11 to various persons in the Jacksonville, Orlando, Tampa, and St. Petersburg areas, as well as other cities in Florida, according to the indictment.

Maximum penalty upon conviction on each count of the indictment which is a misdemeanor is one year in prison and a $1,000 fine.

[Press release from the Department of Justice, May 4, 1973]

The Department of Justice charged a defeated Liberal Party candidate for Congress from the 35th District of New York with failing to file required reports on campaign receipts and expenditures prior to last year's primary and general elections.

Attorney General Richard G. Kleindienst said a two-count criminal information was filed in U.S. District Court in Washington, D.C.

Charged was Alicia Burgos, who ran in the primary election in New York on June 22, 1972, and in the general election there on November 7, 1972.

The Federal Election Campaign Act of 1971, which went into effect on April 7, 1972, requires that all candidates for Congress file reports of campaign receipts and expenditures with the Clerk of the House of Representatives 15 and five days before primary and general elections.

The first count of the information charged her with failing to file such reports for the primary election and the second count charged her with failing to file the reports for the general election.

Maximum penalty upon conviction is one year in prison and a $1,000 fine.

[Press release from the Department of Justice, May 16, 1973]

The Department of Justice today charged John L. Loeb, Sr., chairman of a New York brokerage firm, with disguising $48,000 in contributions to the 1972 Presidential campaign of Senator Hubert H. Humphrey by donating the money in the names of eight other persons.

Attorney General Richard G. Kleindienst said an eight count criminal information was returned in U.S. District Court in New York City.

Loeb, 71, is a resident of New York and is chairman of the Loeb Rhoades and Company brokerage firm in New York.

The eight counts charged him with violation of Section 310 of the Federal Election Campaign Act of 1971 which prohibits the donation of a political contribution in the name of another person to a candidate for federal office or to a committee supporting the candidate.

The information said that on May 12, 1972, Loeb made 14 contributions of $3,000 and one contribution of $6,000 to 11 committees supporting Senator Humphrey.

Maximum penalty upon conviction on each count is one year in prison and a $1,000 fine.

[Press release from the Department of Justice]

The Department of Justice today charged the Finance Committee to Re-Elect the President and three defeated congressional candidates with violations of the Federal Election Campaign Act of 1971.

Attorney General Richard G. Kleindienst said four criminal informations were filed in U.S. District Court in Washington, D.C.

Charged were:

The Finance Committee to Re-Elect the President;

Fritzjof P. Thygeson, a Peace and Freedom Party candidate for the House of Representatives from the 40th District of California who won in the June 6 primary but was defeated in the general election;

Charles W. Johnson, Democratic candidate for the House of Representatives in the 17th District of Ohio, who lost in the May 2 primary, and pleaded nolo contendere—fined $100.

Willam C. Haden, Democratic candidate for the House of Representatives in the 14th District of Pennsylvania, who lost in the April 25 primary, and pleaded nolo contendere—no sentence due to health.

The eight-count criminal information filed against the Finance Committee to Re-Elect the President charged that the Committee, through its treasurer, Hugh Sloan, gave G. Gordon Liddy, a Committee legal advisor, cash sums in the amount of $12,000, $12,000 and $5,300, without receiving a receipt. The Committee was charged in three counts with failing to report these expenditures to the General Accounting Office and with failing to obtain a receipt for and make a GAO report on an additional $2,000 Liddy expended.

Two-count informations were filed against Thygeson and Johnson charging both with failing to file candidate reports of contributions and expenditures on the 15th and 5th days before the primaries in which they ran, as required by the Act.

A one-count information charged Haden with failure to file a report within five days before the primary in which he ran.

The 40th District of California includes the west-central area of San Diego County, about two-thirds of the city of San Diego, Corona, North Island, and parts of El Cajon and Santee.

The 17th District of Ohio encompasses more than half a dozen counties in east-central Ohio.

The 14th District of Pennsylvania includes Allegheny County and the city of Pittsburgh.

The Federal Election Campaign Act was passed by Congress in January, 1972, signed by the President in February, 1972, and went into effect on April 7, 1972.

One of its provisions requires that each candidate for the Senate or the House of Representatives, and committees supporting such candidates, file reports on contributions and expenditures with the Secretary of the Senate or the Clerk of the House. Each presidential and vice presidential candidate, and committees supporting such candidates, are to file reports with the General Accounting Office.

The reports are to be filed at periodic quarterly intervals, as well as 15 and five days before primary and general elections. If there is a last minute donation of more than $5,000 a special report is to be filed within 48 hours of its receipt.

All of the actions referred to in the informations filed today occurred after April 7 of this year.

Maximum penalty upon conviction on each count of the informations is one year in prison and a $1,000 fine.

Pleaded "nolo contendere" fined $8,000

DEPARTMENT OF JUSTICE,
Washington, D.C., June 20, 1973.

Hon. HOWARD W. CANNON,
Chairman, Committee on Rules and Administration,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: When I testified at the hearing on S.J. Res. 110 and S. 372 held by your Committee on June 7, 1973, you requested that the Department amplify its constitutional dialogue concerning certain provisions of S. 372, and also that the Department discuss the limitations imposed by the Federal Election Campaign Act of 1971 on the amount which a candidate or his immediate family may spend for his election.

These questions have not been the subject of any authoritative judicial decision nor of any extended consideration by legal scholars. However, to the extent that it may be of assistance to the Committee, we attach a supplemental memorandum on these questions. I respectfully request that this memorandum be made a part of the record of these hearings.

Sincerely,

ROBERT G. DIXON, Jr.,
Assistant Attorney General,
Office of Legal Counsel.

Enclosure.

MEMORANDUM SUPPLEMENTING TESTIMONY OF ROBERT G. DIXON JR., ASSISTANT ATTORNEY GENERAL, ON S.J. RES. 110 AND S. 372

I. LIMITATION ON A CANDIDATE'S CAMPAIGN SPENDING FROM HIS OWN FUNDS OR THAT OF HIS FAMILY'S

The Federal Election Campaign Act of 1971 (referred to hereafter as the "Act") limits spending by a candidate or members of his immediate family to $50,000 in the case of a presidential or vice presidential candidate, $35,000 in the case of a senatorial candidate, and $25,000 in the case of a candidate for the House of Representatives. Sec. 203(a)(1). "Immediate family" is defined as "a candidate's spouse, and any child, parent, grandparent, brother or sister of the candidate and the spouses of such persons." Sec. 203(a)(2). The limitations apply separately to a candidate's campaigns for nomination and for election. Sec. 203(a)(1). Contributions by any person in the name of another is forbidden, as is acceptance of such a contribution. Sec. 310. The general disclosure provisions are designed to minimize the possibility of evasion. Secs. 301–311.

Constitutionality

From a constitutional standpoint, two issues are presented. The first is whether Congress has a basis for authority in this area; the second is whether the First Amendment is an obstacle.

A. Congressional Office

With respect to limitations on candidate expenditures in congressional elections. the authority of Congress is derived from Article I, section 4, clause 1, of the Constitution, as augmented by the Necessary and Proper Clause (Article I, section 8, clause 18). Article I, section 4, clause 1, provides that "the Times, Places and Manner" of holding elections for Senators and Representatives shall be prescribed in each State by its legislature, but "the Congress may at any time by Law make or alter such Regulations . . ." Regulation of who may contribute and how much may be spent on a congressional campaign would appear fairly clearly to relate to the "manner" of holding the election, particularly in view of the comprehensive meaning that the Supreme Court has given to the phrase "Times, Places and Manner" in the clause. See *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932).

It may be noted, however, that in *Newberry* v. *United States*, 256 U.S. 232 (1921), a limitation on the amount of *expenditures* under the Federal Corrupt Practices Act was held to be unconstitutional as to *primary* elections of candidates for a seat in the *Senate*. This conclusion was reached on the ground that the authority of Congress to regulate elections under Article I, section 4, did not extend to *primary* elections. Although not decided, it would seem that *Newberry* at least suggests the validity of spending limitations in elections other than primaries. As to the general authority of Congress to regulate primaries, *Newberry* is probably no longer good law in view of *United States* v. *Classic*, 313 U.S. 299, 318–319 (1941).[1]

In its report entitled *Congress and the Public Trust* (1970), the Association of the Bar of the City of New York concluded (p. 328, n. 86) that the "Congress' constitutional power to regulate Federal campaign spending has not been seriously questioned since *Newberry* v. *United States*," *supra*. To the same effect, see Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis., 359, 370 (1972).

B. Presidential Office

Congressional power to limit expenditures by a presidential or vice presidential candidate presents a more difficult question. Such elections are not controlled by Article I, section 4. It is the States which "shall appoint in such Manner as the Legislature thereof may direct" their presidential electors. Article II, section 1, clause 2. However, in sustaining the Voting Rights Act Amendments of 1970, lowering the age requirements for voters in Federal elections, Justice Black, who cast the decisive vote in favor of the validity of the statute as applied to congressional elections, based his conclusion on a broad reading of the word "Manner" in Article I, section 4. *Oregon* v. *Mitchell*, 400 U.S. 112, 119–24 (1970). He then stated that "since Congress has ultimate supervisory authority over congressional elections," then it "cannot be seriously contended that Congress has less power over the conduct of presidential elections . . ." 400 U.S. at 124. However, Justice Harlan, dissenting, stated that "although Justice Black rests his decision in part on the assumption that the election of presidential electors is a Federal election," the Supreme Court (citing cases) has held and reaffirmed that "presidential electors act by authority of the States and are not Federal officials." 400 U.S. at 211, n. 89.

On the other hand, as against the proposition that presidential electors hold "State" rather than "Federal" offices, the Court has upheld the power of Congress to protect the choice of presidential electors from fraud and corruption. *Burroughs and Cannon* v. *United States*, 290 U.S. 534 (1934). It is true that the *Burroughs* case may be distinguished on the ground that it involved a challenge only to the *reporting* requirements of the Federal Corrupt Practices Act and not to *spending* limitations. However, the petitioners' constitutional objection in *Burroughs* case was that the Act unduly invaded the constitutional right of the States to conduct the election. It can be argued that if this objection was

[1] The *Classic* case did not, however, involve spending limitations, but a conspiracy under the Criminal Code to prevent qualified voters from having their votes counted in a primary.

overruled as to the reporting requirements of the Act. A constitutional objection to spending limitations in presidential elections does not stand on any better footing.

C. The First Amendment Issue

Although there are no Federal court cases directly in point as to spending limitations on candidates, there are a few State court cases which have upheld spending limitations on candidates as against First Amendment contentions on the ground that it is in the public interest to enable men of limited financial resources to aspire to public office. In *State ex rel. La Follette et al.* v. *Kohler*, 200 Wis. 518, 228 N.W. 895 (1930), the Supreme Court of Wisconsin sustained the validity of a State statute applicable to a candidate for governor and those who acted under his direction and on his behalf, limiting his disbursements to $4,000 in a primary election. Although the court recognized that "there is no yardstick by which reasonableness may be measured with mathematical certainty" (228 N.W. at 914), and although it was claimed that the limitation of $4,000 was unrealistic in view of the high cost of campaigns, the court stated that the statute did not so clearly appear to be an unwarranted interference with constitutional rights (including the right of free speech), and that if the spending limitation was too low, the remedy lay with the legislature. *Ibid.*

In *Adams* v. *Lansdon*, 18 Idaho 483, 110 Pac. 280 (1910), the Supreme Court of Idaho held to be valid a primary election law of that State which limited the expenditures of a candidate for office to no more than 15 percent of the salary attached to the office. The court stated that the law did not conflict with the candidate's constitutional rights of free speech or freedom of the press. "That law," the court observed, "does not attempt to prevent a candidate from freely speaking, writing and publishing his view on all subjects" (18 Idaho at 496), but was merely intended "to prohibit a large expenditure of money, or what is called a check-book campaign, in procuring the nomination of any candidate . . . ." *Id.* at 502.

There are, however, persuasive arguments on the other side. In discussing this question, Redish, in *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900, 912 (1971), has said:

> "It is generally argued that a wealthy candidate should not be permitted to 'buy an election' with his finances and that legislated limits on campaign spending are therefore necessary. The reasoning implicit in this argument seems to be that, when one candidate's financial resources are limited, the only equitable solution is to require the wealthier candidate to reduce his spending to a level approximating that of his opponent. In other words, if a portion of the voting public is to be generally unfamiliar with one candidate's views and record because of his financial inability to become well known, it is only fair that the public be almost as uninformed about the other candidate. Such reasoning presents at the very least a prima facie conflict with the first amendment policy of encouraging as much communication in the political realm as possible."

D. Other Considerations

Although the aims of such spending limitations appear to be commendable, they have been subjected to criticism. For one thing, such legislation may discriminate against non-incumbent candidates and lesser known candidates. It has been estimated that an incumbent of the office of Representative, with fewer than a half million constituents, has tangible advantages of probably more than $150,000 in the form of staff salaries, office supplies, telephone time, and franking privileges, Comment, *Campaign Spending Controls Under the Federal Election Campaign Act of 1971*, 8 Col. J. Law & Soc. Prob., 285, 306 (1972). It has been observed that while a "$50,000 limitation for a congressional campaign may sound generous to incumbents whose re-election does not require spending of amounts anywhere near that figure," yet for "the challenger, the limitation imposes nearly impossible problems." For, "with today's costs, there is no way a challenger can make himself known over a well-identified incumbent under these restrictions." Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C. L. Rev. 389, 469 (1973), quoting Congressman Frenzel of Minnesota. Fleishman's detailed discussion of the problem of the legitimacy and weight of the Government interest in limiting contributions and expenditures may be of some assistance to the Committee. See pp. 449–471. Fleishman is not impressed by the case law on the subject and feels that it "is not strong support for the

constitutionality of legislation that trenches so directly into first amendment freedoms." On the other hand, we are not referred to any *Federal* cases which squarely have held that congressional spending limitations on *candidates* in Federal election campaigns are invalid. In this posture a careful study of the competing considerations would be useful in illuminating to what extent, if any, spending limitations may be imposed consistent with First Amendment rights.

On the question of spending limitations generally, the Committee's attention is also called to the following:

Winter, *Money, Politics and the First Amendment, in Campaign Finances*, 45, 60 (American Enterprise Institute for Public Policy Research, 1971); A. Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359, 387–390 (1972).

II. REPEAL OF THE EQUAL TIME REQUIREMENTS OF SECTION 315 OF THE COMMUNICATIONS ACT AS IT APPLIES TO CANDIDATES FOR PRESIDENT AND VICE PRESIDENT

S. 372 would repeal the equal time requirement of section 315 of the Communications Act as it applies to candidates for President and Vice President. Section 315 would continue to apply, however, to candidates for congressional office and State office.

As indicated in my statement, the President feels strongly that equality of treatment requires a general repeal applicable to all candidates for Federal office.

Preliminarily, it may be noted that the President's views were fully shared by the Senate in 1971 when it voted (71 to 21) to repeal section 315 for candidates for *all* Federal offices. 117 Cong. Rec. S3005, August 3, 1971 (daily ed.).[2]

It may also be recalled that section 315 was originally enacted to insure that if one candidate was given free time, other candidates for the same office would be afforded an equal amount of time and if one candidate purchased time, his opponents would be entitled to purchase an equal amount of time under the same conditions.

Experience with the equal time provision shows that it has resulted in enabling broadcasters to provide very little, if any, free time. Moreover, section 315 has operated to favor incumbents over challengers and has restricted their opponents from access to the electorate. While section 315 therefore has produced results opposite to those anticipated, those results are not confined to presidential and vice presidential candidates. The Senate in its 1971 proceeding recognized by an overwhelming vote that the argument supporting a limited repeal equally supports total repeal. Senator Pastore, who now sponsors a limited repeal, conceded frankly in 1971 that "the President has a point in insisting on complete repeal." 117 Cong. Rec. S13002. August 3, 1971 (daily ed.). He then stated (*Id.*, at S13004):

> "As far as I am concerned, I am perfectly willing to vote for this amendment [the Prouty amendment for *total* repeal], because if I can say to the President of the United States 'We shall exempt your office from the provisions of section 315,' I do not think I can stand up and say 'Insofar as you are concerned, Senator Pastore, the same rule should not apply to you.'"

His 1971 statement is equally true in 1973. Indeed, during the course of debate in 1972 on a similar measure (S. 3178) limiting repeal of section 315 to presidential and vice presidential candidates, Senator Pastore, its sponsor, once again agreed that "the best way to shut the door is to make it all-encompassing." 118 Cong. Rec. S4746, March 23, 1972 (daily ed.). But he pointed out that the House of Representatives was adamant and would only agree to a limited repeal of section 315. *Id.*, at S4750. See also Berry and Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 Harv. J. Legis. 331, 350–1 (1973).

It has been said that the unexpressed but apparent reason for the position taken by the House is to protect incumbents against the use of equal time by their opponents. This is understandable in terms of the self interest of the members; it does not, of course, constitute a reasonable basis for a partial repeal of section 315. Manifestly, if the purpose of partial repeal is to increase the electorate's accessibility to presidential candidates and issues, section 315 should not apply to any candidate for Federal office.

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[2] While the repeal efforts have been directed only at Federal offices, obviously, if repealed as to those, we would assume the repeal should also extend to State offices.

Turning to the constitutional problem, the suspension of section 315 for the Kennedy-Nixon debates in the 1960 presidential race was not challenged so that the courts had no occasion to consider the problem. However, this suspension was "criticized for effectively excluding minority parties from any serious voter consideration." Baker, *A Constitutional Remedy for the High Cost of Broadcast and Newspaper Advertising in Political Campaigns*, 60 Calif. L. Rev. 1371, 1390, n. 134 (1972).

Attention has more recently been focused on the constitutional problems that may arise from repeal of the equal time requirement. Professor Rosenthal discusses these problems in his article, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359, 397–399 (1972), as follows (Footnotes are not quoted except as noted in brackets.) :

> Free time to major party candidates clearly discriminates against all others. Regarding obstacles preventing a third party getting on the ballot, the Supreme Court has said that the two-party systems is not protected by the Constitution. [*Williams* v. *Rhodes*, 393 U.S. 23, 31–32 (1968).]
>
> If section 315 were repealed and minor candidates discriminated against, the discrimination would be at the hands of the broadcasters, rather than the federal government. The pertinent provisions of the Constitution apply to government action—state or federal—not to the actions of private persons. Can it nevertheless be maintained that there is a sufficient nexus between the role of the government in this context and the discrimination imposed by the broadcasters to warrant treating the latter as government action?[3]
>
> Several arguments can be made in support of an affirmative answer. If the purpose of Congress in repealing section 315 would be to open the door to discrimination against minor candidates—and realistically that might well be deemed part of its purpose, however laudable its overall goal—the act of repealing section 315 might be regarded as intended to facilitate private discrimination and perhaps come under the ban of *Reitman* v. *Mulkey*. [387 U.S. 369 (1967).] If control of the air waves be deemed a function that could have been assumed in its entirety by the government, can it wash its hands of its obligation to perform that function without discrimination through delegating it to private parties? Alternatively, the preemptive assumption by Congress of almost complete regulatory control over broadcasting may well impose an obligation to include provisions against discrimination in its regulations.
>
> Assuming that the government is deemed responsible, and that constitutional standards apply, questions of balancing of interests remain. Repeal would open the door to meaningful debates between the major candidates, and information of genuine importance might be made much more readily available to the voters. If the candidates were not charged for the time, their dependence upon private contributions would be reduced, also a healthy development. These advantages would, of course, have to be weighed against the unfairness to the lesser candidates.
>
> Repeal or suspension, without retention of some safeguards, would not guarantee the contemplated advantage and might permit additional unfairness. Theoretically, it would permit a station to discriminate between the principal candidates, giving free time to one the broadcasters favored and charging his opponent. . . .

Speaking of a repeal of section 315, Professor Winter has discussed the competing considerations as follows (Winter, *Money, Politics and the First Amend-*

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[3] In *Columbia Broadcasting System* v. *Democratic National Committee*, Nos. 71–863 to 866, decided May 29, 1973 (41 LW 4688), the question whether the First Amendment required a broadcast licensee to accept a paid editorial advertisement was raised but not decided by a court majority. Three Justices (Burger, Ch. J., Stewart and Rehnquist) held that a refusal to do so does not constitute "governmental action" for First Amendment purposes, saying: "The First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such Acts." 41 LW at 4695. Two Justices (Brennan and Marshall) expressly disagreed on this point. The remaining Justices felt that there was no need to decide that issue. Just as the question before the court on this score was novel, the questions raised by Rosenthal are equal novel and difficult, requiring further study. See, *e.g.*, Rosenthal, *Federal Regulation of Campaign Finance: Some Constitutional Questions*, Study No. 18, Citizens Research Foundation (1971), with commentaries by Alexander M. Bickel, Archibald Cox, Paul A. Freund, Ralph K. Winter, Jr., and Milton Katz, Editor. In the seminar which led to the publication just cited, Professor Alexander E. Bickel, agreeing with Rosenthal, said (*op. cit.*, at p. 66) : "I think that if Congress repeals the equal time provision and the TV stations and networks then give time only to the two major candidates, it doesn't seem to me terribly difficult to impute the action of the networks to the government, and, thus, to subject them to constitutional judgment."

ment (American Enterprise Institute for Public Policy Research (March 1971), 45 at pp. 68–69) :

> On the other hand, there may be reasons not to permit major party candidates to exclude significant third-party candidates by the outright repeal of section 315 as it applies to presidential elections. If the equal time provision is merited to begin with, some affirmative justification ought to be offered for its abandonment in presidential elections. The difficulties it presents can be avoided by legislative modifications such as those suggested above. And surely the facilitation of a debate is not a sufficient justification for abandonment of the "equal time" rules and exclusion of other candidates. As aids to voters, debates are probably overrated. And if they are of great value, then all candidates should be included.

For the purposes of discussion here, it is not important that responsible scholars may regard the matter differently either from a policy or constitutional standpoint. The point is that this is certainly a matter for study by a commission such as S.J. Res. 110 would establish.

III. STATE-BY-STATE LIMITATIONS ON EXPENDITURES FOR PRESIDENTIAL CANDIDATES

Section 4 of S. 372 would provide that no candidate for presidential nomination could spend in a single State more than the amount which would have been applicable to him had he been a candidate for the office of Senator from the State. Presently section 104(a)(3)(A)(i), (ii) of the Federal Election Campaign Act of 1971 contains a similar provision, except that it is confined to spending for use in a State of communications media and broadcast stations.

The existing provision, so far as we are aware, has not been the subject of consideration by any court. A provision restricted to expenditures for communications media, would probably survive constitutional challenge since it deals with services that are of necessity in short supply. For example, a candidate with unlimited financial resources could readily monopolize prime time to the exclusion of a competing candidate whose funds are limited. In our opinion, however, to extend such a restriction across the board to expenditures for other readily available services such as newspaper advertisements, outdoor advertising, handbills, and other campaign services has no corresponding justification. Certainly, there is no justification for such a restriction mentioned in the Committees favorable report. S. Rept. No. 93–170, 93d Cong., 1st Sess. (1973).

It would be one thing if there were any logical basis for coupling a presidential race with a race for Senator. But obviously, the campaign for each office stands on an entirely different footing, with different issues and varying needs that are involved in reaching the electorate.

As a constitutional matter, the question primarily is whether the state spending limitation that would be imposed by section 4 of S. 372 violates the First Amendment as an unlawful restriction on the rights of free speech and association for political activity.

Professor Winter has summed up the conflict between spending limitations and the First Amendment as follows (Winter, *op. cit.*, at 60–61) :

> Many of the supporters of limitations on campaign expenditures and contributions style themselves as vigorous defenders of First Amendment rights. It is thus surprising to find that of the many problems raised by such legislation, the free speech issue is the least mentioned. . . . A limit on what a candidate may spend is a limit on his political speech as well as on the political speech of those who can no longer effectively contribute money to his campaign. In all of the debate surrounding the First Amendment, one point is agreed upon by everyone: no matter what else the rights of free speech and association do they protect explicit political activity. But limitations on campaign spending . . . expressly set a maximum on the political activity in which persons may engage.
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> * * * * * * *
>
> The First Amendment prohibits the setting of a legal maximum on the political activity in which an individual may engage. This is the case whether or not the maximum is imposed in the name of equalizing opportunity or whether an actual discriminatory effect can be shown. Even under a 'balancing' test, such regulation is invalid because there is no counter-

> vailing interest (for example, preserving public peace) to 'balance' against the restriction on speech. In other words, the restriction is imposed not to preserve some other legitimate interest of society but solely for the sake of restricting the speech itself—for the sake, indeed, of affecting the political outcome. But that is precisely what the First Amendment is all about. . . .

The committee's favorable report does not refer to what legitimate interests of the electorate would be protected or preserved by introducing such an extraordinary spending restriction on a Presidential candidate. It seems apparent to us that this spending limitation can have no more immediate and direct result than to restrict greatly the amount of political information which should be available to the people in a national election.

Although the courts have not dealt with spending limitations such as are proposed by section 4 of S. 372, it has considered a constitutional challenge to the spending limitation of 18 U.S.C. 610, which prohibits political expenditures by unions and corporations in connection with federal elections. *United States* v. *C.I.O.*, 335 U.S. 106 (1948). That case involved an indictment against the C.I.O. because a union newspaper advocating support of a particular candidate was printed and distributed by mail at the cost of about $100 to union members and a few other persons. The District Court for the District of Columbia dismissed the indictment on the ground that the statute was an unconstitutional abridgment of First Amendment rights. Upon appeal to the Supreme Court, a majority of the Court held that a publication in a union newspaper, distributed to those persons accustomed to receive copies, did not fall within the prohibition of the statute. The majority indicated that if the statute were construed to prohibit the publication by corporations and unions of periodicals advising their members, stockholders or customers of the danger or advantage involved in the election of candidates espousing certain measures, "the gravest doubt would arise in our minds as to its constitutionality."[4] 335 U.S. at 121. Four Justices, while concurring in the dismissal of the indictment, concluded that such expenditures were prohibited by the sweeping restrictions of the law, and that the law, as such, violated the First Amendment. Speaking for the concurring Justices (Black, Douglas and Murphy), Justice Rutledge stated that there "can be little doubt of the Congress' power to regulate political contributions and expenditures by labor unions, as well as by other organizations and individuals, in the interest of free and pure elections and the prevention of official corruption," by appropriate measures which do not violate First Amendment rights. (335 U.S. at 139–140). However, as the statute applied to the union's activities, it was invalid. Justice Rutledge said in that connection (335 U.S. at 144):

> There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose.
>
> The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the election is deprived of information, knowledge and opinion vital to its function. . . .

Applying the principles of Justice Rutledge's opinion to section 4 of S. 372, we believe that the effect of limiting a candidate for the Presidency to expenditures which he would incur if he were running for Senator is so restrictive in a national election as to deprive the electorate of free and full discussion so essential "to the full, fair and untrammeled operation of the electoral process."

To be sure, there may be conflicting views on this point that may command respect. Yet what section 4 proposes is on its face so novel in its reach, so vague and questionable in its purpose, and so fraught with danger to First Amendment rights and free and open discussion in a national election, that the Congress in its wisdom may wish to defer consideration of this proposal until a Commission such as one established under S.J. Res. 110 has a reasonable opportunity to study it.

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[4] See also, *Pipefitters* v. *United States*, 407 U.S. 385, 401 (n. 12), 417 (n. 29) (1972).

IV. THE INDEPENDENT LITIGATING AUTHORITY OF THE FEDERAL ELECTIONS COMMISSION, INCLUDING CRIMINAL CASES

At the hearings the Department also questioned the constitutionality of the proposal that the Commission have authority to prosecute criminal cases and in its own name conduct litigation in the Supreme Court.

In advancing this argument, the Department has assumed that such authority is the intention of section 8 of the bill, as reflected by its broad language vesting authority in the Commission to present evidence before Federal grand juries and to "prosecute," which in common parlance refers to criminal cases. So also, we assume that the authority "to defend or appeal to any court" would extend to the Supreme Court.

The Committee's report on S. 372 (S. Rept. No. 93–190) is none too clear on these points. It merely indicates that the Commission will administer and enforce the Act (p. 2); and the section-by-section analysis merely repeats the language of the Act (p. 18). However, at the hearings there were statements and articles introduced suggesting that the Department of Justice "will have no role whatsoever, except, of course, from the standpoint of technical advice." [5] Accordingly, we have given the language of section 8 the reasonable meaning which we think it is intended to convey, of divesting the Attorney General (and Solicitor General) of his criminal litigating authority. While we stand on the constitutional argument made in our original testimony, we wish at this time to elaborate somewhat on the policy considerations.

The Department of Justice opposes fragmentation of its criminal enforcement activities because such a proposal would be at odds with the most effective and efficient use of the Department's resources—its highly trained and experienced trial lawyers working in close coordination with the Federal Bureau of Investigation. You do not develop competent criminal prosecutors overnight. This is a long process. Nor would we expect that the Commission's investigative staff could have the skill and training of FBI personnel.

The Second Hoover Commission recognized the need for centralizing responsibility for all litigation, on behalf of the executive branch, in the Department of Justice. It recommended as follows: [6]

> The Department of Justice should be recognized as the chief law office of the Government. It should conduct all litigation before the courts on behalf of the Government and its executive departments and agencies, except as Congress authorizes otherwise.

The Commission noted that "certain regulatory bodies have been authorized to conduct [civil] litigation independently," and stated that "the effectiveness of our [its] basic proposal will be decreased to the extent that such congressional authority is extended." *Id.*

The Commission's Task Force Report on Legal Services and Procedure (March 1955) stated that the "fragmentation of legal services contributes generally to inefficiency in the performance of legal functions." (Report, p. 59). The Task Force expressed the view that the Attorney General "should be the chief nonjudicial law officer in fact as well as in name, thereby establishing executive responsibility for Government legal affairs and achieving both economy and efficiency in legal administration." Report, *supra* at 60.

The views expressed by the Second Hoover Commission are consistent with the Constitution, which vests the Executive power in the President of the United States; and charges him with taking care that the laws be faithfully executed. Article II, sections 1 and 3. As the Supreme Court has stated, speaking through Chief Justice Taft, the Attorney General "is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed." *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922).

The argument has been made that Attorneys General have been reluctant to prosecute election cases, particularly those involving members of their own parties and contributors to their campaigns. If that argument has any validity in supporting the prosecuting authority conferred on the Commission by S. 372, the same argument could be invoked to withdraw the Attorney General's au-

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[5] Federal Election Campaign Act of 1973, *Hearings before the Subcommittee on Communications of the Committee on Commerce*, U.S. Senate, 93d Cong., 1st Sess. on S. 372 (1973), p. 70–71.

[6] *Legal Services and Procedures*, a report to the Congress by the Commission on organization of the executive branch of the Government, March 1955, p. 6.

thority to prosecute criminal offenses under laws administered by other regulatory agencies. Since persons and corporations subject to such regulatory agencies are often substantial contributors to Federal campaigns, it could be argued that the Department of Justice should not be relied on to prosecute them. On that basis each independent regulatory agency could take over the jurisdiction of criminal offenses.

Such dismemberment of the Attorney General's authority could conceivably create great burdens on businessmen and individuals who might be unnecessarily harassed by criminal prosecutions freely initiated by independent agencies. Since members of those commissions cannot be removed by the President, and since they are not directly responsible to the people, is the risk not greater to leave criminal prosecution to them, rather than to an Attorney General, directly answerable to the President, and who can be removed by the President at will?

Just as the public interest requires even-handed justice, it also requires that unjust and groundless prosecutions should not be brought. The news publicity attending a dismissal of a prosecution rarely catches up with the harm done to an innocent individual who has been charged with crime. The Department of Justice may indeed appear to move slowly at times on some cases, but feels that it is more important to exercise due care so that the innocent will not suffer from a hasty investigation or impulsive and unsupportable charges and indictments. Such a result is better assured, in the long run, if an official directly responsible to the President, with the long traditions of the Attorney General's office has the exclusive criminal prosecuting function.

EXHIBIT 5

U.S. GENERAL ACCOUNTING OFFICE,
Washington, D.C., June 20, 1973.

Hon. HOWARD W. CANNON,
Chairman, Committee on Rules and Administration,
U.S. Senate

DEAR MR. CHAIRMAN: Enclosed herewith is the legal memorandum concerning the constitutionality of authorizing an independent Federal Elections Commission to maintain civil and criminal actions which I agreed at the hearing on June 7, to furnish to the Committee for use in its deliberations on S. 372 and other bills relating to Federal elections.

The memorandum is in the nature of staff work done under severe time constraints; therefore, it cannot be an exhaustive treatment of the subject. We trust, however, that it will be of help to you. We continue to be of the view that criminal as well as civil authority to litigate is constitutionally appropriate in the area of elections.

If we may be of further assistance to the Committee, please advise.

Sincerely yours,

PHILLIP S. HUGHES,
Director.

Enclosure.

GENERAL ACCOUNTING OFFICE,
June 20, 1973.

MEMORANDUM

To: Director, OFE—Phillip S. Hughes
From: Counsel, OFE—Robert L. Higgins, Attorney, OGC—James K. Scarborough, Legal Intern, OGC—John R. Broadway, Jr.
Subject: Legal Memorandum concerning Constitutionality of Authorizing The Proposed Federal Elections Commission To Bring Civil and Criminal Actions

QUESTION PRESENTED

May the Congress, consistent with the constitutional separation of powers, authorize an independent elections commission to maintain civil and criminal actions in the Federal Courts through its own attorneys?

DISCUSSION

The Department of Justice (Statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, before the Senate Committee on Rules and Administration on June 7, 1973) has taken the position that proposed legislation vesting in the elections commission, the authority to initiate and prosecute criminal cases, raises a most serious constitutional question under the doctrine of separation of powers. In the Department's opinion, such authority cannot constitutionally be transferred outside the executive branch. Therefore, the proposed independent commission cannot be empowered to initiate and prosecute criminal cases, and the Department is not aware of any such agency possessing a like power. In addition, the Department sees no reason for a departure from the traditional policy that the representation of Federal agencies in court (civil and criminal) should be under the supervision and control of the Attorney General.

First, as to civil proceedings, there are a number of agencies and independent commissions which have been empowered by Congress to institute court actions in their own names. The question of whether to vest such power in the elections commission does not appear to pose any constitutional problem and presents only a question of legislative policy for the Congress to decide.

As to criminal proceedings, our research has disclosed no conclusive authority impeding the Congress from investing an independent elections commission with the authority to prosecute criminal actions arising out of violations of Federal laws pertaining to elections.

All of the express powers of the Federal Government pertaining to elections detailed in the Constitution are vested in the Congress. Article 1, in Section 4, gives Congress power to alter State law as to the times, places and manner of holding elections for Senators and Representatives, except as to the place of "chusing" Senators; and, in Section 5, makes each House the judge of elections, returns and qualifications of its own members. Under Article II, Section 1, as modified by the 12th Amendment, the House elects the President, and the Senate the Vice-President whenever the Electoral College fails to do so. There is no express constitutional grant of power over elections to either the executive or judicial branches; the only constitutional function given the President is approval or veto of any legislation on the subject, and the judiciary has only such judicial powers as might be inferred under Article III.

The broad power of the Congress to protect Federal elections from fraud and corruption is shown by *Burroughs & Cannon* v. *United States*, 290 U.S. 534 (1934), in which the Supreme Court upheld the constitutionality of the prior Federal Corrupt Practices Act. The following quotations from the Court's opinion at page 545 and 547–548 relates to presidential elections but are equally applicable to congressional elections as well:

> To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."
>
> * * * * * * *
>
> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.

No authority precisely on point has been found. The three cases and one Attorney General opinion cited by Assistant Attorney General Dixon, in his statement (p. 16) appear distinguishable or attributable to statutory, not constitutional, provisions.

Ponzi v. *Fessenden*, 258 U.S. 254 (1921), is of no relevance here. That case involved the authority of the Attorney General to deliver a Federal prisoner for trial in a State court. At issue were the Attorney General's custodial responsibilities under Section 4 of the Act of March 3, 1891, 26 Stat. 839. As indicated at page 262, the function of the Attorney General as "hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed," all derive from the cited provisions of statutes, and the Revised Statutes, and not necessarily from the Constitution.

In fact, the responsibility to institute civil actions and criminal proceedings on behalf of the United States was not vested in the Attorney General for the first 72 years of the Nation's constitutional history. Under the Act of September 24, 1789, 1 Stat. 73, 92, that power was vested solely in the "attorney for the United States in that district . . ." The Attorney General was given no supervisory power over such district attorneys; he could merely "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."

The Attorney General was not given supervisory powers over district attorneys until enactment of the Act of July 31, 1861, 12 Stat. 285. Not until almost midpoint of this 72-year period were they subjected by statute to the direction of any executive officer, and then only to a Treasury Department official in connection with certain cases involving revenue matters. See the Act of May 15, 1820, 3 Stat. 592, 596. Initially, the district attorneys of the United States were compensated only by fees as taxed by the respective courts (1 Stat. 92), and by 1842 they were still only receiving token "retainer" type compensation of $200 (with a couple of higher exceptions) although allowed to retain fees, above their office expenses, up to $6,000 (5 Stat. 427, 483).

During this period, we found no court cases concerning the district attorneys' status. In a case concerning the Princess of Orange's stolen crown jewels, Attor-

ney General Taney gave as his opinion that since the district attorneys could be removed by the President, they were executive officers. 2 Op. Atty. Gen. 482 (1831). From this, he drew the conclusion that the President could direct the discontinuance of a forfeiture, presumably under the tariff law then in effect. There seems to be no other authority on the point, until Congress ended the autonomy 30 years later, by the 1861 statute, and then entirely resolved the issue by the Act of June 22, 1870, which created "an executive department of the Government of the United States, to be called the Department of Justice of which the Attorney General shall be the head."

In the light of preceding history, therefore, it seems clear that the language at page 262 of the *Ponzi* case, to which the Assistant Attorney General refers, must be regarded as relating to the particular function of the Attorney General there involved, and to the statutory provisions cited, and not as stating an authoritative constitutional principle that must be accepted as governing here.

Of some relevance, but still not persuasive, is *United States* v. *Cox*, 342 F. 2d 167 (1965) ; certiorari denied, 381 U.S. 935 (1965). Its relevance, however, derives from the separation of powers between the executive branch, and the judicial branch. The court stated that, as an incident of the constitutional separation of powers, the courts were not free to interfere with the discretionary powers of the United States Attorneys. In our view, *Cox* involved an interpretation based on the statutory role of the U.S. Attorneys as officers of the executive branch; what is said in that context has no necessary persuasiveness had the Congress legislated otherwise. Certainly there is nothing in *Cox* requiring a conclusion that Congress cannot constitutionally legislate otherwise.

We come now to *Springer* v. *Philippine Islands*, 277 U.S. 189 (1928). In construing the Philippine Organic Act, the majority opinion drew an analogy to the Federal Constitution's separation of powers, and, in the language at page 202 cited by the Assistant Attorney General, bottomed its holding squarely upon the rigid view of the separation of powers enunciated two years earlier in *Myers* v. *United States*, 272 U.S. 52 (1926). That rigid view was modified less than a decade thereafter, especially in the case of independent regulatory commissions, in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). See also *Weiner* v. *U.S.*, 357 U.S. 349 (1958). If *Springer* is to be regarded as having relevance here, that relevance derives not from the discarded rigid view of the majority opinion, but from the dissenting opinion of Mr. Justice Holmes, a veritable road sign pointing the route to *Humphrey's Executor*, in which he characterized the separation of powers principle as follows: (27 U.S. 209–211)

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other . . .
>
> ". . . At an early date it was held that Congress could delegate to the Courts the power to regulate process, which certainly is lawmaking as far as it goes . . . With regard to the Executive, Congress has delegated to it or to some branch of it the power to impose penalties. . . . It is said that the powers of Congress cannot be delegated, yet the Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a *quasi*; . . .
>
> It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

In 1887 Congress created the Interstate Commerce Commission and vested in it the described fusion of powers only 17 years after having created the Department of Justice itself, and within three decades after having ended the semi-autonomous status of the United States Attorneys by subjecting them to the supervision of the Attorney General. Within ten years of its creation, the Supreme Court held that the Interstate Commerce Commission, as a body corporate, had power to sue and be sued in the Federal courts. *Texas and Pacific Railroad Co.* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896).

As to civil actions, therefore, there is simply no basis for disputing that the Constitution permits the vesting of litigative authority in an independent regulatory agency. No similar judicial determination has been found as to criminal prosecutions, undoubtedly because that function has from the first been vested by Congress in the United States Attorneys and, in recent times, in the Depart-

ment of Justice. There is a statutory exception, however, for criminal proceedings in the armed services under the Uniform Code of Military Justice, 10 U.S.C. 801–940, authorized under Article I, Section 8, paragraph 14 of the Constitution.

CONCLUSION

In summation, no convincing authority has been found that would preclude the vesting of litigative powers in an independent regulatory commission concerned with Federal elections. The judicial precedents cited by the Department of Justice are either irrelevant or explainable in terms of the controlling statutory provisions. The fact that authority to bring both civil and criminal prosecutions was vested solely in district attorneys having at least semi-independent status for the first 72 years of the Nation's history, until the Congress by statute placed them under the supervision of an executive department makes it entirely clear that the Congress may, in its legislative discretion, reverse that decision and place such authority elsewhere, in whole or in part.

Finally, the Congress is not precluded from considering the historical problems of enforcing Federal laws relating to elections in deciding whether to vest full enforcement powers, civil and criminal, in an independent elections commission. It is clear from the example of various regulatory commissions that granting such authority as to civil actions would not violate the Constitution. With respect to criminal prosecutions, the demonstrated need for further legislative action concerning election laws, an area over which the Congress has broad power, should provide sufficient basis upon which to grant such power to the commission, especially in the absence of conclusive authority that it would be unconstitutional to do so.

UNITED STATES GENERAL ACCOUNTING OFFICE,
Washington, D.C., July 10, 1973.

Hon. HOWARD W. CANNON,
Chairman, Committee on Rules and Administration,
U.S. Senate

DEAR SENATOR CANNON: As a supplement to the legal memorandum forwarded to you by letter dated June 20, 1973, the attached Appendix A is a representative list of Federal agencies with statutory authority to file civil actions. We have found no further authority with respect to criminal actions.

We are also transmitting herewith for the Committee's consideration a legal memorandum on the subject of congressional authority with respect to appointments to the proposed Federal Elections Commission.

Please advise us if we may be of further assistance to the Committee.

Sincerely yours,

(S) Phillips S. Hughes,
PHILLIP S. HUGHES,
Director.

Attachments.

APPENDIX A

REPRESENTATIVE STATUTORY PROVISIONS AUTHORIZING DISCRETIONARY FILING OF CIVIL ACTIONS BY REGULATORY AND OTHER FEDERAL AGENCIES

1. *Securities and Exchange Commission*, 15 U.S.C. 77t(b); 78u(e); 80a–41(e); 80b–9(e).
2. *Federal Power Commission*, 15 U.S.C. 717s(c).
3. *Civil Aeronautics Board*, 49 U.S.C. 1486(a).
4. *National Labor Relations Board*, 29 U.S.C. 154(a).
5. *Environmental Protection Agency*, 42 U.S.C. 1857c–8(b).
6. *Small Business Administration*, 15 U.S.C. 687c(a).

GENERAL ACCOUNTING OFFICE,
July 10, 1973.

MEMORANDUM

To: Director, Office of Federal Elections, Phillip S. Hughes.
From: Counsel, Office of Federal Elections, Robert L. Higgins; Attorney, Office of General Counsel, N. Bradley Litchfield.
Subject: Legal Memorandum on Congressional Authority with Respect to Appointments to the Proposed Federal Elections Commission.

QUESTION PRESENTED

To what extent, if any, may Congress limit the President's appointment power to persons recommended by others or otherwise prescribe qualifications for members of the proposed Federal Elections Commission?

CONSTITUTIONAL PROVISIONS

Article I, Section 4. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Article I, Section 8, clause 18. "[The Congress shall have power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article II, Section 2, clause 2. "[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counsuls, 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."

DISCUSSION

Numerous legislative proposals are now under consideration by the Congress which would create an independent Federal Elections Commission with broad administrative power and with authority to maintain civil and criminal actions to enforce Federal election laws in the Federal courts. We understand that differing viewpoints are held concerning the authority of Congress with respect to appointments to such a commission.

In an earlier memorandum dated June 20, 1973, we cited *Burroughs and Cannon* v. *United States*, 290 U.S. 534 (1934) as showing the power of Congress to protect Federal elections from fraud and corruption. The power of Congress over congressional and presidential elections was recently reiterated in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). The Court, in an opinion by Justice Black, based the power of Congress on Article I, Section 4, and sustained in part the constitutionality of the Voting Rights Act Amendments of 1970. The opinion quotes *Smiley* v. *Holm*, 285 U.S. 355 (1932), to the effect that the words of Article I, Section 4, establish the constitutional authority of the Congress "to provide a complete code for congressional elections . . ." including the "prevention of fraud and corrupt practices . . . "(supra at 122). Justice Black concludes (supra at 124) that Congress has "ultimate supervisory power over congressional elections" and he adds:

"Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice presidential elections and to set the qualifications for voters for electors to these offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it have over congressional elections."

In exercising its supervisory power over elections, it is clear that Congress may establish an office, agency, or commission and may prescribe qualifications of the office which may limit the power of appointments to such office. Thus, Professor Edward S. Corwin states in *The Constitution of the United States of America: Analysis and Interpretation*, ed. Corwin (1964), Senate Document No. 39, 88th Congress, page 501:

"That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is by law, and takes place by virtue of Congress's power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers. As incidental to the establishment of an office Congress has also the power to determine the qualifications of the officer, and in so doing

necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representatives of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by others. Indeed, it has contrived at times to designate a definite eligibility, thereby virtually usurping the appointing power."

For examples of statutes where the President has been limited to making appointments from a list of recommendations made by others, see Appendix I to this memorandum. There are numerous statutes wherein Congress went even further and virtually assumed the appointment power by actually designating individuals for specific public office or by directly providing for the appointment of officers to serve on commissions for the execution of governmental work. See Appendix II to this memorandum.

One recent example of this type of statute is section 103 of Pub. L. 91–379, approved August 15, 1970, which created the Cost Accounting Standards Board. This Board was established, "as an agent of the Congress . . . [and] independent of the executive departments," to promulgate mandatory cost-accounting standards and regulations for the pricing, administration, and settlement of all large negotiated contracts between the Government and national defense contractors. The statute expressly provides that the Board shall be comprised of the Comptroller General and four other members who are to be selected by the Comptroller General from representative groups that will be affected by the Board's official actions.

Our research of cases deciding the constitutionality of statutes directly appointing or significantly limiting the President's range of appointable officers has disclosed only limited authority squarely on point.

In *Springer* v. *Philippine Islands*, 277 U.S. 189, 201 (1927), the Court nulified legislative appointments of executive officers to two Philippine government corporations on the grounds that, under the Organic Act of the Philippine Islands, the power of appointment was an exclusively executive function. The Court's rationale for its holding asserts that under the American constitutional system (State and Federal) the legislative branch, as a general rule, cannot exercise either executive or judicial power. The Court classifies the appointing power as an executive function, but suggests, nevertheless, that such power can be exercised by the legislature where "expressly granted or incidental to its powers . . .", supra at 202. Thus *Springer*, as one of the few opinions considering the appointment power, would appear to support the exercise of the power to appoint by Congress where necessary to effectuate the exercise of congressional power, such as its "ultimate supervisory power" over Federal elections.

Springer is of further interest here in that it sets forth with approval a more indirect method whereby Congress may constructively share the appointment power. Noting the general rule that the legislative branch lacks the power of appointment, the opinion further denies any legislative power to "engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; *though the case might be different if the additional duties were devolved upon an appointee of the executive.*" (Emphasis added), supra at 202, citing *Shoemaker* v. *United States*, 147 U.S. 282 (1893) at 300–301.

The statute under attack in *Shoemaker* created a Commission to establish what became Rock Creek Park in the District of Columbia and provided the two members of the Commission, all the members of which were defined in the statute as public officers, would be the Chief of Engineers of the Army and the Engineer Commissioner of the District of Columbia. The constitutionality of designating those officials as members of the Commission was challenged on the basis that it was an appropriation by Congress of the President's power to appoint. The Court rejected that challenge and held that since those two persons were officers of the United States previously appointed by the President and confirmed by the Senate they need not be re-appointed to perform additional duties "germane to the offices already held by them." "It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing officer without thereby rendering it necessary the incumbent should be again nominated and appointed." *Shoemaker* at 301. This case represents the constitutional au-

thority for indirect congressional exercise of the appointment power by augmenting the duties of established public offices held by Presidential appointees. In discussing the power of appointment to public office under the Federal Constitution in connection with the *Springer* case, a note at 42 Harvard Law Review 426 (1929) made the following observations:

"The necessity of a precise analysis of the relation between executive functions and the power of appointment, incidentally illustrated in *Myers* v. *United States*, has again been brought to the attention of the profession by recent decision of the Supreme Court in *Springer* v. *Government of the Philippine Islands*. The general indefiniteness of the constitutional provisions relating to the powers of the President and the impracticability of sharply demarcating the executive from other branches of the government render it problematical whether the power to appoint is an executive function and, if so, whether exclusively within presidential control. As in the *Myers* case, both historical content and practical application should constitute criteria in the determination of this question. Moreover, the extent of the powers allocated by Congress should not be controlled by any technical considerations of the doctrine of separation of powers."

After analyzing the historical materials from the Constitutional Convention, the note concluded as follows:

"Since no definite conclusion seems warranted, resort should be made to Congressional practice to determine what body has exercised the power. For, it has been suggested that, 'A persistent legislative practice which involves the delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary.' [Brandeis, J., dissenting in *Myers* v. *United States*, 272 U.S. 52, 283 (1926)]. Statutes have specified particular requisites for nominees of the executive. Moreover, Congress has specifically exercised the power of appointment by enactments which name the office, the occupant of which shall succeed to the presidency under specified conditions; or name those who are to be members of quasi-public associations or corporations; or name officers or directly provide for their selection, to serve on commissions for the execution of governmental work; or appoint individuals to public office; or order the President to change the rank of a particular officer in the army or navy. Herein is illustrated a legislative practice, starting at the very outset of our government and continuing unchallenged to the present time. To question the constitutionality of the appointments made 'would be to lay hands on the Ark of the Covenant.' Moreover, the only case which considered the constitutionality of such congressional appointments held that Congress had the power to designate a person to fill an office created by it. The existing state constitutions contain various provisions relating to the problem. The ordinary constitutional distributive clause for the separation of powers has been deemed insufficient to vest the power of appointment, as per se executive function, solely in the governor; yet legislative practice utilizing such power has been sanctioned.

"On the whole, judicial intervention would seem to be highly undesirable. The question essentially involves a political distribution of power over which the court professes to exercise no jurisdiction. Congress has acted in the belief that it may appoint to office, and since the precise location of the power is a matter of doubt, the Supreme Court should not bar future modifications warranted by changed conditions and an altered public opinion."

CONCLUSION

The authorities discussed herein demonstrate that, in exercising its constitutional power to protect the integrity of Federal elections by establishing an independent commission or office, the Congress may limit the President's power to appoint the members thereof and may otherwise prescribe qualifications for the members.

The precise line between congressional and presidential authority in this area is far from clear. It does seem clear, however, that Congress may limit appointments to a specific category or group of persons or to a list of persons recommended by others. Furthermore, Congress may also devolve additional duties upon an existing, public office filled by executive appointment without necessitating the renomination and reappointment of the incumbent officer.

APPENDIX I

Statutes wherein Congress has confined the President's selection to a small number of persons to be named by others. This list is copied from Brandeis, J., in *Myers* v. *United States*, 272 U.S. 52 (1926) at page 274, note 56.

[56] Act of Feb. 25, 1863, c. 58, § 1, 12 Stat. 665, Comptroller of the Currency, on nomination of the Secretary of the Treasury, amended by Act of June 3, 1864, c. 106, § 1, 13 Stat. 99; Act of April 23, 1880, c. 60, § 4, 21 Stat. 77, 78, United States International Commission, on nominations of state governors; Act of Feb. 10, 1883, c. 42, §§ 2, 3, 22 Stat. 413, managers of World's Industrial and Cotton Centennial Exposition, on recommendation of executive committee of National Cotton Planters' Association and majority of subscribers to enterprise in the city where it shall be located, commissioners to the Exposition to be appointed on nomination of state governors; Act of July 1, 1902, c. 1362, § 59, 32 Stat. 641, 654, commission to sell coal and asphalt deposits in Indian lands, one appointment to be made on recommendation of principal chief of Choctaw Nation, one on recommendation of Governor of Chickasaw Nation; Act of Feb. 23, 1920, c. 91, § 304, 41 Stat. 456, 470, Railroad Labor Board, three to be appointed from six nominees made by employees, three to be appointed from six nominees made by carriers.

APPENDIX II

(A) Statutes wherein Congress appointed individuals to public office. This listing is copied from 42 Harvard Law Review 426 (1929), at 430, note 28.

[28] 3 STAT. 400 (1817) (president to employ John Trumbull to paint pictures); 4 STAT. 717 (1834) (joint committee of Congress to contract with American sculptor for marble of Ellsworth for Supreme Court); 5 STAT. 618 (1843) (Professor Morse to superintend experiments with telegraph); 9 STAT. 115 (1846) (Regents of Smithsonian Institute appointed by joint resolution; every Congress has followed this practice whenever a vacancy has occurred); 10 STAT. 180 (1853) (Sharley to administer oath to vice president-elect, King, at Havana); 15 STAT. 1 (1867) (joint resolution to name managers of National Asylum; every Congress has followed this practice whenever a vacancy has occurred); 19 STAT. 123 (1876) (named supervising commissioner of Washington National Monument Society); 21 STAT. 170 (1880) (Batchelder to make survey of battle of Gettysburg); 22 STAT. 386 (1882) (Hayes to be employed to publish pamphlet on goats); 28 STAT. 580 (1894) (editor of International Arbitration named); 29 STAT. 470 (1896) (Green to supervise library of Congress); 37 STAT. 731 (1913) (Colum to be special resident commissioner for Lincoln Memorial, others appointed by 38 STAT. 768 (1914), 41 STAT. 537 (1920)); 38 STAT. 388 (1914) (Goethals to investigate claims of a corporation); 38 STAT. 772 (1914) (President to detail a named person to go to Alaska to construct railroad), 38 STAT. 777 (1914) (Kunz appointed to North American Indian committee).

(B) Statutes wherein Congress has exercised the power of appointment by naming officers or directly providing for their selection, to serve on commissions for the execution of governmental work. This listing is compiled from Harvard Law Review, *supra* at 431, 432.

9 Stat. 102 (1846) (Smithsonian Institute created with vice president, chief justice, mayor, three senators to be named by president of senate, three representatives to be selected by speaker of the House, six others to be named by joint resolution, to be Board of Regents); 12 Stat. 283 (1861) (board of commissioners to equalize salaries of United States officers with two senators selected by presiding officer, three representatives named by the speaker of the House, to be committee); 26 Stat. 492 (1890) (Rock Creek Park Committee with chief engineer of United States and engineering committee of District of Columbia as members); 35 Stat. 546 (1908) (national monetary committee to be appointed by presiding officer of Senate and by Speaker of House of Representatives); 36 Stat. 882 (1910) (president of Senate and speaker of House to appoint committee to Mexico Centennial); 38 Stat. 251, 260 (1913) (Federal Reserve Board with secretary of treasury, comptroller of currency, as members, and, by 42 Stat. 620 (1922), comptroller voted $7,000 additional pay for such services); 39 Stat. 929, 932 (1917) (vocational education board with secretaries of agriculture, commerce, labor, and United States Commissioner of Education, as members); 41 Stat. 1063 (1920) (federal power committee with secretaries of war, interior, and agriculture as members).

EXHIBIT 6

MEMORANDUM ON THE CONSTITUTIONALITY OF CONTRIBUTION AND EXPENDITURE LIMITATIONS, FROM COMMON CAUSE

Until the enactment of the Federal Election Campaign Act of 1971, federal law had contained contribution and expenditure limitations for approximately 60 years, and 29 states now have some form of these ceilings in their corrupt practices acts.[1] These laws had as their primary function the dual goals of (1) reducing the corrupting influence of large campaign contributions, and (2) reducing the costs of campaigns thus reducing the pressures to secretly evade the limit on contributions.

Enactment of contribution and expenditure ceilings poses a number of constitutional questions, relating primarily to the possible infringement of the First Amendment's freedom-of-speech and freedom-of-association guarantees.[2] Due to virtual nonenforcement in the past of laws containing contribution and spending ceilings, there is no federal case ruling indirectly on the constitutionality of such limits, and there is only one state case construing the validity of such ceilings, *State* v. *Kohler*, 200 Wis. 518, 228 N.W. 895 (1930), in which the Wisconsin Supreme Court upheld against constitutional attack a statute limiting the amount which might be spent by candidates and their personal campaign committees.[3] Although these constitutional questions merit serious discussion and careful analysis, we believe that contribution and expenditure limits clearly pass constitutional muster under existing precedents.

In fact, ceilings on contributions and expenditures foster and protect the exercise of First Amendment freedoms in three ways: (1) they protect the rights of the less affluent to express themselves by running for office; (2) they help prevent the drowning out of all other political viewpoints by well financed candidates and interest groups; and (3) they ensure the equality of the voting rights of each citizen by limiting the influence on candidates of the large contributions.

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[1] Fleishman, "Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971," 51 *N.C.L. Rev.* 389, 450 (1974).

[2] For a discussion of the constitutional issues involved in the regulation of election campaign practices, see Lobel, "Federal Control of Campaign Contributions," 51 *Minn. L. Rev.* 1 (1966); Fleishman, "Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971," 51 *N.C.L. Rev.* 389 (1973); Rosenthal, *Federal Regulation of Campaign Finance: Some Constitutional Questions* (1971); Redish, "Campaign Spending Laws and the First Amendment," 46 *N.Y.U.L. Rev.* 900 (1971); Court & Harris, "Free Speech Implications of Campaign Expenditure Ceilings," 7 *Harv. Civ. R—Civ. Lib. Rev.* 214 (1972). See also Court & Harris "Campaign Spending Regulation: Failure of the Frst Step," 8 *Harv. J. Leg.* 640 (1971); Berry & Goldman, "Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971." 10 *Harv. J. Leg.* 331 (1973); Roady, "Ten Years of Florida's 'Who Gave It—Who Got It' Law," 27 *Law & Contemp. Prob.* 434 (1962); Note, "Statutory Regulation of Political Campaign Funds," 66 *Harv. L. Rev.* 1259 (1953).

[3] Wisconsin Supreme Court declared: " It is a matter of common knowledge that men of limited financial resources aspire to public office. It is equally well known that successful candidacy often requires them to put themselves under obligation to those who contribute financial support. If such a candidate is successful, these obligations may be carried over so that they color and sometimes control official action. The evident purpose of the act is to free the candidates from the temptation to accept support on such terms and to place candidates during this period upon a basis of equality so far as their personal ambitions are concerned, permitting them, however, to make an appeal on behalf of the principles for which they stand, so that such support as may voluntarily be tendered to the candidacy of a person will be a support of principle rather than a personal claim upon the candidate's consideration should he be elected. . . . It may be replied that the act seeks to throw democracy back upon itself, and so induce spontaneous political action in place of that which is produced by powerful political and group organizations." State *ex rel. LaFollette* v. *Kohler*, 200 Wis. 518, 228 N.W. 895, 912 (1930).

I. DESPITE CERTAIN COMMUNICATIVE ASPECTS, CONTRIBUTIONS OF MONEY TO, AND EXPENDITURES OF MONEY BY, POLITICAL CANDIDATES PARTAKE MORE OF ACTION THAN OF SPEECH AND MAY BE REASONABLY REGULATED UNDER THE POLICE POWER OF THE FEDERAL GOVERNMENT

The proposition that only "speech" and not "action" is protected by the First Amendment is now discredited, and it is clear that the Amendment at times covers more than sheer verbal communications. See e.g., *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (right to refuse to salute flag); *Stromberg v. California*, 283 U.S. 359 (1931) (right to display a red flag); *NAACP* v. *Button*, 317 U.S. 415 (1963) (right to solicit legal business). It is still true, however, that the permissibility of regulating First Amendment rights varies with their mode of expression, and that usually the nonverbal exercise of such rights, particularly when joined with acts which are not necessarily communicative, is more susceptible to regulation than is pure speech. Giving and spending money do not constitute acts of verbal communication. In the words of Professor Freund, "We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited without violating the First Amendment." [4]

For First Amendment purposes, giving and spending money is communicative action with a potential for disrupting normal political processes; in this respect, it is analogous to picketing or demonstrating. In *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965), the Supreme Court "emphatically" rejected the notion that the First Amendment afforded the same kind of freedom to those who "communicate ideas by patrolling, marching, and picketing on streets and highways" as it offers those "who communicate ideas by pure speech." The Court upheld the facial constitutionality of a Mississippi statute which banned picketing in such a manner as to obstruct or interfere wth free entrance to and exit from public buildings in *Cameron v. Johnson*, 390 U.S. 611 (1968). It declared that such communicative activity was sufficiently "intertwined" with action to be regulable, and it emphasized that such a statute was "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society (;) . . . the fact that free speech is intermingled with such conduct does not bring it within constitutional protection." 390 U.S. at 617. In a second *Cox v. Louisiana* case, 379 U.S. 559 (1965), the Court upheld against First Amendment attack the convictions of defendants for violating state statutes prohibiting breach of the peace, obstructing public passages, and picketing near a court house: "The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association." 379 U.S. at 563. The Court's explanation of its rationale in this case is applicable to the question of the permissibility of limiting campaign contributions and expenditures: "We are not concerned here with such a pure form of expression as newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct." 379 U.S. at 564. See also *Central Hardware Co. v. National Labor Relations Board*, 407 U.S. 539 (1972); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

That not all communicative conduct is protected by the First Amendment is clear from the Supreme Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968), upholding the constitutionality of a provision of the Selective Service Act which made it a crime to knowingly destroy a Selective Service registration certificate. The Court held that draft card burning was not "symbolic speech" protected by the First Amendment: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in conduct intends thereby to express an idea." 391 U.S. at 376. Campaign contributions and expenditures are communicative only in the sense that burning a draft card is communicative; all such acts are subject to regulation because, in the words of the *O'Brien* Court, " 'speech' and 'nonspeech' elements are combined in the same course of conduct." 391 U.S. at 376. The Court recently held that a state's prohibition of various forms of explicit sexual entertainment by live performers in establishments selling liquor did not violate the First Amendment:

> "[A]s the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes,

[4] Commentary of Prof. Paul A. Freund, the Harvard Law School, in Rosenthal, *Federal Regulation of Campaign Finance: Some Constitutional Questions*, 72 (1971).

the scope of permissible state regulations significantly increases. States may sometimes proscribe expression which is directed to the accomplishment of an end which the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action'." *California v. LaRue*, 41 U.S.L.W. 4039, 4042 (1972).

Many kinds of "communications," such as deceptive advertising [5] certain kinds of libels, the false activation of a burglar alarm, the shouting of "fire" in a crowded theatre (*cf. Schenck v. United States*, 249 U.S. 47, 51 (1919) (Holmes J.)) may be criminalized without violating the First Amendment because they cause directly or embody themselves evils which the government is authorized to prevent. That a reasonable limitation on campaign contributions and expenditures is not barred by the First Amendment is indicated by the constitutionality of the federal anti-bribery law, 18 U.S.C. § 201(e). *Cf. United States v. Brewster*, 408 U.S. 501 (1972) (upholding the constitutionality of the indictment of a Senator for soliciting and receiving a bribe). A bribe is certainly a form of direct and unequivocal "communication," but no one has seriously suggested that the First Amendment protects it. Anti-bribery statutes are constitutional because they are aimed at action which, though communicative, violates notions of public policy. Campaign contributions are all too often a similar form of buying favors: the donation of money communicates to the candidate the information that the donor seeks either a direct *quid pro quo* (such as favorable action by an administrative agency) or, more usually, an indirect form of influence (such as access or consultation when certain decisions are pending).

II. THERE IS NO CONSTITUTIONAL RIGHT TO MAKE UNLIMITED CONTRIBUTIONS TO A POLITICAL CAMPAIGN OR FOR A CANDIDATE TO EXPEND AS MUCH MONEY AS HE CHOOSES IN AN EFFORT TO BE ELECTED OR REELECTED

In order to foster "[e]ffective advocacy of both public and private points of view, particularly controversial ones," *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), the Supreme Court has recognized an independent constitutionality protected right of association, see *e.g., Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961). In order to argue that a limitation on campaign contributions/expenditures is unconstitutional because it infringes this right of association or violates the right to freedom of speech an individual is directly guaranteed by the First Amendment, however, it is necessary to demonstrate that an individual possesses an absolute discretion to make as large a political campaign contribution or expenditure as he wishes. A number of Supreme Court holdings establish the power of Congress to limit, in certain circumstances, the associational rights and the ability to participate in the political process of certain individuals and groups.

Where the governmental interest is compelling, the Court has upheld registration statutes which require the disclosure of identity of certain individuals or the disclosure of membership in certain organizations even though such disclosure will limit and impair the ability of such individuals and organizations to exercise their political and civil rights. See *e.g., Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961) (registration of Communist Party officials and members); *Viereck v. United States*, 318 U.S. 236 (1943), *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964) (registration of foreign agents and of activities engaged in on behalf of a foreign principal); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1929) (registration of Ku Klux Klan members). Cases striking down state attempts at compelling disclosure of NAACP membership lists (*e.g., NAACP* v. *Alabama*, 357 U.S. 499 (1958); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961)) may be distinguished on the ground that in such cases, no valid state interest in disclosure was evident:

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[5] The Court has held that "purely commercial advertising" is subject to much greater regulation than communication which is not inspired by a profit motive, *Valentine* v. *Christensen*, 316 U.S. 52, 54 (1942); *Breard* v. *City of Alexandria*, 341 U.S. 622, 642, 643 (1951), although the fact that the dissemination of a communication takes place under commercial auspices does not remove it from all First Amendment protection. *Smith* v. *California*, 361 U.S. 147, 150 (1959); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265–266 (1964). The power of the FCC to ban cigarette advertising from television has been upheld, *Banzhaf* v. *FCC*, 405 F. 2d 1082 (CA DC 1968), cert. denied, 396 U.S. 842 (1969). These cases imply that the federal government has power to require that political advertising on television and radio be for certain minimum periods (e.g., 30 seconds), on the theory that very short "spot" ads are (like commercial advertising) intended simply to condition rather than inform and are likely to be somewhat deceptive because they convey a simplistic "image" of a candidate.

in the context of Southern hostility to civil rights organizations, the true purpose of such laws was the destruction of the NAACP.

The compelling state interest which campaign contribution/expenditure limitations foster was described by the Court in *Burroughs and Cannon v. United States*, 290 U.S. 534 (1934), a case which held constitutional the disclosure-of-contributors requirements of the 1925 Corrupt Practices Act: "Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be doubted." 290 U.S. at 548. The Court adverted to this same rationale when it upheld the constitutionality of a statute requiring the registration of lobbyists in *United States v. Harriss*, 347 U.S. 612 (1954); "Congress has . . . merely provided for a modicum of information from those who for hire attempt to influence legislation . . . It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act—to maintain the integrity of a basic governmental process." 347 U.S. at 625. Although these two cases deal with disclosure requirements, their rationale is applicable to a law establishing a ceiling on political campaign contributions and expenditures because the government is aiming at the same serious evils (corruption, undue influence of special interest groups) and because the incidental effect of limiting political participation is also the same, although in the former cases it stems simply from the effects of disclosure rather than direct governmental restraint.

Another line of precedent indicates that there is no constitutional right to quantitatively unlimited participation in the financing of federal elections. The Supreme Court has thrice upheld the validity of the 1925 Corrupt Practices Act's flat prohibition of union contributions and expenditures in connection with political campaigns, 18 U.S.C. § 610, although it has avoided passing upon the constitutional questions raised by such a prohibition. *United States v. CIO*, 335 U.S. 160 (1948); *United States v. UAW*, 352 U.S. 567 (1967); *Pipefitters' Local 562 v. United States*, 407 U.S. 385 (1972). There have been no Supreme Court cases dealing with § 610's ban on corporate political contributions or expenditures, but a lower court has upheld the predecessor of § 610 against constitutional attack, *United States v. United States Brewers' Assn.*, 239 F. 163 (W.D. Pa. 1916); but *cf.*, *United States v. First National Bank of Cincinnati*, 329 F. Supp. 1251 (S.D. Ohio 1971), and its validity as applied has also been sustained, although the constitutional question was avoided. *United States v. Lewis Food Co.*, 366 F. 2d 710 (CA9 1966). See also *Egan v. United States*, 137 F. 2d 369 (CA8 1943) (upholding constitutionality of Public Utility Holding Company Act's ban on political contributions by registered public utility companies). If an absolute ban on the political activities of groups of individuals organized into unions and corporations is permissible, it would seem a *fortiori* acceptable to set a ceiling on contributions and expenditures by individuals. It may, of course, be argued that the concentration of funds in organizations makes their contributions and expenditures more susceptible to regulation than those of individuals. There are two answers to this argument, however: organizations are themselves entitled to assert First Amendment rights, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and the associational rights protected by the First Amendment have been held to reach contributors to organizations, *Bates v. City of Little Rock*, 361 U.S. 516 (1961); *United States v. Rumely*, 345 U.S. 41 (1953). The cases which have risen under § 610 do, therefore, support the constitutional validity of the proposed contribution/expenditure limitations because they arise out of a context in which all the First Amendment rights applicable to individuals could be asserted.

III. CEILINGS ON POLITICAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES ARE CONSTITUTIONAL BECAUSE THEY ARE A REASONABLE REGULATION OF THE MANNER IN WHICH FIRST AMENDMENT RIGHTS MAY BE EXERCISED

Campaign finance limitations on contributions and expenditures would not prohibit the making of political contributions and expenditures but would instead simply impose limitations on the overall amounts which could be contributed and spent. This legislation would thus be far less drastic than the flat prohibition against a union or corporation making *any* campaign contributions or expenditures contained in 18 U.S.C. § 610. "[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute," *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis J. concurring). The Supreme Court

has frequently held that First Amendment rights may be reasonably regulated according to the time, place, and manner of their exercise. *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Adderley v. Florida*, 385 U.S. 39, 48 (1966); *Cox v. New Hampshire*, 312 U.S. 569, 574–576 (1941); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). The proposed contribution/expenditures ceilings may be regarded as simply a nondiscriminatory regulation of the manner in which First Amendment rights are exercised.

Such limitations are neutral with respect to the content of political expression. They do not operate censorially to suppress unpopular views, and they do not single out persons who advocate particular political beliefs, or penalize anyone for association with persons or organizations oriented to such advocacy. See *e.g., United States v. Robel*, 389 U.S. 258, 278 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967). Like the "Fairness" and "Equal Time" doctrines enforced by the Federal Communications Commission, the contribution/expenditure limitations apply in exactly the same way regardless of the viewpoint sought to be advocated or the beliefs of the person making the contribution or expenditure. See *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 392 (1969). Finally, these ceilings do not represent a sweeping prohibition of all political expression through contributions and expenditures, but instead modulate the level of political discourse so that more voices may participate and so that weak voices may not be drowned out. These ceilings are unlike the state corrupt practices legislation which the Supreme Court unanimously held unconstitutional in *Mills v. Alabama*, 384 U.S. 214 (1966). In that case, an Alabama law had made it a crime "to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." The statute had been applied to convict a newspaper editor for writing an editorial on election day regarding a question on the ballot. The Court asserted, "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." 384 U.S. at 219–220.

It is clearly established that differences in the media of communication justify differences in the First Amendment standards applied to them. *Red Lion Broadcasting Co. v. Federal Communications Commission, supra*, at 386; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). In campaign finance, the medium of expression is money, and for large contributors, the medium is, indeed, the message. The proposed ceilings on campaign contributions and expenditures resemble the municipal ordinances regulating sound trucks upheld in *Kovacs v. Cooper*, 336 U. S. 77 (1948) (opinion of Reed J.). See also *California v. LaRue*, 41 U.S.L.W. 4039, 4042, n. 4 (1972). Although there was no majority opinion in *Kovacs*, the case was approved and explicated by a Court majority in *Red Lion Broadcasting Co. v. Federal Communications Commission, supra*, at 387 in language which might well apply to limitations on private campaign financing:

> [T]he ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. . . . [T]he Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech. . . . The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."

See also *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

IV. ANY RESTRICTION UPON THE EXERCISE OF FIRST AMENDMENT RIGHTS IMPOSED BY LIMITATIONS UPON CAMPAIGN CONTRIBUTIONS AND EXPENDITURES IS JUSTIFIED BY THE COMPELLING AND OVERRIDING GOVERNMENTAL INTEREST IN PRESERVING THE INTEGRITY OF THE ELECTORAL PROCESS AND IN PREVENTING THE IMPROPER INFLUENCE OF MONEY ON THE DECISIONMAKING OF PUBLIC OFFICIALS

The First Amendment freedoms of speech, association, press, religion, assembly, and petition have traditionally been given special protection because they are the indispendable preconditions for the exercise and protection of all other rights and freedoms. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). Although the proposition that First Amendment rights occupy a "preferred" position, see *Thomas v. Collins*, 323 U.S. 516, 530 (1945), has been criticized, see *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter J. concurring), a number

of constitutional doctrines indicate the elevated and specially protected status of such rights. *Cf., e.g.*, the "clear and present danger" rule, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Dennis v. United States*, 341 U.S. 494, 510 (1950); the overbreadth doctrine, *United States v. Robel*, 389 U.S. 258, 265–266 (1967); negative presumptions, *Speiser v. Randall*, 357 U.S. 513, 526 (1958); the alternative means test, *Aptheker v. Secretary of State*, 378 U.S. 500, 512 (1964). First Amendment rights are said to need "breathing space" to survive, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), because they are "delicate and vulnerable," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and because their exercise is easily deterred or "chilled" by governmental action, *Dombrowski v. Pfister*, 380 U.S. 479, 486–487 (1965). Therefore the Supreme Court has ruled that the exercise of First Amendment rights may be limited only if the government demonstrates reasons or interests which are "compelling," *NAACP v. Button, supra* at 438 (1963), "substantial," *NAACP v. Alabama*, 357 U.S. 449, 464 (1958), "subordinating," *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960), "paramount," *Thomas v. Collins, supra* at 530 (1945), "'cogent," *Bates v. City of Little Rock, supra*, at 524, "strong," *Sherbert v. Verner*, 374 U.S. 398, 408 (1963), or "overriding and compelling," *Gibson v. Florida State Investigating Comm.*, 372 U.S. 539, 546 (1963). The Court also requires that the means chosen to limit the exercise of First Amendment rights be "precise," *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), have as narrow an impact as possible, *NAACP v. Button, supra*, at 430, and not be vague, overbroad, or indiscriminate in their sweep, *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1965); *Aptheker v. Secretary of State, supra*, at 512. Finally, it must be established by the government that no "less drastic means" exist which might be alternatively used to implement the state's interest without infringing First Amendment rights. *Sheldon v. Tucker*, 364 U.S. 479, 488 (1960); *United States v. Robel, supra*, at 265.

Whatever the adjectival test chosen to describe the nature of the interest which the government must demonstrate in order to limit the exercise of First Amendment rights, it is clear from the Court's own language in numerous cases that the preservation of the integrity of the electoral process from the corrupting effect of money is a "compelling and overriding" state interest. There have been no Supreme Court holdings dealing directly with the constitutionality of campaign contribution/expenditure limitations, but the Court has often asserted that Congress has broad authority to protect American political institutions against "the corroding effect of money employed in elections by aggregated power": "Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. [A case involving 18 U.S.C. § 610, banning union political contributions and expenditures] thus raises issues not less than basic to a democratic society." *United States v. UAW*, 332 U.S. 567, 582, 570 (1957). The following quotations indicate the high priority and presumptive constitutionality the Court has accorded to laws aimed at preventing fraud and corruption in the electoral process:

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election [of the President] from the influence of violence, *of corruption*, and of fraud, is a proposition so startling to arrest attention and demand the gravest consideration.
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> If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence *and corruption.*
>
> If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and *insidious corruption.*
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> *Ex parte Yarbrough*, 110 U.S. 651, 657–658 (1884) (emphasis added).
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> The Congressional act under review seeks to preserve the purity of presidential and vice presidential elections.
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> . . . The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation *to safeguard such an election from the improper use of money to influence the result* is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses

> every other power essential to *preserve the departments and institutions of the general government from impairment or destruction*, whether threatened by force or *by corruption*.

Burroughs & Cannon v. *United States*, 290 U.S. 534, 545–548 (1934) (emphasis added).

> It cannot be doubted that these comprehensive words [of Article I of the Constitution which grant Congress power to regulate the "times, places, and manner" of holding Congressional elections] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, *prevention of fraud and corrupt practices*, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added). See also *Ex parte Siebold*, 100 U.S. 371, 387 (1880).

It seems clear that ceilings on campaign contributions and expenditures are not vague or imprecise. Nor are such prohibitions overbroad because they indiscriminately suppress activity which can be constitutionally forbidden and that which cannot, *cf. United States v. Robel*, *supra* at 265, although admittedly the overbreadth analysis necessitates a judgment as to the size of contributions which are likely to have a corrupting effect on the political process. This is an area in which the Court should properly defer to the expertise of Congress, however, as it has done in cases involving other election laws. In *United States v. Classis*, 313 U.S. 299, 320 (1941), the Court declared:

> "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with [sic] the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421. That principle has been consistently adhered to and liberally applied, and extends to the congressional power by appropriate legislation to safeguard the right of choice by the people of representatives in Congress.

Finally, there are no alternative means available to accomplish the task of such ceilings, since the very evil which Congress is seeking to extirpate is the corrupting effect of money. Disclosure laws alone are not adequate because even if enforced, they will not prevent large contributors from seeking to influence candidates through their contributions. The judgment of Congress that no alternative means exist to protect the electoral process will be given great deference by the Court, particularly in light of Congress' long experience with ineffective disclosure requirements:

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship of the means adopted and the end to be attained, are matters for congressional determination alone."

Burroughs & Cannon v. United States, *supra* at 547–548.

V. ANY RESTRICTION UPON THE EXERCISE OF FIRST AMENDMENT RIGHTS IMPOSED BY LIMITATIONS UPON CAMPAIGN CONTRIBUTIONS AND EXPENDITURES IS JUSTIFIED BY A GOVERNMENTAL INTEREST IN EFFECTUATING THE FIRST AMENDMENT RIGHTS OF LESS AFFLUENT CITIZENS (1) BY PROTECTING THE ABILITY OF EVEN POOR CANDIDATES TO RUN FOR OFFICE, (2) BY PREVENTING THE DROWNING OUT OF OTHER POLITICAL VIEWPOINTS BY THE BEST FINANCED VOICES, AND (3) BY ENSURING THE EQUALITY OF THE VOTING RIGHTS OF LESS AFFLUENT CITIZENS BY LIMITING THE INFLUENCE ON CANDIDATES OF AFFLUENT CONTRIBUTORS

In previous sections, the ceilings on campaign contributions and expenditures have been defended negatively, in the sense that the evils at which such legislation is aimed have been demonstrated to justify the incidental infringement of the First Amendment rights of contributors or candidates who wanted to give or spend more than the ceilings allowed. But the campaign finance limitations involved here also have an important positive impact on the exercises of the First Amendment rights of many citizens who are not prevented from effectively participating in the political process. Many lack financial resources

and this handicaps both their ability to run for office and their ability to communicate their views to their elected representatives on an equal basis with those providing large contributions. The contribution/expenditure limitations implement true democratic self-government by opening the political process to all citizens, regardless of their personal wealth. As John Stuart Mill wrote:

> We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves; it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at is seen with different eyes from those of the person whom it directly concerns.

J. S. Mill, *Consideration on Representative Government*, 67 (1875). The proposed campaign finance legislation fosters and protects the exercise of First Amendment freedoms in three ways: (1) it protects the rights of the less affluent to express themselves by running for office; (2) it helps prevent the drowning out of all other political viewpoints by well financed candidates and interest groups; and (3) it ensures the equality of the voting rights of each citizen by limiting the influence on candidates of the large contributor.

As the costs of campaigning have skyrocketed, it has become almost an unwritten amendment to the Constitution that only those Americans with money or access to it may participate in governing. The question is not whether wealthy political representatives can provide dedicated and compassionate leadership. The point is rather that each citizen should have an equal opportunity to participate in the electoral process. As the Supreme Court declared in *Kramer v. Union School District*, 395 U.S. 621, 626 (1969), "Any unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government." The government's interest in protecting the openness of the political process against racial discrimination is well established, see *e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944), and this rationale extends to the prevention of other invidious and irrational barriers to participation in democratic self government. As the Court remarked in invalidating the poll tax, "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966).

As the sound truck case, *Kovacs v. Cooper*, 336 U.S. 77 (1948) (opinion of Reed J.) makes clear, the First Amendment does not guarantee the right of the loudest voice to drown out all others. One authority has noted that "the most important effect of money in a political campaign is not that the candidate with the most money will win, but that the candidate with the lesser amount of money will not be able to present his case to undecided voters." Lobel, "Federal Control of Campaign Contributions," 51 *Minn. L., Rev.* 1, 3 (1966). "It is now well established that the First Amendment protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Spending ceilings help insure a balanced flow of differing points of view to the public; by keeping any person or group from flooding the media with material advocating a single point of view, the limits prevent a candidate from destroying, by sheer volume instead of reason, the effectiveness of the communications of other candidates. In order to protect the information flow to the public, the Government is authorized to act affirmatively to insure that the First Amendment rights of all citizens to receive a variety of viewpoints are respected. In a medium of technological scarcity, such as radio or television, the government has been allowed to enforce such regulations as the Fairness and Equal Time doctrines on the ground that the public has a right "to receive suitable access to social, political, esthetic, moral and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). One of the justifications for applying the antitrust laws to newspapers has been to prevent a single source from controlling all the channels of newspapers communication with the public:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernment combinations a refuge if

> they impose restraints upon the constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

Associated Press v. United States, 326 U.S. 1, 20 (1945). See also *Citizen Publishing Co. v. United States*, 391 U.S. 131, 139 (1969). Even the associational rights of organizations must give way when necessary to protect the First Amendment rights of free expression of their members. *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

Finally, contribution and expenditure ceilings will ensure the equality of votes cast in primary and general elections, an interest the Supreme Court has recognized not only in the reapportionment cases, see *e.g. Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964), but in cases overturning state laws that imposed financial burdens (see *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)) and property qualifications (see *City of Phoenix* v. *Kolodziejski*, 399 U.S. 205 (1970); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969)) on the right to vote. The Court has asserted that "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," *Reynolds* v. *Sims*, *supra*, at 543, and that "No right is more precious in a free country than that of having voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). Limitations on contributions and expenditures help equalize the weight of each ballot case in much the same way as does redistricting to ensure that legislative districts have equal number of voters. Dollars magnify the voting power of the big contributor. Large donations invariably buy increased influence over and access to candidates, decreasing proportionately the power of smaller contributors to have a candidate meaningfully consider their views. In addition to effectuating the principle of "one man, one vote," the financial realities of campaigning make it necessary also to enforce the principle of "$250, (or $500), one person," in order to assure that some voters are not "more equal" than others in the eyes of candidates or elected officials.

VI. THE PROPOSED CEILINGS ON CONTRIBUTIONS AND EXPENDITURES DO NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST NONINCUMBENTS

Neither the Constitution nor state statute sanctifies the status of incumbency in this country, and incumbents have no inherent legal right to a specially protected position in any system of financing campaigns. In discussing the related question of the status of minor parties the Supreme Court stated: "All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted . . . The absence of such voices would be a symptom of grave illness in our society." Any ceilings on contributions and expenditures must be absolutely neutral vis-a-vis incumbents and nonincumbents. This does not mean, however, that ceilings are absolutely unconstitutional, but it does mean that ceilings must be drafted so as not to contribute to the entrenchment of incumbents or place special obstacles in the path of nonincumbents who seek to displace the incumbents of the moment.

The principles of government neutrality are illustrated by two recent Supreme Court cases, *Williams v. Rhodes*, 393 U.S. 23 (1968), in which state laws regulating political parties were struck down, and *Jenness v. Fortson*, 403 U.S. 431 (1971), in which they were upheld. In *Williams v. Rhodes*, *supra*, the American Independent Party and the Socialist Labor Party challenged the constitutionality of certain Ohio laws which required a party other than the Democrats or the Republicans to obtain petitions signed by qualified electors totaling 15% of the votes cast in the preceding gubernatorial election in order to win a place on the Presidential ballot. Numerous other burdens were imposed on the establishment of new parties. In order to be recognized on a ballot, a party had to elect a county central committee for each county in Ohio and elect a state central

committee consisting of two members from each Congressional district, it had to elect delegates to a national convention, and its candidates for nomination in the primary had to file petitions signed by qualified electors. Technicalities of state law which disqualified persons who had voted in another party's primary in the last four years from serving as convention delegates and from signing primary nominating petitions made the selection of delegates and the collection of petition signatures extremely difficult. The Democrats and the Republicans faced substantially smaller burdens, since they were allowed to retain their ballot position simply by obtaining 10% of the vote in the last gubernatorial election and did not need to obtain any signature petitions to appear on the Presidential ballot. The Supreme Court held that these restrictions on minority parties unconstitutionally denied Equal Protection of the laws to persons who wanted to organize themselves into minority parties and to persons who wished to vote for minority party candidates, because the Ohio laws made it "virtually impossible," 393 U.S. at 24, 25, for a new political party, even though it might have hundreds of thousands of members, to get its candidates placed on the Presidential ballot. The Court stated that "the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate." 393 U.S. at 31. The rationale of the Court's decision is contained in the following passage:

> [Ohio] claims that the State may validly promote a two-party system in order to encourage compromise and political stability. The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.

393 U.S. at 31–32. A valid state interest in the prevention of "multitudinous fragmentary groups" on the ballot was recognized, but the Court stated that this danger was in the instant case no more than "theoretically imaginable." 393 U.S. at 23.

Jenness v. Fortson, supra, concerned a challenge by the Socialist Workers Party to a Georgia law which provided that a candidate for elective public office who did not enter and win a political party's primary (a "political party" was defined as an organization whose candidate received 20% or more of the vote at the most recent gubernatorial or presidential election) could have his name printed on the ballot at the general election only if he had filed a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question. The Court unanimously upheld the Georgia statute, distinguishing (with less than total clarity) *Williams v. Rhodes* primarily on the basis that the Ohio qualifications were significantly more restrictive and comprehensive:

> "But the *Williams* case, it is clear, presented a statutory scheme vastly different from the one before us here. Unlike Ohio, Georgia, freely provides for write-in votes. Unlike Ohio, Georgia does not require every candidate to be the nominee of a political party, but fully recognizes independent candidacies. Unlike Ohio, Georgia does not fix an unreasonably early filing deadline for candidates not endorsed by established parties. Unlike Ohio, Georgia does not impose upon a small party or a new party the Procrustean requirement of establishing elaborate primary election machinery. Finally, and in sum, Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo." 403 U.S. at 438.

The dispositive factors for the Court were apparently the fact that the impact of the overall Georgia scheme did not weigh as heavily upon the organizational abilities of minor parties or independent candidates as did the Ohio requirements. Also, the Court emphasized that the major party candidates were not especially favored, since a major party candidate would have to win a difficult and perhaps costly primary battle to get his name on the ballot, a barrier which could be roughly approximated to the difficulty of collecting the signatures of 5% of the electorate. The Court closed its opinion with a statement of principle which should be borne in mind in considering the treatment of nonincumbents in a system of financing campaigns which imposes contributions and expenditure ceilings.

"The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing 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 441–442.

Ceilings on contributions and expenditures do not in themselves discriminate individiously against minority party, independent, or nonincumbent candidates. It is clear that some reasonable balance must be made between imposing ceilings which will reduce the corrupting influence of money and allowing nonincumbents to raise enough money to effectively challenge incumbents. If properly drawn, no special barriers are thrown in the path of nonincumbents and the standard of *Rhodes* and *Jenness* is satisfied.

COMMON CAUSE,
Washington, D.C., June 29, 1973.

Re Constitutionality of Enforcement Powers Within an Independent Elections Commission.

Hon. CLAIBORNE PELL,
U.S. Senate, Washington, D.C.

DEAR SENATOR PELL: I was asked to submit a memorandum on the constitutionality of vesting an independent elections commission with the power to investigate and prosecute violations of the campaign finance laws when I appeared with Fred Wertheimer on June 7, 1973, before your committee. After carefully reviewing the proposal and studying the pertinent legal authorities, I have concluded that the proposal is constitutional for the reasons set forth in this letter.

The proposal for an independent elections commission, with civil and criminal enforcement powers, is part of the legislation to strengthen and reinforce the Federal Election Campaign Act of 1971. The proposed commission is to be composed of seven members to be appointed by the President for a fixed term. Two of these are to be appointed from recommendations to be provided by the Speaker of the House and two from recommendations to be provided by the President Pro Tem of the Senate.

As the commission's structure is similar to that of existing independent agencies of the executive branch, the judicial precedents defining the authority of these agencies is extremely relevant.

Independent agencies have been found to have the constitutional authority to enforce the laws under their jurisdiction. For example, the Federal Trade Commission from its inception in 1914, has exercised law enforcement functions. In *National Harness Manufacturer's Assoc.* v. *Federal Trade Commission*, 268 F. 705 (6th Cir. 1920), its investigation and prosecution of statutory violations was held to be a valid exercise of executive and administrative authority and did not violate Articles I and II of the United States Constitution. Additionally, the Supreme Court has held that the Federal Trade Commission may institute proceedings, follow up decrees and police their obedience in the area within its jurisdiction. *United States* v. *Morton Salt*, 338 U.S. 632 (1950); see also *Texas and Pacific Railroad Co.* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896), holding that the Interstate Commerce Commission, as a corporate body, has the authority to sue and be sued in the Federal courts.

S. 372 empowers the Independent Elections Commission to enforce legislation which in 1971 had been assigned to three separate officials, the Clerk of the House, the Secretary of the Senate and the Comptroller General. Authority to prosecute, however, remained in the Department of Justice. This has not proven satisfactory and in order to assure fair, impartial and strong enforcement with due respect for the independent concerns of the three separate bodies affected—House, Senate and Executive—the Independent Elections Commission has been proposed.

The Supreme Court position in upholding the constitutionality of restrictions on the President's power to remove members of the Federal Trade Commission is equally applicable to this situation:

> We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.
>
> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the other, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, *The Works of James Wilson (1896)*, vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., § 530, citing No. 48 of the *Federalist*, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." *Humphrey's Executor v. United States*, 295 U.S. 602, 629–630 (1935).

Similarly, the structure of the Independent Elections Commission precludes one branch from imposing its control over the enforcement and freedom from "influence in the administration of their respective powers."

Assistant Attorney General Dixon, in his statement before this Committee on June 7, 1973 cites three cases in support of the Justice Department's assertion that the proposed commission could not constitutionally be empowered to enforce the campaign finance laws, civilly and criminally. The three cases cited by Mr. Dixon are either inapplicable or distinguishable to the instant situation.

In *Springer v. Philippine Islands*, 277 U.S. 189 (1928), the Philippine legislature established a commission composed of the Governor-General, the Speaker of the House of Representatives and the President of the Senate to administer government-owned shares in a coal company. The Supreme Court invalidated this arrangement on constitutional grounds, because legislators were given executive powers in circumvention of the appropriate appointment process. The Court noted that "the case might be different if the additional [executive] duties were devolved upon an appointee of the executive." 277 U.S. 189, 202. Since the Election Commission, unlike the Philippine Commission will be composed solely of Presidential appointees, the dictum in *Springer* undermines Mr. Dixon's position.

Ponzi v. Fessenden, 258 U.S. 254 (1922) involved the question of whether a federal prisoner, with the consent of the Attorney General, could be brought to answer criminal charges in a state court on writ of habeas corpus. The Attorney General's intervention was held not to be a usurpation of judicial power on the grounds that part of his duty is to aid the harmonious operations of both federal and state courts. This case does not address the issue of whether the authority to prosecute rests solely with the Executive branch.

U.S. v. Cox, 342 F. 2d 167 (5th Cir. 1965) concerned the issue of whether a court can compel the Attorney General to prosecute an indictment returned by a grand jury. The appellate court held that, as an incident of the separation of powers, the judiciary cannot override the discretion of the Attorney General. The case does not hold, however, that only the Attorney General has the constitutional authority to prosecute; it holds merely that the judiciary cannot initiate prosecution.

These three cases are not legal precedent in support of Mr. Dixon's assertion. That assertion appears to result from a misguided conception of the absolute nature of the separation of powers. It is true that Congress is barred by the Due Process and Bill of Attainder Clauses of the Constitution from directly punishing individuals (except for contempts of Congress). And Article II gives the Executive the power to enforce the laws. Yet Congress clearly retains a degree of control over enforcement in its full authority to structure the institutions and

mechanisms by which the laws are to be enforced. The Department of Justice itself was established by statute in one of the first acts of the first Congress (1 Stat. 73, September 24, 1789), and it still exists pursuant to statutory authority, 5 U.S.C. § 101.

The authority to commence prosecution has never been exclusively reserved to the Attorney General on constitutional grounds. The present practice by which administrative agencies refer all criminal prosecutions to the Department of Justice is a consequence of Executive Order No. 6166 of June 10, 1933, issued pursuant to authority granted by an Act of June 30, 1932 C. 314, 47 Stat. 1489, 1517. In Section 5 of that Order, President Roosevelt ordered that "the functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States . . . now exercised by any agengy or officer, are transferred to the Department of Justice." The statute authorizing this reorganization of government departments sought to consolidate procedures and thereby reduce expenditures. The transfer of prosecutional power to the Attorney General from the agencies was founded not on the doctrine of separation of powers but on the exigencies of economic crisis.

The flexibility of the present system is attested to by the opening phrase of 28 U.S.C. § 516 (1966): "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under direction of the Attorney General." According to the notes accompanying this statute, the opening phrase may apply to future exceptions.

2. The Constitution does not specify the departments by which the business of the Executive branch will be transacted, and the creation of such agencies is the prerogative of Congress, as was recognized by Attorney General Cushing, as long ago as 1854:

"[T]he Constitution does not specify the subordinate, ministerial, or administrative functionaries, by whose agency or counsels the details of the public business are to be transacted. It recognizes the existence of such official agents and advisers, in saying, that the President 'may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices'; and these officers are again recognized by the Constitution in the clause which vests the appointment of certain inferior officers 'in the heads of departments'; and it leaves the number and the organization of those departments to be determined by Congress." 6 Op. Atty. Gen. 326, 327 (1854).

In upholding the constitutionality of the Federal Corrupt Practices Act, the Supreme Court stated:

"The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone."

The sad fact is that no previous campaign finance legislation has ever been enforced. The creation of an Independent Commission appointed by the President, including members selected from recommendations of Senate and House leaders, with independent enforcement powers is clearly within the authority of Congress. The creation of an independent commission with supervisory authority over campaigns for constitutionality separate bodies reinforces rather than undermines the separation of powers.

I hope this information will be of assistance to the Rules Committee.

Sincerely,

KENNETH J. GUIDO, JR.,
Associate General Counsel.

EXHIBIT 7

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CONGRESSIONAL CONTROLS ON CAMPAIGN FINANCING: AN EXPANSION OR CONTRACTION OF THE FIRST AMENDMENT?

IRVING FERMAN*

Congressional attempts to purify the election process by mitigating the undue influence of wealth reflect a Sisyphean mentality. Past attempts[1] presumed that restriction of political expression by limiting contributions and expenditures and requiring disclosure as a condition to expression would produce fair elections and public debate.

* Professor of Law, Howard University Law School. B.S., New York University, 1941; J.D., Harvard Law School, 1948. The author wishes to express his gratitude for the vital research support provided him by Reverend Ira Patrick Seymour, a third year student at Howard University Law School.

1. In 1907, Congress prohibited political contributions by corporations in response to President Theodore Roosevelt's description of the strong public feeling that such legislation was needed. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. Political committees which operated to influence congressional elections were required to report and identify all contributions and disbursements by legislation enacted in 1910. Act of June 25, 1910, ch. 392, 36 Stat. 822. By 1910, Congress broadened the coverage of prior legislation by expanding the concept of contributions. Act of Oct. 16, 1918, ch. 187, 40 Stat. 1013.

The Federal Election Campaign Act of 1971[2] evidences the fact that these past attempts have failed. Moreover, there is little reason to believe that this most recent attempt at purification is the panacea. The foreseeable inefficacy of the Act suggests that future congressional response is inevitable. The constitutionality of limitations on contributions and expenditures coupled with disclosure, the conventional methods resorted to by Congress, warrants examination. The role of the court in evaluating these mechanisms requires definition. Finally, the constitutionally permissible bases for congressional purification controls require explication.

I. The Federal Election Campaign Act of 1971

In addition to raising several significant questions of constitutionality and of enforceability, the Act does not eliminate one of the major evils attendant to high campaign costs—that of the undue influence exercised by the wealthy few on candidates.[3]

The Act repeals the prior prohibitions upon contributions in excess of $5,000. Only the candidate himself is limited in the amount he can contribute to his own campaign.[4] Although the Act would eliminate the problems that existed in those states in which candidates with large personal fortunes at their disposal ran for office,[5] the Act would do

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Finally, in 1925, the Corrupt Practices Act was adopted which provided the first comprehensive legislative treatment of the problem of corruption in congressional elections. Federal Corrupt Practices Act, 2 U.S.C. § 241 (1970). Presidential elections came under legislative scrutiny in 1940 when the Hatch Act placed spending limitations and disclosure requirements on presidential candidates, committees and contributions. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147.

2. Federal Election Campaign Act of 1971, 86 Stat. 3 (1972).

3. Ninety per cent of all campaign funds are contributed by less than one per cent of the American population. As a result, an elected official is "in danger of becoming an indentured satrap, unable to serve the interests of his constituents because of his commitments and obligations to a few special interests." *Hearings on H.R. 13721, H.R. 13722, H.R. 13751, H.R. 13752, H.R. 13935, H.R. 14047 & H.R. 14511 & S. 3637 Before Subcomm. on Communication & Power of Comm. on Interstate & Foreign Commerce*, 91st Cong., 2d Sess. 40 (1970) (Statement of Russell D. Hemenway).

4. Federal Election Campaign Act of 1971, § 203, 86 Stat. 9 (1972), *amending* ch. 645, § 608, 62 Stat. 723 (1948). Limitations are placed in presidential, senatorial, and congressional elections, both on the candidate and on members of his individual family. National banks, corporations, labor organizations, and government contractors are prohibited from making contributions. 18 U.S.C. § 610 (1970), *as amended*, §§ 205, 206, 62 Stat. 723 (1972).

5. *E.g.*, New York (Richard Ottinger), Tennessee (William Brock), Ohio (Howard Metzenbaum), Texas (Lloyd Bentsen), Connecticut (Richard S. Schweiker), California (John V. Tunney).

nothing to eliminate the problem of preventing candidates from becoming beholden to wealthy individual contributors who finance their campaigns.

The Act also poses compliance and enforcement problems which may undermine its effectiveness. It establishes an elaborate reporting mechanism, requiring a political committee to report its receipts and expenditures on the tenth day of March, June, and September and on the fifteenth and fifth days preceeding the day upon which an election is held. In addition, any contribution of $5,000 or more received after the last report filed prior to an election must be reported within forty-eight hours of its receipt.[6] This imposes a great burden upon candidates, particularly during hectic pre-election days.[7]

In addition, it is not clear that these requirements can or will be effectively enforced. The Secretary of the Senate and the Clerk of the House, to whom enforcement of the reporting requirements is entrusted in congressional elections, and the Comptroller General to whom enforcement of the reporting requirements is entrusted in presidential elections,[8] each lacks the staff to effectively enforce the reporting requirements.[9] Even assuming sufficient staffing, these officials possess only the power to request relief from the Attorney General.[10] Moreover, critics of the enforcement mechanism seriously question whether the Secretary of the Senate and Clerk of the House will supply the vigilance required to make the reporting requirments effective. The reports filed by incumbent Senators and Representatives, with whom these officials have had substantial contact during sessions and who are responsible for the Secretary's and Clerk's selection, will most likely receive only cursory scrutiny.[11]

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6. Federal Election Campaign Act of 1971, § 304(a), 86 Stat. 14 (1972).

7. *Hearings on H.R. 8284 before Subcomm. on Elections of the House Comm. on House Administration*, 92d Cong., 1st Sess. 123 (1971).

8. Federal Election Campaign Act of 1971, § 301(g), 86 Stat. 12 (1972).

9. *See* S. DOC. NO. 37, 92d Cong., 1st Sess. 1-3 (1971); *Hearings on Legislative Branch Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 1st Sess. 651-55 (1971); 117 CONG. REC. S 12, S 882 (daily ed. Aug. 2, 1971).

10. Federal Election Campaign Act of 1971, § 308(d), 86 Stat. 18 (1972).

11. *See* S. REP. No. 92-96, 92d Cong., 1st Sess. 85, 88-89 (1972). The report cited the following views of Professor David Adamany:

> For decades the Secretary [of the Senate] and the Clerk [of the House] have been filing officers under the existing federal statutes. In these decades a pattern has been created of accepting reports without question and simply making them available to the public. I do not believe that a change in the statutory rules will change the deeply ingrained view that the Secretary and Clerk are merely filing officers.

Id. at 85-86.

The two foundations of the congressional attempt at purification lie in the disclosure and certification requirements for expenditures on communications. The elaborate disclosure requirements specified by the Act[12] are the product of two primary factors; first, the purported loss of public faith and trust of public officials engendered by spiralling campaign spending;[13] and second, the belief that disclosure is more effective in limiting the exercise of undue influence than ceilings on contributions.[14]

> If there were full public disclosure and publication of all campaign contributions and expenditures during a campaign, the voters themselves could better judge whether a candidate has spent too much. This policy would do more to protect the political system from unbridled spending then [sic] limits on the size of contributions and expenditures.[15]

In addition, disclosure reveals the identity of those interests which support a candidate.[16] Since presumably there is a correlation between the sources from which a candidate receives support and the positions he takes on issues, such disclosure supplies the public with relevant information, and hence enhances the self-governing rationale of the first amendment.

Although the disclosure requirements may, in fact, curb the undue influence of wealth and provide the public with relevant information, they raise serious constitutional questions. In *Common Cause v. The Finance Committee to Re-Elect the President*,[17] the defendants alleged

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12. The Act requires the treasurer of a political committee supporting a candidate for federal election to disclose the full name, mailing address, occupation and principal place of business of any individual who contributes in excess of $100 to that committee. Federal Election Campaign Act of 1971, § 304(a)(b)(2), 86 Stat. 15 (1972). The same information is required from any individual who makes a contribution or expenditure in excess of $100, other than to a political committee or candidate. Federal Election Campaign Act of 1971, § 305, 86 Stat. 16 (1972).

13. S. REP. NO. 92-96, 92d Cong., 2d Sess. 90 (1972).

14. *Id. See Hearings on H.R. 8284 Before the Subcomm. on Elections of the House Comm. on House Administration*, 92d Cong., 1st Sess. 117 (1971).

15. TWENTIETH CENTURY FUND, REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FINANCING CONGRESSIONAL CAMPAIGNS, ELECTING CONGRESS—THE FINANCIAL DILEMMA 15 (1970), *as cited in* S. REP. NO. 92-96, 92d Cong., 2d Sess. 90 (1972).

16. *Hearings on S. 1, S. 382 & S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-96, at 518-19, 529-30, 551, 555-56 (1971); *Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 92d Cong., 1st Sess., 53, 68, 114-15, 127 (1971).

17. Common Cause v. The Finance Committee to Re-Elect the President, Civil No. 1780-72 (D.D.C., filed Sept. 6, 1972).

that the constitutional interests in the rights of free speech and free association in making campaign contributions were infringed by disclosure requirments.[18] Although this suit was filed under the Federal Corrupt Practices Act, the constitutional issues to be adjudicated in this case will be determinative of the constitutionality of the Federal Election Campaign Act of 1971 disclosure requirements.[19]

The scheme for limiting expenditures set forth in the Act departs significantly from the inefficacious ceilings imposed by the Federal Corrupt Practices Act. Ceilings are imposed only upon expenditures for communications media—broadcasting stations, newspapers, magazines, outdoor advertising facilities, and telephones.[20] The total amount of expenditures for those items on behalf of a candidate cannot exceed $50,000 or 10 cents multiplied by the number of eligible voters.[21] The constitutionality of both the limitations on expenditures and the scheme devised for enforcing the limitations are questionable.

Before any person can make any charge for use on behalf of any candidate of any television or radio time, newspaper or magazine space, or outdoor advertising facility, that person must obtain certification from the candidate that the payment of such charge will not exceed expenditure limitations of the Act.[22] Since certification must come from the candidate, he, in effect, can preclude individuals or groups who desire to express their support for him by making an expenditure from actually making the expenditure. Thus, the candidate can exercise a prior restraint upon these individuals, merely because he apprehends public perception of undesirable implications from that particular group's support. Where an individual desiring to make an expenditure

18. Memorandum of Points and Authorities for Defendant at 8, Common Cause v. The Finance Committee to Re-Elect the President, Civil No. 1780-72 (D.D.C. filed Oct. 6, 1972).

19. Complaint for Plaintiffs at 13, Common Cause v. The Finance Committee to Re-Elect the President, Civil No. 1780-72 (D.D.C. filed Sept. 6, 1972).

20. Federal Election Campaign Act of 1971 § 102(1), 86 Stat. 3 (1972). Among the expenditures not covered by the Act are *inter alia* those for mass mailings, brochures, printing, WATS lines, postage, telegrams, campaign headquarters, airplane rentals, salaries of campaign staffs, public relation firms. S. REP. No. 92-96, 92d Cong., 2d Sess. 70 (1972).

21. Federal Election Campaign Act of 1971, § 104(a)(1)(A), 86 Stat. 5 (1972). Expenditures for the use of broadcast stations on behalf of a candidate may not exceed sixty per cent of the amount determined under § 104(a)(1)(A). Federal Election Campaign Act of 1971, § 104(a)(1)(B), 86 Stat. 5 (1972).

22. Federal Election Campaign Act of 1971, § 104(b), 86 Stat. 6 (1972). The Act requires certification for expenditures by or on behalf of any candidate. Thus, the charge to the candidate can not be circumvented by purportedly "independent" committees.

on behalf of a candidate can not obtain certification, and disclaims the consent of a candidate, the news medium is required to verify the disclaimer.[23] This requirement may be so onerous that the news media may simply refuse to print any individual statement.[24]

Thus, there are several significant obstacles to the effectiveness of the Federal Election Campaign Act of 1971 in mitigating the undue influence of wealth. Absent limitations on contributions, the power of wealth upon a candidate remains unchecked. Compliance with and enforcement of filing requirements are not certainties. Disclosure requirements and the certification provisions concerning expenditures for communications media may not be able to withstand challenge on first amendment grounds. The limitation on expenditures may also be subject to first amendment challenges.

II. The First Amendment's Limitation on Congressional Power to Regulate

The following analysis focuses upon the existence of and the degree to which the first amendment circumscribes Congress' power to require disclosure, curb expenditures and limit contributions. To the extent that the subject matter of both the Federal Election Campaign Act of 1971 and the first amendment is political expression, the Act itself enters the realm of the first amendment.[25] In determining whether congressional

23. Campaign Communications and Disclosure of Federal Campaign Funds, 37 Fed. Reg. 6156, 6159 (1972).

24. Letter from A.C.L.U. to Comptroller General of the United States, Aug. 1972, at 2 (copy on file at American University Law Review).

25. The first amendment prohibits congressional abridgement of freedoms of speech and press, rights of peaceful assembly, and redress to government of grievances. As these protected areas of expression interweave, the first amendment components establish a unified safeguard against governmental intervention with that expression required for the ideal of self-government to be attained. Although this article is mainly concerned with first amendment protection derived from the free speech clause, the overall first amendment protection does reflect a constitutional preference for open political debate. In De Jonge v. Oregon, 299 U.S. 363 (1937), the majority held that the rights of the first amendment must be preserved "to maintain the opportunity for free political discussion." *Id.* at 365. Such discussion is the very function of the first amendment according to Alexander Meiklejohn, who restricted his "absolutist" approach to public expression, *i.e.*, expression which served the goal of self-government. A. Meiklejohn, Political Freedom 55 (1948). The majority in New York Times Co. v. Sullivan, 376 U.S. 255 (1964), acknowledged "a profound national commitment to the principle" of robust public debate. *Id.* at 270. In Garrison v. Louisiana, 379 U.S. 64 (1964), the political expression aspect of the first amendment was succintly described in light of *New York Times Co. v. Sullivan*. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 74, 75. That the Federal

imposition of ceilings and disclosure requirements are constitutional, two questions must be determined; first, whether the protection of the first amendment extends to contributions, expenditures and disclosure; and second, assuming such protection, whether the first amendment limits congressional power to regulate through the ceiling and disclosure mechanisms.

Analysis with respect to contributions is warranted for several reasons. First, although Congress chose not to impose limitations on contributions in the Federal Election Campaign Act, its decision to do so was more a product of the admitted unenforceability of such limitations than any apprehended unconstitutionality.[26] The continued existence of the undue influence of wealth may prompt such limitations. Second, the new certification procedures concerning media expenditures may have the same effect on an individual's political expression as that ensuing from ceilings imposed on contributions. Since an individual may be prevented from expressing his political support in the manner of his choosing, the same first amendment interest attaches to his expression as that which attaches to his contributions.[27] Third, the unconstitutionality of disclosure requirements results only if disclosure infringes upon a protected first amendment interest. This interest, under the following analysis, is the right to make a contribution.

1. The Scope of the First Amendment

What the actual scope of the first amendment is or was intended to be is still an open question.[28] Nevertheless, some generalizations concerning its functions can be made. Scholars and the Supreme Court recognize that the first amendment is designed to protect those activities related to the governing process.[29] Two concepts inhere in this notion:

Elections Campaign Act of 1971 involves this same self-government area is manifest in its regulation (limitations on contributions and expenditures) of the exercise of the expression and the consequences of the regulation (disclosure) upon its exercise. Since the totality of the first amendment's protection of public expression is intersected by the Federal Election Campaign Act of 1971, the conflict between the Constitution and a congressional regulation occurs.

26. *See Hearings on H.R. 8784 Before the Subcomm. on Elections of the House Comm. on House Administration*, 92d Cong., 1st Sess. 119, 124 (1971).

27. *See* text accompanying notes 31-47 *infra*.

28. *Compare* Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949), *with* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970).

29. *Compare* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 19-20 (1954) *and* Meiklejohn, *The First Amendment is An Absolute*, 1961 SUP. CT. REV. 245, 252, *with* New York Times v. Sullivan, 376 U.S. 254, 269 (1964) *and* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

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first, that the public, in order to exercise this function intelligently, has a right to know;[30] second, that the individual, in order to actively participate in self-government, has a right to communicate his political preferences.[31]

a) Contributions

If a contribution is a form of political expression, the first amendment applies, to some degree, to protect it from congressional intervention. A contribution may be actual expression and thus fall directly within the language of the amendment. Alternatively, it may be that type of conduct without which expression is silenced, and therefore protected by the amendment as essential to safeguarding actual expression.[32]

This distinction between speech and speech-plus has no established boundaries:[33] but the distinction must, at the very least, be identified by more than the simple formula that speech equals words and speech-plus encompasses acts. For certain acts are so communicative that they

30. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). *Cf.* Lamont v. Postmaster Gen., 381 U.S. 301 (1965); Associated Press v. United States, 326 U.S. 1 (1945).

31. *Compare* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513-14 (1969), *with* Cohen v. California, 403 U.S. 15, 24 (1971). The clear and present danger test, and its underlying premise—that truth can be gained by the public only if all individuals advocating ideas are permitted to express them in the marketplace—reflects the view that truth is elusive and can only be obtained where a healthy pluralism exists. Under this view, since a contribution contributes to the pluralism, it should be protected.

32. The distinction between "speech" and "non-speech speech" becomes relevant only if the test adopted by a court provides for greater protection of the speech element in expression than for the action element. The balancing test of first amendment interests applied in this article to the Federal Election Campaign Act of 1971 dismisses the difference between expression and conduct by assuming that no absolute prohibition of governmental regulation attaches to contributions or expenditures. *Cf.* T. EMERSON, *supra* note 28, at 85.

33. The term, "speech plus," as used herein, embraces all protected types of speech activity other than pure speech. "This Court has never limited the right to speak . . . to mere verbal expression." Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring). *E.g.*, in Stromberg v. California, 283 U.S. 359 (1931), the Court, without articulating its reasoning, held that the first amendment protected the right to display a red flag. In West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), Justice Jackson, writing for the majority, characterized the flag salute as a "form of utterance" [*Id.* at 632] without specifying whether it was speech or speech-plus. Since all exercises of speech rights involve some action which facilitates communication of a message, one cannot definitively distinguish speech from speech plus. *Cf.* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23.

become first amendment speech. For example, in *Tinker v. Des Moines Independent Community School District*,[34] the act of wearing an armband was protected as "akin to speech" and not speech-plus. Similarly, in *Cohen v. California*,[35] the wearing and parading of a message advertised on the back of a jacket was referred to as speech rather than speech-plus. Thus, the state cannot regulate communication under the guise of regulating conduct.[36] Any such regulation is, in fact, a regulation of speech.

The communicative component of political expression in a campaign is the citizen's expression of his political choices. A democracy relies on the unbridled expression of such choices. Contributing to a political campaign is the way most citizens can effect that expression. Other modes of political expression in the complex twentieth-century political process are often too ineffectual to have a significant impact on a campaign or to influence the government's decision making policy.[37] Since the first amendment encourages participation in government as a precept of democracy, it must protect the ability to communicate political expression. When this communication is in the form of a contribution, the contribution itself becomes expression.

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34. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). This characterization stemmed in part from the communicative value of wearing armbands. The Court made it clear, however, that the characterization was also attributable to the absence of any showing that petitioners' exercise of their speech rights would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. . . ." *Id.* at 509. This suggests that it is only where undesirable disruption occurs that activity would lose the characterization of "closely akin to pure speech." The question not directly addressed by the Court is whether this activity loses its protection where the disruption is caused by those reacting to the activity and not those engaged in the activity. *See* Gregory v. City of Chicago, 394 U.S. 111 (1969).

35. Cohen v. California, 403 U.S. 15 (1971). The Court asserted that the conviction rested solely upon the "*offensiveness* of the words Cohen used to convey his message to the public" [*Id.* at 18 (emphasis added)], and not "upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views. . . ." *Id.*

36. *Id.* The Court noted that "[t]he only 'conduct' which the state sought to punish is the fact of communication." *Id.*

37. Even if other means for a contributor to communicate his views do exist, the contributor can opt for the most effective means of expression. Although in *Cohen*, the use of a colloquial word for sexual intercourse as the action verb in a statement against the Selective Service System was a more offensive exercise of expression than the use of a phrase such as "stop the draft," Cohen's choice of polemic was protected by the first amendment. So the contributor can choose to flaunt his wealth when that form of political expression is selected as the most effective means open to him.

Even if it is argued that a contribution is not expression, the protection of the first amendment is not limited to speech; it applies to conduct which is so interrelated with expression that to divorce one from the other is to effectively deny the expression.[38] The Supreme Court's development of the concept of "speech-plus" insured that conduct necessary for effective communication is included within the first amendment protection of speech.[39]

Prohibiting the means of communication often results in abridging expression.[40] For example, to exclude boycotting, parading, or sitting-in from first amendment protection by labelling it as non-speech conduct is to allow the suppression of the communication of an idea. The first amendment must do more than create a right and then leave it in a vacuum, protecting its existence but not its exercise. For this very reason, speech-plus is protected.[41] When the communicative value of the

38. Thus, the method of expression by flag display could not be constitutionally prohibited by a state legislature since the regulated conduct resulted in a direct suppression of the attempted communication. Stromberg v. California, 283 U.S. 359, 369 (1931). Nor can Congress regulate the communicative aspect of a contribution under the guise of regulating the conduct part of the contribution. *Cf.* Street v. New York, 394, U.S. 579, 586-87 (1969).

39. Justice Harlan, concurring in United States v. O'Brien, 391 U.S. 367 (1968), distinguished "those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate" from the selection by O'Brien of conveying his message by draft card burning. *Id.* at 388-89 (Harlan J., concurring). When the conduct involved is essential to communication, the Court has provided the full protection of the first amendment. *See* Edwards v. South Carolina, 372 U.S. 229 (1963). Picketing on the State House grounds was not disruptive of public order and reflected "an exercise of [first amendment] rights in their most pristine and classic form." *Id.* at 235.

40. In Martin v. Struthers, 319 U.S. 141 (1943), a municipal ordinance abridged expression by prohibiting door-to-door convassing if the resident was called to the door by the canvasser. The balancing of interests in crime prevention and privacy with first amendment expression required that expression not be limited by prohibiting that means of communication. *Id.* at 143-44. Kovacs v. Cooper, 336 U.S. 77, 82 (1949), accommodated the public interest in privacy by allowing reasonable regulation of sound track amplified expression but it left intact the conclusion reached in Saia v. New York, 334 U.S. 558 (1948), that "[l]oud-speakers are today indispensable instruments of effective public speech." *Id.* at 561.

41. "Action is often a method of expression and within the protection of the First Amendment." Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring). *Cf.* T. EMERSON, *supra* note 28, at 293. If a concomitant right to that of political expression is the exercise of political influence, then doing so by a contribution appears to be the sort of action Justice Douglas referred to in his concurring opinion in *Brandenburg*. 395 U.S. at 454 (Douglas, J., concurring).

conduct is marginal, the conduct is labelled speech-plus, and hence the government has wide discretion over its regulation. Thus, in *Cox v. Louisiana*,[42] obstructing a sidewalk and picketing near a courthouse were not forms of expression afforded full first amendment protection. Of course, the conduct did share some "communicative" relation to the expression of protest against racial segregation, but that conduct was more directly related to disrupting the public order. While even pure speech requires the "conduct" of noise and therefore could disrupt public order,[43] the conduct in *Cox* partook of mob action and was disruptive to "the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."[44]

If Congress determined that unlimited contributions of monies to political campaigns were a threat to "the existence of an organized society" in that corrupted elections presented only a facade of a democratically structured government, then such a regulation of the conduct of political expression would be constitutionally valid.[45] But, clearly, the maximum effect of untoward influence by wealthy contributors on a campaign does not approximate the disruptive effect of mob action in the streets. Contrasted with the facts in *Cox*, the making of a campaign contribution would be the very form of political expression open to protestors when the streets are closed. The first amendment's philosophical bias toward full participation in government buttresses the view that political expression should be protected even if the conduct by which that expression is made is not as communicative in nature as the conduct in *Tinker* or *Cohen*.

Under this analysis, the act of contributing is characterized as symbolic speech. The definition of such speech requires that the "speaker" possess the intent to communicate and has reason to believe that his

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42. 379 U.S. 536, 555 (1965).

43. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23.

44. 379 U.S. at 539.

45. The view in *Cox* parallels the clear and present danger test principle that government need not wait for its own destruction before attempting to limit expression which promotes the overthrow of the democratic process. Gitlow v. New York, 268 U.S. 652, 667 (1925). In his dissent in *Gitlow*, Justice Holmes answers this purported justification for regulation of expression: "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Id.* at 673 (Holmes, J., dissenting). Therefore, the risk that a wealthy elite might gain control of the democracy through political expression is one the first amendment requires be taken.

conduct will be received by his audience as communication.[46] At a minimum, a contributor intends to communicate his support to a candidate. Further, a candidate views this financial support as ideological support.[47] A contribution, whether speech or speech-plus, seems to be the type of political expression protected by the first amendment.

b) Expenditures

A campaign expenditure enables the candidate to communicate his message to the voters. That a citizen has a first amendment right of expression is clear, but when that citizen dons the role of a candidate, his interest in expression and its exercise differs somewhat from that of the private citizen. A candidate is actually the leader of a voluntary political association; at the least, he is the association's representative to the public, and therefore has the right to subsume within his freedom of expression the funds accumulated by the association and spent to further his candidacy. This is distinguished from a union leader or corporate director's freedom of expression in that their positions do not include permission of the members of their "association" to express political views or expend the association's funds for a particular candidacy. Thus, in *Pipefitter's Local Union No. 562 v. United States*,[48] the Supreme Court required that a union establish a voluntary association for political expenditures rather than use previously collected union funds to promote a candidate.[49] A candidate, as the representative of a political association, does not suffer a loss of first amendment protection because of his role; rather the first amendment is particularly relevant when protecting an exercise of expression so vital to the institution of self-government.

As a means of communication, expenditures qualify as speech-plus and are protected by the first amendment. A candidate can not communicate during a campaign by typical speech-plus forms of conduct such

46. The Supreme Court has yet to arrive at a specific test for defining that symbolic conduct which is protected by the first amendment and that which is not. Cowgill v. California, 396 U.S. 371 (1970) (Harlan, J., concurring). The definition used in the text appears in Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1117 (1968). The intent to communicate is presumed from the fact that the conduct is a departure from the actor's normal activities.

47. The communicative nature of this conduct should not turn on the size of the audience since the essence of communication is not that an idea is widely disseminated but that it is disseminated at all. This would suggest, therefore, that public disclosure is not required to promote the exercise of this political expression.

48. Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).

49. *Id.* at 426-27.

as picketing, boycotting, or mass demonstrations.[50] In fact, an expenditure serves an even more important function in communicating the "speaker's message" than does typical speech-plus acts. For the campaigner deprived of the ability to expend funds also loses his ability to communicate, while the protester does not lose his ability to dissent merely because one form of conduct has been regulated away. A candidate within sufficient funds to expend is no longer a candidate.[51] Such expenditures are the *sine qua non* not only of the candidate's expression via the media but also of the organizational costs of bringing a candidate into contact with the citizenry. In a political campaign, expenditures are indispensable to communication and thus closer to speech (on a continuum from speech to conduct) and more clearly within the first amendment protection of speech-plus than typical speech-plus conduct.

c) Disclosure

Since a contribution is a form of expression, the requirement of disclosure attaches a limiting condition to its exercise. The first amendment has consistently been interpreted as prohibiting governmental action which may deter the exercise of expression. In *National Association for the Advancement of Colored People v. Alabama*,[52] the Supreme Court invalidated a disclosure statute requiring the NAACP to provide a list of its members to a state regulatory agency. Listing the consequences of disclosure of identity as "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public

50. In Business Executives' Move For Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), Judge Wright intimated that the modus operandi of an individual seeking to exercise first amendment rights is a valid consideration in the adjudicatory process. Judge Wright began his analysis of the issue before the court—whether a broadcast licensee may refuse to sell time for editorial advertising of a controversial public issue—by acknowledging that both the Democratic National Committee and BEM were organizations which "do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations." *Id.* at 646. Resort to these types of newsworthy acts by candidates is not only infrequent, but also ineffective to convey the candidate's message to large segments of the electorate.

51. In Harper's Magazine, Senator Fred Harris wrote of his experience as a candidate for the Democratic Presidential nomination who failed to receive serious attention from the media because of his lack of funds. As a result of this lack of media attention, his strongly flavored populist views were never made part of the 1972 Presidential campaign debate. Senator Harris perceived the problem in the following manner: "[i]ts a circle. The press doesn't take you seriously because you haven't got the money. You don't get the money because the press doesn't take you seriously." HARPER'S MAGAZINE, May, 1972, at 20.

52. 357 U.S. 449 (1958).

hostility," the Court recognized that the "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group expouses dissident beliefs."[53] In a different area—legislative investigation—the Court described the "disastrous" effect on a witness's life that forced revelations of past Communist party affiliation could have.[54] Two years later, the Court struck the balance in favor of a legislative investigation,[55] but the effect of disclosure as a post-restraint on expression was still recognized. It was justified in the unique historical situation involving the fear of a Communist attempt to overthrow the United States Government.

Disclosure may operate as a post or even prior restraint if an individual who expresses unpopular views must risk community standing, perhaps livelihood, when his identity is made public. While some citizens are in a financial, social or political position to assume such a risk, most citizens would be fearful of the consequences of expression if their identities were to be divulged.[56] For example, in a company-owned town in which subsistence is contingent upon conformity with the company's policies, a resident who contributes to a candidate challenging the company rule may suffer appreciable injury if disclosure is required.[57] In this

53. *Id.* at 460-66.

54. Watkins v. United States, 354 U.S. 178 (1957). *Cf.* Baird v. State Bar of Arizona, 401 U.S. 1, 3 (1971).

55. Barenblatt v. United States, 360 U.S. 109 (1959).

56. If disclosure legislation deters "fat cats" from buying favor from elected officials, it must also deter persons ideologically motivated who will fear "buying" disfavor from their government, their clients or their employers. *Hearings on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications of the Sentate Comm. on Commerce*, 92d Cong., 1st Sess. 583 (1971) (statement of R. Winter, Jr., Professor, Yale Law School). Professor Winter explains that a business executive opposed to the war in Vietnam might have been deterred by an effective disclosure statute from contributing to the McCarthy campaign of 1968 for fear of governmental retaliation against his company. A lawyer may consider the potential loss of clients before providing monetary support for unpopular candidates. University faculty members may fear disclosure of contributions to candidates with views inconsistent with the prevailing campus orthodoxy lest they danger tenure, salary and physical well-being. H. PENNIMAN & R. WINTER, JR., CAMPAIGN FINANCES—TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS 23 (1971). *See also* Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900, 905 (1971).

57. The Gilman Paper Company controls the city of St. Mary's, Georgia. When Dr. Carl Drury sought the office of state representative, formerly held by the Gilman Paper Company lawyer for several terms, the consequences of exercising the freedom of political expression were imprinted on the lives of those who supported him. The job of one paper mill shift supervisor was terminated for no known reason other than that his father had been very close to the candidate. A sheriff's deputy also lost his position when

sense, little political expression can occur unless anonymity is preserved. The first amendment predilection for free and open expression protects the identity of the speaker or contributor for this very reason.[58]

2. The First Amendment's Limitation

Defining the expression regulated by the Federal Election Campaign Act of 1971 as protected by the first amendment is not determinative of the constitutionality of the Act; rather it creates a constitutional interest which Congress must recognize. Although the language of the first amendment appears to wall in political expression as a sanctuary against any governmental invasion, the Supreme Court has held that there are permissible intrusions. Two major tests have justified the exercise of such congressional power: the clear and present danger test and the ad hoc balance of the individual and governmental interests.

a) The Clear and Present Danger Test

The clear and present danger test was first enunciated by the Supreme Court in *Schenck v. United States*.[59] This test requires the government to establish the following: first, the evil to be avoided must be substantial. The mere apprehension of violence or of destruction of property is insufficient to warrant governmental intrusion in a first amendment area.[60] Second, the danger must be present or imminent.

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he refused to spy on Dr. Drury. The story of Dr. Drury's election and the aftermath emphasize the necessity for anonymity if political expression is to be exercised where it is most needed. Schuck & Wellford, *Democracy and the Good Life in a Company Town,* HARPER'S MAGAZINE, May, 1972, at 56.

58. Talley v. California, 362 U.S. 60 (1960).

> There can be no doubt that . . . an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."

Id. at 64, *citing* Lovell v. Griffin, 303 U.S. 444, 452 (1938). The Court has characterized the protection against identification requirements as the right to remain anonymous. Although the majority in United States v. Rumely, 345 U.S. 41 (1953), did not reach the question of whether there is a conflict between congressional investigative power and one's right to remain anonymous, Justice Douglas did, noting that "if the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship . . ." *Id.* at 57-58 (Douglas J., dissenting). *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965); NAACP v. Alabama, 375 U.S. 449, 462 (1958).

59. Schenck v. United States, 249 U.S. 47 (1919).

60. Justice Brandeis, concurring in Whitney v. California, 274 U.S. 357 (1972) noted that the evil to be prevented must be a serious one: "[t]he fact that speech is likely to

Only an emergency can justify repression because it is only during an emergency that the first amendment self-governing mechanism of free and open debate will not offset the "dangerous" exercise of speech sought to be regulated.[61] Third, as the gravity of the anticipated evil increases, the degree of probability of evil that the government must establish decreases.[62] Alternatively, as the speech involved progresses from advocacy to incitement the government burden also decreases. Finally, before the speaker can be curbed, it must be established that he possessed the specific intent to create the apprehended evil.[63]

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result in some violence or in destruction of property is not enough to justify its suppression." *Id.* at 378 (Brandeis, J., concurring).

Alexander Meiklejohn, in criticizing the test, suggests that even the evil recognized by the Court in *Schenck* was insufficient to warrant curbing first amendment rights. He claimed that "the 'right to prevent evils' does not give unqualifiedly the right to prevent evils." A. MEIKLEJOHN, POLITICAL FREEDOM 40 (1960).

61. Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring). Justice Brandeis substituted the word "imminent" for the word "present", as used by Justice Holmes in *Schenck*. *Id.* at 373 (Brandeis J., concurring). Absent such imminent danger, "the remedy to be applied is more speech, not enforced silence." *Id.* at 377 (Brandeis, J., concurring).

62. Although the Holmes-Brandeis formulation is interpreted as protecting speech short of incitement, Justice Brandeis intimated that advocacy was punishable where circumstances suggest that "the advocacy would be immediately acted on." *Id.* at 376 (Brandeis J., concurring). In DeJonge v. Oregon, 299 U.S. 353 (1937), Chief Justice Hughes noted that an abuse of first amendment rights occurs when speech is used in order to incite to violence or crime. *Id.* at 364. The omission of any affirmation that advocacy may be prohibited suggested that at least in the *DeJonge* facts, the evil was not serious enough to warrant the curbing of advocacy. In Dennis v. United States, 341 U.S. 494 (1951), the Court suggested that advocacy of overthrow of the government by force or violence, when such is the goal of a conspiracy, is not protected by the first amendment. *Id.* at 511. This conclusion may be influenced significantly by the fact that pro-Communist speech, uttered in the early 1950's, was viewed as a greater threat to overthrow of the government than it was at other times. Thus, one author has suggested that under the *Dennis* test, which requires a determination of the gravity of the evil discounted by its improbability, speech can be suppressed if the evil will occur from any cause, though the speech itself is not the catalyst. M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 65 (1966).

63. In Abrams v. United States, 250 U.S. 616 (1919), Justice Holmes stated that speech may be constitutionally punished only if it "produces or is intended to produce" a clear and present danger of the evil which Congress may prevent. *Id.* at 627 (Holmes, J., dissenting). This language suggests that if a contribution or expenditure produces the evil, specific intent need not be shown, but rather, is inferred, from the actual production of the danger. It also suggests that, irrespective of whether the contribution or expenditure produces the evil, it may also be prohibited if it is made with specific intent to produce the evil. The specific intent requirement is satisfied if the individual possessed the aim to produce the evil or if the aim to produce it is the "proximate motive of the

The clear and present danger test is not usually applied to the kind of expression involved in a political contribution, expenditure, or disclosure of financial sources.[64] But the historical application would not preclude the test's viability if the evil to be corrected has reached "dangerous" power levels in recent times.[65] Thus, the modern cost of a political campaign has expanded the potentiality for corruption to the point that a unique danger to the political system may have been created.[66]

The "evil" of corrupt influence peddled by wealthy contributors is of such immediacy that the integrity of the political process may well be on sale. Just as the historical clear and present dangers included the aspect of an emergency which suspended the safeguards of the first amendment, this threat to the political system is particularly immediate in that as the process is corrupted, it loses the ability to reaffirm its own integrity. Corrective legislation at this stage is a necessary reaction to the inflow of contributions which now infect the political process with the very evil at which the legislation is aimed.[67] Of course, not every

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specific act although there may be some deeper motive behind." *Id.* (Holmes J., dissenting). *See also* Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES 130-32 (1954).

In light of the language in *Abrams*—that actual production of the evil obviates the need to prove specific intent—this element presents no obstacle with respect to campaign contributions or expenditures, assuming that either of the two acts actually produces the evil.

64. The test has been applied in judging the constitutionality of convictions obtained for subversive activities (*see* Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961)) and criminal syndicalism (Brandenburg v. Ohio, 395 U.S. 444 (1969)).

65. This statement is suggested by the evolution of the test from *Whitney* to *Dennis*. In *Whitney*, the evil apprehended was the use of force or violence as a means of effecting the overthrow of the government. In *Dennis*, however, the Court stated that an *attempt* to overthrow the government by force was sufficient evil for Congress to prevent. 341 U.S. at 501. An attempt to overthrow the government was sufficiently dangerous in 1951 because of the alleged Communist infiltration of the United States. It was not sufficiently dangerous in 1927 when the specter of communist infiltration was absent. *See id.* at 581 (Douglas, J., dissenting).

66. The clear and present danger test as used in Dennis v. United States, 341 U.S. 494 (1951), does apply to the danger of corruption of elections in that the Smith Act prosecution there punished the act of conspiring to advocate Communist views which called for the violent overthrow of government, while the statute here aims at both conspiring and advocating an untoward influence destructive of the election process. Just as the Court did not wait until the "putsch" was accomplished before restricting some expression, so Congress can not relax while corruption infiltrates government.

67. This reasoning rests on the assumption that it is campaign contributions that infect the election process. This assumption is not uncontroverted:

> We are very often deceived by the fact that very successful politicians have access to money. I suspect they have access to money because they are successful

contribution is intended to corrupt the political process; but the aggregation of large sums, often tendered by representatives of special interests, does create a political debt, the payment of which is too susceptible to corruption for unlimited contributions to be sheltered within the first amendment. The clear and present danger test applies in like manner to the need for congressional regulation of expenditures and disclosure. If the above application is warranted, then the exercise of congressional power though intersecting with the protected area of the first amendment is valid.

But the speech withdrawn from protection by this test has always had an immediate causal relation to the evil. The first amendment cure for corrupt infection is open discussion of the evil and wide participation in the political process. It is only when the causal relationship is so immediate that the first amendment is inoperative as a self-governing mechanism that the test has been implemented.[68] Although corruption is manifest in the daily news, it has not assumed the trait of "imminency" which triggers an application of the clear and present danger test. Indeed if the cure under the first amendment is to expose corruption and educate the public, then limiting the amount of political expression by regulating contributions and expenditures or requiring disclosure runs counter to that goal of maximizing communication. To restrict communication when the danger is not impending is to promote the development of the danger by denying the first amendment safeguards of self-government so that a cover of silence is provided for the corruptive influence.[69]

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politicians far more often than they are successful politicians because of their access to money.

I am less concerned about money in politics because I think the law of diminishing returns applies to it, that is to say, there are large numbers of people with access to political money, far more access than their opponents who, in fact, have less use for it. Incumbents and those pursuing established policies, it seems to me, get less for each dollar they spend than those seeking to challenge the status quo—and again, there are circumstances where the opposite occurs—but I am afraid that a limitation on the use of money in campaigns would be a way of institutionalizing a political cartel in this country.

Winter, Jr., *Commentary*, in FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 76 (A. Rosenthal ed. 1971).

68. Justice Brandeis wrote in Whitney v. California, 274 U.S. 357 (1927):

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify suppression. Such must be the rule if authority is to be reconciled with freedom.

Id. at 377.

69. DeJonge v. Oregon, 299 U.S. 353 (1937), described the maintenance of first

Beyond the question of whether the test can be invoked to support the limitations on speech imposed by the Federal Election Campaign Act of 1971 lies the question of the viability of the test as applied to any situation other than incitement. Critics such as Justice Douglas cite the inadequate protection the test provides for the individual's speech interest if a court looks only to the likelihood of the evil occuring.[70] Conversely, Justice Frankfurter rejects the test because the doctrine does not provide adequate protection to the state interest.[71] If contributions and expenditures are closer to speech-plus than to speech, then Chief Justice Vinson would deem the test inappropriate:

> When the effect of a statute or ordinance upon the exercise of the First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity.[72]

The absurdity prophesized by Chief Justice Vinson may have been presented in *Brandenburg v. Ohio*.[73] The conviction of a Ku Klux Klan leader under an Ohio syndicalist law for threatening direct violence to federal government officials if they continued to suppress the white race was reversed because the danger of mere advocacy was not sufficiently imminent to allow a breach of the first amendment protection of speech. Justice Douglas wrote a lengthy concurring opinion which directly addressed the question of whether advocacy of even the most violent action was not still protected as speech by the absolute language of the first amendment and thus not susceptible to regulation under a clear and present danger justification.[74]

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amendment opportunity for free political discussion as the "security of the Republic, the very foundation of constitutional government." *Id.* at 365. Political discussion operates to focus public attention on corrupting influences, thus rendering these influences impotent as the electorate becomes outraged at examples of wealth buying power. When expression is limited, wealth continues to have an input even if it is by circumvention of the letter of the law; the curative power of the first amendment may, however, be blocked. The security of the election process lies in the expansion of expression.

70. *See* Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring).

71. In his concurring opinion in *Dennis*, Justice Frankfurter cited approvingly the conclusion drawn by Paul Freund that the test is an oversimplified judgment unless it takes into account "the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity." Dennis v. United States, 341 U.S. 494, 542-43 (1951) (Frankfurter, J., concurring).

72. 339 U.S. at 397.

73. 395 U.S. 444, 449 (1969). In *Brandenburg*, the Court, in overruling Whitney v. California, 274 U.S. 357 (1927), adopted the position of Justice Brandeis in *Whitney*, that mere advocacy of ideas could not be suppressed. 395 U.S. at 448-49.

74. 395 U.S. at 439 (Douglas, J., concurring).

This past term in *Cole v. Richardson*,[75] the Court refused to join the issue that Justice Douglas introduced in *Brandenburg*, and instead Chief Justice Burger argued that a loyalty oath requiring opposition to the overthrow of constitutional government by force, violence or illegal means was not prohibited by the first amendment because there is no constitutonal right to overthrow the government.[76] In his dissent, Justice Douglas argued that the issue of the case was not whether a constitutional right to overthrow the government existed but whether the advocacy of that or any other unpopular or militant view was protected by the first amendment. Justice Douglas applied the test in *Brandenburg* and found no clear and present danger.[77] The majority did not apply this test, avoiding it by characterizing the issue as above. It is here contended that the majority realized that the clear and present danger test had, after *Brandenburg*, lost its applicability to any but the most obvious of violent incitements and was therefore no longer a viable basis for governmental restriction of speech.

b) The Ad Hoc Balancing Test

As the clear and present danger test and its offspring[78] offered limited viability to developing congressional conflicts with the first amendment, the Supreme Court fashioned the ad hoc balancing test. The balance is between the first amendment interest and the propriety of the means chosen to effect the governmental interest. Professor Emerson suggests that this balance is made in the following manner:

> The burden of proof is on the proponents of the regulation to establish (a) the control is clearly necessary to correct a grave abuse in the operation of the system and is narrowly limited to that end, and that this objective cannot be achieved by other means; (b) that the regulation does not limit the content of expression; (c) that the regulation operated equitably and with no undue advantage to any group or point of view; (d) that

75. 405 U.S. 676 (1972).

76. *Id.* at 686.

77. *Id.* at 688 (Douglas, J., dissenting).

78. In Gitlow v. New York, 268 U.S. 652 (1925), the Court formulated the bad tendency test. One salient difference between the *Gitlow* test and the clear and present danger test is that only in the former, the individual speaking need not be able to foresee the effect of a given utterance in order to be punished for that utterance.

Strictly speaking, the test applied in *Dennis v. United States* is also distinguishable from the Holmes-Brandeis formula. In *Dennis*, the Court referred to the gravity of the evil discounted by its improbability [341 U.S. at 506], whereas Holmes and Brandeis required that the danger be probable. Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring).

the control is in the nature of a regulation, not a prohibition, and does not substantially impair the area of expression controlled; and (e) that the regulation can be specifically formulated in objective terms and is reasonably free of the possibility of administrative abuse.[79]

It is submitted that any justification of the Federal Election Campaign Act of 1971 regulation of political expression must accord with the above formula or the governmental invasion must yield to the protected first amendment interests.

1) Contributions

The ceiling on contributions is designed to prevent the undue influence exerted on the election process by the wealthy contributor. If it is assumed that contributions are a form of expression protected by the first amendment, then is not the freedom of expression of the wealthy contributor as deserving of as much protection as that of the limited contributor? To place a ceiling on the wealthy contributor is to limit the effectiveness of his expression, a direct affront to first amendment protection. Moreover, from the standpoint of social engineering, the risk of untoward influence of wealthy contributors is better borne by access under the first amendment than in forcing these contributors to seek to exert their influence through other channels.[80]

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79. T. EMERSON, *supra* note 28, at 634. Professor Emerson's formula is a scholarly synthesis of prevailing case authority on the role of the first amendment in the area of political system purification legislation. Burroughs v. United States, 290 U.S. 534 (1934), upheld the power of Congress to enact federal corrupt practices legislations vis-a-vis the power of the states, but no first amendment issue was decided. *Id.* at 547. No Supreme Court case has decided the particular questions raised in this article. T. EMERSON, *supra* note 28, at 635-39. The Emerson test does derive authority from Supreme Court decisions protecting the first amendment from improper statutory infringement. Schneider v. State, 308 U.S. 147 (1939) (regulation restricting leafleting was overbroad considering first amendment importance); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (conviction of Jehovah Witnesses for soliciting reversed: "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom"); *In Re* Stolar, 401 U.S. 23 (1971) (refusal to answer Ohio State Bar Committee questions on beliefs and associations was protected by first amendment); Street v. New York, 394 U.S. 576 (1969) (first amendment prohibits punishment under a flag desecration statute for expression of disgust with American flag); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (there is a "narrower scope for operation of presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . .").

80. The President's Commission on Campaign Costs in 1962 recognized that unrealistic ceilings on contributions may invite evasion of the laws through the channelling of

Given the governmental and constitutional interests,[81] the ad hoc balancing formula requires that the regulation be both necessary and narrowly limited to the promotion of the governmental interest. No doubt, the limitation of contributions has the advantage of being a direct brake on the abuse of untoward influence. But since this advantage is achieved by restricting political expression, the regulation is valid only if it is the only means of achieving this advantage. Alternative remedies which do not restrict expression but rather promote the governmental interest by expanding expression have constitutional preference in first amendment adjudication. Such alternatives as free broadcast time or mailing privilege, public subsidation of a campaign, or tax incentives for contributions[82] avoid invading the first amendment protected areas and are compatible with the basic assumptions of democratic self-government that

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funds to influence opinion on issues favorable to the candidate or the encouragement of broadcasts against an opponent rather than in favor of candidate. *See Hearings, supra* note 3, at 95. Under the Federal Election Campaign Act of 1971, the latter would now be charged to the candidate. *See* Campaign Communications and Disclosure of Federal Campaign Funds, 37 Fed. Reg. 6156, 6158 (1972).

An even greater danger to the political processes would ensue if a wealthy contributor, prevented from expressing himself through a contribution, sought to use his wealth to influence a legislator. Since an individual, acting alone, is not subject to the lobbying disclosure provisions, the only impediment to the effectiveness of wealth, in such a situation, would be the personal integrity of the legislator. In contrast, where an individual is permitted to express himself through large contributions, the debate attendant to a political campaign may itself counteract the undue influence of wealth on a candidate, forcing him to be attentive to the views of the public and not just those of a select few, in order to win the election.

81. *See* text accompanying notes 31-47 *supra*.

82. Proposals have been made in the form of legislation requiring radio and television stations to provide free time, or to reduce the price of time for candidates during a campaign. In these proposals such free time would not include "spots." There is no question that Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), clearly establishes congressional authority for such a proposal. *See* H. ALEXANDER, MONEY IN POLITICS 198 (1972).

Likewise, indirect public subsidies have been proposed by providing free mailings for candidates on committees. Such mailings would equalize opportunities to reach voters. *See* H. ALEXANDER, *supra*.

Two Presidents, Theodore Roosevelt and Harry Truman, have recommended direct government subsidies for election campaigns. *See* A. HEARD, THE COSTS OF DEMOCRACY 431 (1960). On March 3, 1961, an official of the Democratic National Committee stated the position of the Committee before the Subcommittee on Communication of the Senate Commerce Committee, recommending prohibition of private contributions with campaigns to be financed entirely out of appropriations.

INT. REV. CODE OF 1954, § 41(b), provides for a tax credit for the taxpayer of an amount equal to one-half of all political contributions, the credit being limited to $12.50 ($25.00 in the case of a joint return).

the first amendment emphasizes.

The formula also prohibits any regulation which directly limits the content of the form of expression. The first amendment protects more than merely the actual message conveyed by expression; the manner in which the message is conveyed is a crucial part of the speech itself.[83] Indeed, the function of the first amendment is to invite public debate under the supposition that truth will best be achieved by insuring that the opportunity to engage in healthy dispute remains open.[84] In *Cohen v. California*,[85] Justice Harlan expounded upon these ideals. He defined the content of expression as including emotive and cognitive elements.[86] A restriction on the emotive element of expression is invalid as an abridgement of the first amendment protection of expression. Such a restriction also dilutes the cognitive element of an individual's expression because the two elements are inseparable.[87]

The emotive element of a contribution is its size; its cognitive element is the expression of political support. Under this analysis, a restraint on the size of a contribution limits the degree of political support which the contributor can express and thus deprives him of the opportunity to express himself emotively as well as substantively. The restriction may result in totally foreclosing the communication of a cognitive message. If the wealthy contributor is deprived of the opportunity to express

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These proposals are designed to assure the widest and broadest campaign debate, providing an equal opportunity for all to participate as candidates in the political process. The rationale underlying these proposals is that such diversity in a campaign will regulate any untoward influence of the wealthy contributor not by constitutionally suspect ceilings, but by the operation of free debate.

83. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25-26 (1971); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969); Walker v. Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting); Terminello v. Chicago, 337 U.S. 1, 4 (1949).

84. *See* New York Times Co. v. Sullivan, 376 U.S. 255, 269-70 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

85. Cohen v. California, 403 U.S. 15 (1971). In *Cohen*, the defendant was convicted for parading through the halls of a courthouse with the words "fuck the draft" written on the back of his jacket. The Supreme Court reversed the conviction.

86. *Id.* at 26. The emotive content of the speech was the use of the word "fuck" as opposed to another term which conveys the same notion. While recognizing that this word might be distasteful to some, Justice Harlan discerned that "one man's vulgarity is another's lyric." *Id.* at 25.

87. Justice Harlan noted that "words are often chosen as much for their emotive as their cognitive force." *Id.* at 26. Individuals desiring to convey a message often resort to a particular manner of expression because that mode is likely to attract the public's attention. Thus, Congress, in limiting the emotive content of the speech might, at the same time, prevent the cognitive message from being heard.

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himself emotively, *i.e.*, in a way that is meaningful to him, he may choose not to contribute at all. Both as a direct limitation on the emotive element of content and as a deterrent to a wealthy contributor's expression, the ceiling on contributions fails the ad hoc balancing test.

2) Expenditures

As envisioned by Congress, the limitations on expenditures are designed to protect the public interest in maintaining the purity of the electoral process by providing equal opportunity for all persons to serve as candidates, the modest as well as the wealthy.[88] Additionally, it is intended that these limitations will generate a greater diversity of views, thus responding to the public need to hear a full debate of political issues. This public right is arguably satisfied if poor candidates and parties are provided an opportunity to enter the political process and campaign for their interests in a meaningful way. In *Bullock v. Carter*,[89] the Supreme Court satisfied the need for minority representation in the political arena by invalidating primary election filing fees which were too high to permit poor groups to enter the primaries. This judicial action safeguards the rights of expression of all parties. It did not limit one candidate in order to serve another.[90]

Political debate reaches its most pervasive and intense level in an election campaign, particularly for the presidency. The domination of a campaign by those with unlimited resources infects the election process which depends upon the expression of diverse views. Such dissent serves as a constant challenge to make more responsive the dominant powers in the political process. Limiting expenditures serves as a brake on the dominant group. It provides hope for access to the political process by the weaker minority interests which often represent dissenting views. At the same time, the limitation assures that those with dominant resources will not overwhelm those with limited resources.

88. *See Hearings on H.R. 8284 Before the Subcomm. on Elections of the House Comm. on House Administration*, 92d Cong., 1st Sess. 9, 14 (1971); *Hearings on S. 1, S. 382, & S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-96, at 269-271 (1971).

89. Bullock v. Carter, 405 U.S. 134 (1972). The Court invalidated filing fees ranging as high as $8,900. The Court ascertained that the size of these fees would both prevent qualified but less affluent people from running for office, and, at the same time, substantially impair the ability of minority groups to elect candidates who represent their interests. *Id.* at 144. A similar problem is presented if expenditures in elections are unlimited.

90. It is for this reason that the rationale underlying *Bullock* could not be invoked to justify the limitations on campaign expenditures.

Couched in these terms, the governmental interest is derived from the same source as the constitutional interest in expenditures—both interests spring from the first amendment. The common source requires a different application of the ad hoc balancing test, for it works best when the governmental interest is detached from the constitutional interest. The balance is then between the governmental regulation and the constitutional interest. When both interests converge, the test really weighs the extent to which the regulation serves each first amendment interest. To be valid, therefore, the regulation must infringe to the least possible extent on the constitutional interest while being necessary to effect the governmental interest, even though both interests have a constitutional foundation.[91]

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91. Senate Commerce Committee hearings did proffer an application of the balancing test which would hold the Federal Election Campaign Act of 1971 constitutional as measured by its effect on the first amendment.

> Where, as here, legislation intending to preserve the purity of Federal elections by limiting spending also has the side effect of touching upon First Amendment rights, the criteria for determining its constitutionality are the presence of an evil which may validly be prevented, a reasonable relationship of the regulation to the evil, and the relative degree of effect upon the right to speak. There is a balancing of the limited effect upon free speech as against the substantiality of an evil to the prevention of which a regulatory statute is reasonably addressed.

SENATE COMM. ON COMMERCE, FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-96, 92d Cong., 1st Sess. 77 (1971).

The report cites Konigsberg v. State Bar, 366 U.S. 36 (1961), as a source of such a test. In *Konigsberg*, an applicant to the state bar refused to answer questions about past membership in the Communist party. The Supreme Court upheld the right of the bar committee to both question Konigsberg and to refuse his application on the grounds that he did not answer the question even though he had asserted the first amendment as protecting his silence. Justice Harlan weighed California's "interest in having lawyers who are devoted to the law in its broadest sense" against "the minimal effect on free association" of the bar committee's questions. *Id.* at 52.

The distinction between the *Konigsberg* decision and the test applicable to the Federal Election Campaign Act of 1971 is that in determining the validity of the Act, the interests are not weighed against each other. Rather, the regulation is applied to the first amendment interest and a determination made as to whether the government interest could be served by a regulation less destructive of first amendment interests. Thus, California should have "lawyers who are devoted to the law in its broadest sense" but that end must be accomplished within a constitutional framework. The determination by the majority that the effect on free association was minimal validated the state action as one which served the state interest without unduly infringing on the first amendment. The same conclusion could not be drawn with respect to the Federal Election Campaign Act of 1971, for it invades protected areas subordinating some first amendment interests to other first amendment and governmental interests when a regulation molded to the same end could be employed without recklessly destroying the first amendment interests described in this article.

One requirement of the balancing formula is, "that the regulation operates equitably and with no undue advantage to any group or point of view." Generally, the built-in advantages of the incumbent will automatically require the expenditure of disproportionate sums by the challenger. These advantages are such that in the past fifteen years, not more than fifteen per cent of the challenges to incumbent senators nor eight per cent of the challenges to incumbent representatives have been successful.[92] To place this advantage into the ad hoc balancing formula, Professor Ralph K. Winter emphasizes that a limitation on expenditures would likely operate inequitably against the challenger:

> We cannot always count on having men of good will and honest intent in office. Systematic regulation of political campaigns by Congress must inevitably lead to those in power regulating in favor of themselves. The reason the first amendment takes matters of political speech and political activity out of the legislative process is because we cannot rely on those in power to exercise that power in behalf of their political opponents.[93]

The limitation also operates inequitably when one candidate is renown for reasons unrelated to political service. The candidate who has not had this affiliation must rely upon disproportionate expenditures to offset the advantage.[94] The best interests of the political process are served by allowing unlimited expenditures so that personalities are not the determinative issues in a campaign.

Since an expenditure is a form of expression, the regulation of that amount of expression beyond the limitation is in fact a prohibition of that amount of expression. The prohibited expression is of the same nature as the permitted expression, except that the governmental interest in regulation is asserted when the expression reaches a certain level.

The congressional committee's report highlights a second facet of the balancing test—that the judiciary, and not the legislature which has no conflict before it, is the branch of government best able to make a determination of the effect on free speech. Further, the use by Congress of judicial standards selected from one case, divorced from the judicial development of the standards, emphasizes the inability of Congress to perform the role of the judiciary or to bind the judiciary by selecting a judicial test of constitutionality.

92. *Hearings, supra* note 3 at 96 (testimony of Dr. Herbert E. Alexander).

93. H. PENNIMAN & R. WINTER, *supra* note 56, at 61.

94. An example of this built-in equity in fixing limitations on expenditures was the case of John Glenn, the astronaut hero who achieved extensive public recognition while running in Ohio for the Democratic senatorial nomination in 1970 against Howard Metzenbaum. Metzenbaum had to spend a significant amount just to achieve sufficient minimum recognition so that a campaign debate could be maintained.

In *Gregory v. Chicago*,[95] a group of protestors were arrested when the police were no longer able to protect them from attacks by irate homeowners. The validity of the arrests was rejected because the expression of the protestors had not been effected by disorderly conduct.[96] As the protestors paraded to City Hall through the business district, their expression was protected; but the police suppressed their expression just when, by redressing the Mayor at his house,[97] it promised to become most effective. Although the governmental interest in public order has high priority, it cannot be accomplished by a regulation which operates in fact as a prohibition. To restrict an expenditure at the level at which it effects the communicative desire of the candidate is to prohibit the communication that a supplemental expenditure could promote. This directly violates the first amendment. Even though the limit set may seem reasonable in light of current expenditures, the regulation still abridges the rights of those who are either able to spend more or are required to spend more in order to effectively communicate their message. To that extent, the balancing test would characterize the control as in the nature of a prohibition and therefore the "regulation" would be invalid.

3) Disclosure

When applied to the requirement of disclosure, the ad hoc balancing test raises the strongest argument that the Federal Election Campaign Act of 1971 violates the first amendment. The first amendment interest in not conditioning the exercise of political expression on a waiver of anonymity has already been discussed.[98] Apart from that limiting condition on the exercise of expression, the regulation undermines the foundations of the first amendment in a more abstract sense. Disclosure deters expression by turning public attention from the content of the expression to the identity of the speaker. In this way, disclosure institutionalizes an invalid public reaction to the exercise of free speech. Information concerning the speaker's affiliation should be only collateral to the deliberative public debate of issues sought by the first amendment.[99]

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95. Gregory v. City of Chicago, 394 U.S. 111 (1969).

96. "Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." *Id.* at 112.

97. *Id.* at 119 (Black J., concurring).

98. *See* note 58 *supra* and accompanying text.

99. The argument supporting this critical view of public disclosure is that in anticipation of such exposure, people will be made too fearful to engage in unpopular political activity. Under our system of law, such identification with unpopular political activity

The first amendment interests must be balanced against a regulation serving two governmental interests: first, public disclosure of sources of contributions would tend to prevent the corruptive influence of wealth on the political process by exposing the corruption; second, disclosure aids the public in making an informed judgment both as to the type of ideological support a candidate attracts and as to the direction toward which a candidate might be influenced. The importance of this information is that it expands the public's knowledge about a particular candidate, making the choice at an election one of enlightened self-government. The first amendment functions to produce this sort of democracy by protecting the widest dissemination of ideas and, in this sense, the governmental interest shares a tinge of first amendment philosophical support.

Applying the ad hoc balancing test formula, the regulation must be narrowly limited to promote the governmental interest. If the regulation is so broad as to violate a first amendment interest without being necessary to serve the other governmental and first amendment interests, the regulation must be rejected. In *Talley v. California*,[100] the governmental interest in identifying the author of publicly distributed handbills was to provide the public with a remedy against the previously unidentified sources of fraud, false advertising and libel. The requirement of disclosure was held unconstitutional because, in addition to remedying the evil at which the statute was directed, it had the net effect of dissuading those who held unpopular views from exercising their first amendment expression.[101] Such overbreadth was fatal.

The overbreadth in the disclosure rule is that not all individuals who contribute over one hundred dollars[102] have an intent to corrupt or the effect of corrupting a candidate they support. Although contributors of small sums over one hundred dollars will not be able to corruptly influence the candidate, disclosure would operate to discourage their support. To attain constitutionality, disclosure must at least have an operative sum of sufficient value so that the infringement on a first amend-

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is not unethical, unpatriotic, or immoral, and the assumptions made by the public about a person whose name is identified as a contributor is incorrect. If we then attempt to protect the contributor from such exposure, are we not reinforcing and institutionalizing the essentially incorrect assumptions or inferences made by the public? For further discussion of this point, *see* Ferman, *A Comment by a Civil Libertarian*, THE COMMITTEE AND ITS CRITICS 246-48 (F. Buckley, Jr. ed. 1962).

100. Talley v. California, 362 U.S. 60 (1960).

101. *Id.* at 64.

102. Federal Election Campaign Act of 1971, §§ 304(a)(b)(2), 305, 86 Stat. 15-16 (1972).

ment interest is warranted. Even then, less objectionable methods, such as public subsidies of elections, will safeguard the wealthy individual's right to contribute with anonymity while promoting the government's interest of avoiding the corruptive influence of large contributions.

Disclosure is also invalid under the ad hoc balancing test if the exposure acts as a prohibition of expression rather than a regulation of non-expression elements. Indeed, the rejection of prior restraints or the antipathy to post-restraints which operate as prior restraints may be predicated upon the fact that both restraints directly prohibit expression.[103] The essence of the rule against prior restraint is that censorship of speech can not be tolerated within the framework of the first amendment.[104] Disclosure requirements which are post-restraints deter the initial contribution, and that is not self-censorship as the contributor does not make a voluntary choice; rather, he must accept the invalid public reaction and its ramifications as a consequence of his exercise of expression.[105] Thus the deterrent effect of disclosure on making a contribution results in a prohibition on expression and not a mere regulation.

Disclosure not only undermines the right of a contributor to retain his anonymity, but it also limits the ability of the candidate to obtain contributions. The Supreme Court in *Branzburg v. Hayes*[106] held that a New York Times reporter could not invoke the first amendment to immunize himself from divulging his news sources before a grand jury investigation of the Black Panther Party. Such disclosure, it was argued,

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103. In New York Times Co. v. Sullivan, 376 U.S. 255 (1964), Justice Brennan suggested that if truth is the only defense to a libel suit brought by a public official, a critic of official conduct would be lead to "self-censorship" in order to avoid libel judgments. *Id.* at 279. Unless the factors which lead to self-censorship are removed, the "uninhibited, robust and wide-open" debate by which the public receives information can not take place.

104. New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring); Near v. Minnesota, 283 U.S. 697, 715-16 (1931).

105. In Branzburg v. Hayes, 408 U.S. 665 (1972), the majority adopted the view that such censorship is not induced by government action but rather, is self-induced. According to the Court, disclosure of news sources to a grand jury would deter the expression only of those who are involved in a criminal activity; it concluded that the disinclination of criminals to divulge their identities is non-first amendment based. *Id.* at 691. While that argument could be applied to campaign contributors in that those who seek to wield improper influence have a "criminal" interest in anonymity, the majority of contributors do not share such an interest. As to them, disclosure strikes as a prior-restraint, for it attaches consequences to the initial exercise of expression which militate against that exercise. "Self-censorship," as defined in the case is censorship protecting an illegal self-interest; "self-censorship" by not contributing to a political campaign goes to determining a valid, indeed preferable, exercise of political expression.

106. 408 U.S. 665 (1972).

would result in a loss of news sources, since confidentiality could no longer be guaranteed. That loss would restrict news dissemination about unpopular or militant groups whose activities may be steeped in secrecy. While the majority did apply the ad hoc balancing test, it held that there was only a hypothetical deterrent effect on freedom of the press, particularly since the only sources who would require confidentiality before the grand jury would be those involved in unlawful activities.[107]

Branzburg is distinguishable from the disclosure regulation in that a presumption can be made that those who would be deterred from contributing have a protectable interest in anonymity. The first amendment interest in protecting unpopular or minority views, not the desire to avoid law enforcement, is the source of the secrecy.

The balance in *Branzburg* was different than that presented by the Federal Election Campaign Act of 1971. In *Branzburg*, no government regulation was involved other than those elaborating on the right of the grand jury as an institution to compel testimony for the purpose of law enforcement. Thus, the *Branzburg* test did not balance a regulation with the first amendment interest. Instead the Court looked to both interests—the grand jury's role in law enforcement and the need for confidentiality to promote freedom of the press—and weighted the invasion of each, holding that the law enforcement interest had to be served unless a clearer showing of the first amendment violation was established. Since disclosure is a regulation, a court may accept both the government and first amendment interests as equal and balance only the effect of the regulation on the first amendment interest against the necessity of the regulation to promote the governmental interest.

III. Justification of the Court's Role in the Ad Hoc Balancing Test

Justice Roberts in *Schneider v. State*[108] spoke to the very heart of the ad hoc balancing test when he described it in the following manner:

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions; and so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reason advanced in support of the regulations of its free enjoyment of its rights.[109]

107. *Id.* at 691.
108. Schneider v. State, 308 U.S. 147 (1939).
109. *Id.* at 161.

What the court has to balance in considering corrupt practices legislation-contributions ceilings, disclosure and expenditure limitations—are conflicting interests which presumably are both within the orbit of the first amendment: the individual's right to express himself without restraint in making a campaign contribution balanced against the public right to be protected from excessive contributions improperly influencing a campaign and ultimately the public debate; the personal right of the campaigner to express himself unlimitedly even if as a result the views of others are not heard as well in the campaign forum balanced against the public interest in having all views effectively expressed; the personal right of the contributor in having his contribution remain private and unexposed balanced against the public interest in maintaining the purity of the election process by guarding against improper influence of the contributor and domination of the campaign.

That a court may use the ad hoc balancing test to weigh a regulation which is designed to promote a first amendment interest balancing it against another first amendment interest is not clear from the evolution of the test. In *Red Lion Broadcasting Co. v. FCC*,[110] the Supreme Court did make such a balance. However, in holding that the right of the public to hear was paramount to that of the licensee to express himself, the rationale was limited to the "public trust" character of broadcast media. Thus, the majority said:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. The people as a whole retain their interest in free speech by radio and their right to have the medium function consistently with the ends and purposes of the first amendment.[111]

A newspaper publisher is not so limited and may exercise wide discre-

110. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

111. *Id.* at 390. Although the court may not question the balance struck by the legislature, it is not precluded from determining how well the regulation serves the governmental interest. A regulation which directly serves the governmental interest has a greater chance of passing judicial scrutiny. Thus, in *Red Lion*, the fairness doctrine directly enhanced the governmental interest—the right of the public to be informed. The limitations on expenditures do not directly serve this same governmental interest in the Federal Election Campaign Act of 1971. While these limitations may prevent the flooding of the communications media with only one candidate's views, they do not, unlike the fairness doctrine, insure that the views of opposing candidates will be conveyed to the public. Moreover, a candidate may utilize his media expenditures to foster an image, and not to convey his position on the issues. For these reasons, the Act should be more closely scrutinized than, for example, the fairness doctrine.

tion as to the content of the news he prints.[112] Perhaps the distinction lies in the highly regulated area of the broadcast as opposed to newsprint media and that distinction, characterized as a "public trust," enables the balance of two first amendment interests to be made.[113] The election process does take on some of the "public trust" characteristics, particularly in the extensive governmental regulation required to operate the election process.[114] But at the very least, the test should be used to

112. *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Unlike the broadcast media, a newspaper is subject to constraints similar to the fairness doctrine which requires the presentation of both sides of a controversial issue of public importance. Additionally, while a newspaper is not prohibited from rejecting editorial advertisements, such a choice is denied to a broadcast licensee. *Compare* Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune, 307 F. Supp. 442 (N.D. Ill. 1969), *aff'd*, 435 F.2d 470 (7th Cir. 1970), *with* Business Executives Move for Vietnam Peace, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 405 U.S. 953 (1972).

113. The broadcast media, unlike the newspaper industry, is a highly regulated industry. *See* Communications Act of 1934, 47 U.S.C. §§ 301-609 (1970). A broadcaster, unlike a publisher, is a licensee of the government; his control over a frequency extends at a maximum for three years. After the expiration of this term, a broadcaster is subject to license renewal. Communications Act of 1934, 47 U.S.C. §§ 307, 309 (1970). Since a licensee's compliance with the public interest standard [Communications Act of 1934, 47 U.S.C. § 309(a) (1970)] is subject to review by the Federal Communications Commission, the content of broadcast materials, unlike that of a newspaper, is government-regulated.

114. The Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) justified government action allegedly intruding on a broadcaster's freedom of expression by characterizing the media as a "public trust" due to both the scarcity of frequencies and the public's right to hear controversial opinions from all points of view. *Id.* at 389. Justice White, writing for the majority, was careful to clarify what interests had been balanced: "[n]o one has a First Amendment right to a license . . . and as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.* The government regulation served a first amendment interest while the broadcaster's interest was arguably not freedom of speech but an economic freedom to operate a business without governmental regulation. Even if the broadcaster's freedom of speech is the interest in conflict with the government's interest, the decision can be reconciled with the present application of a balancing test on the grounds that the infringement was minimal and the governmental regulation [Federal Communications Act of 1934, 47 U.S.C. § 315 (1970)] was not overbroad since it served the government first amendment interest without unduly limiting the broadcaster's ability to express himself. The suggestion that a broadcaster would be limited if required to allow equal coverage to all points of a controversy even where such broadcasts would be without compensation to the broadcaster was dismissed by the Court as "at best speculative" and not historically founded. *Id.* at 392-93.

In the area of regulation of political expression, the "public trust" aspect of an election goes to the power of Congress to regulate. Burroughs v. United States, 290 U.S. 534 (1934). The actual balancing is accomplished by a test similar to that used in *Red Lion, i.e.*, isolate the interests, determine whether the regulation is overbroad when

promote both first amendment interests, rejecting any regulation which serves one to the detriment of the other.

In these situations the court must, after determining that the regulation constitutes an abridgment of the first amendment, balance the existence of a significant threat of infection to the health of the election process and the capacity of the regulation in question to treat such infection. Additionally, it must consider the non-existence of other regulations, less onerous to the first amendment, which if adopted, would be equally and possibly more effective in treating the purported malady.

This technique is supported by Justice Frankfurter, concurring in *Dennis v. United States*.[115]

> The demands of free speech in a democratic society . . . are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.[116]

Is this possible? For example, in viewing the first amendment impermissibility of limiting contributions, the court would not have to deal with insurmountable obstacles in weighing "within the confines of the judicial process" the factors mentioned above: the threat, the capacity of the regulation to meet the threat as well as its effect on the first amendment. However, a court would be obligated in applying the ad hoc balancing test to consider the existence of any regulations less onerous to the first amendment.[117] Assuming that an argument is made that such a less onerous alternative exists, *e.g.*, the partial public subsidy of campaign costs, the regulation with its infringement of first amendment protected areas would not be necessary to serve the governmental interest. That is, if we had a partial public subsidy, it would dilute the influence of the wealthy on a campaign thereby promoting the public interest in maintaining a purer election process without invading first amendment rights.

In thus weighing a partial public subsidy as a less onerous alternative, a court would function in a way similar to a congressional committee

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applied to the first amendment interests, and uphold only those regulations which do not unduly restrict freedom of expression. That both interests—governmental and individual—derive protection from the first amendment, requires that the effect on the regulation serving the governmental interest not be unduly restrictive of the individual interest.

115. Dennis v. United States, 341 U.S. 494 (1951).

116. *Id.* at 524-25 (Frankfurter, J., concurring).

117. Shelton v. Tucker, 364 U.S. 479, 488 (1960). *Cf.* Schneider v. State, 308 U.S. 147, 161 (1939).

considering a legislative proposal. Such consideration would clearly not have a justicable aura. Justice Frankfurter raised the same doubt in *Dennis* when he argued:

> Free speech cases are not an exception to the principle that we are not legislators, that direct policy making is not our province. How best to reconcile competing interests is the business of legislatures and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.[118]

What is suggested in the Frankfurter view is the difficulty of balancing interests which is ordinarily a judicial function as opposed to arbitrarily making a choice between two conflicting interests which is a legislative function. The difficulty arises that if a court is to balance "within the confines of the judicial process," it must make a fine measurement of all the factors, not all of which are legal, and then view possible imbalances; and further that some of these factors are generally not part of the judicial record upon which the court must base its decision. Judicial analysis is based on logic and rationality which is not the form of analysis required to sift through a multitude of factors to choose between conflicting interests.[119]

But the judicial balancing in the ad hoc test is not the same as the legislative choosing of interests, for a court balances the constitutional interest with the regulation, not with the governmental interest. The reconciliation of competing interests which Justice Frankfurter places in the exclusive power of Congress remains there under the ad hoc test. What the court does is demand that the manner in which the interests are reconciled by the legislature reflects the interests of the first amendment and not be so overbroad as to invade those protected interests when another regulation could achieve the same reconciliation without intruding on the first amendment. Let Congress choose whatever interests it desires to promote, but allow the court to safeguard the first amendment by requiring that the manner of promoting the chosen interest be constitutional.

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118. 341 U.S. at 539-540.

119. For the Court to remain within the confines of judicial analysis when balancing, it must not choose; such choice is the function of the legislature. In choosing, the Court must measure, or mathematize, the complex of factors to be considered, some of which are not part of the judicial record. Such measurement requires a form of analysis which should provide a design for the consideration of a great number of factors. This analysis is foreign to the judicial process. *Cf.* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1443-44 (1962).

In *United States v. O'Brien*,[120] the Supreme Court did not broach the governmental interest until it determined that the regulation requiring the non-destruction of a draft card did not abridge the first amendment. Then the Court recognized that the governmental interest in an orderly selective service system was within the power of Congress[121] and hence made no balance. The legislature had already done the balancing; that is, it had chosen to promote a compulsory draft even though many citizens would oppose the draft often basing their expression in the first amendment. The Court concluded that since the regulation in *O'Brien* was not overbroad and without an abridgment, no balance could be made. This analysis of *O'Brien* is enhanced by the Supreme Court decision in *United States v. Robel*.[122] Once again, the Court indicated that "we deem it inappropriate for this Court to label one [interest] as being more important or more substantial than the orther."[123] After invalidating the statute in *Robel* as being overbroad, the Court defined the constitutionally permissable scope of its inquiry:

> We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.[124]

A very persuasive response to this problem which the ad hoc balancing test introduces in forcing on a court the need to review congressional means of reconciling interests is that the first amendment in the first instance precludes the imposition of any control which regulates expression. There is a basic wisdom in such a flat prohibition in that it recognizes that government can not be neutral where those in power have a stake in the size of controls[125] and the imposition of such controls,

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120. United States v. O'Brien, 391 U.S. 367 (1968). The defendant had been convicted for burning his draft card in public. The Court merely assumed that the alleged communicative element in burning the draft card was sufficient to bring the first amendment into play. *Id.* at 376.

121. *Id.* at 381.

122. United States v. Robel, 389 U.S. 258 (1967). The Court invalidated a section of the Subversive Activities Control Act of 1950 which imposed criminal sanctions on any member of a Communist-action organization employed in any defense facility.

123. *Id.* at 268 n.20.

124. *Id.*

125. *See* H. PENNIMAN & R. WINTER, JR., *supra* note 56.

> Systematic regulation of political campaigns by Congress must inevitably lead to those in power regulating in favor of themselves. The reason the First Amendment takes matters of political speech and political activity out of the legislative process is precisely because we cannot rely on those in power to exercise that power on behalf of their political opponents.

Id. at 61.

therefore, must restrict the expression of those not in power.

The courter-argument is that the reality of our increasingly centralized and monopolistic society requires affirmative governmental action if we are to maintain an effective system of freedom of expression, and that the traditional absolutist view (essentially laissez-faire) is unresponsive to the existing inequities in the marketplace of ideas.[126] Therefore, government must affirmatively promote, so the argument goes, freedom of expression by regulations which maintain an open political marketplace subject to the traditional constraints on all governmental invasions of the individual's freedom of expression. Those are the constraints which a court must consider in applying the ad hoc balancing test.

Perhaps one answer to the separation of powers friction is found in *Douds*. There, the legislature was required to make a finding that the national security was in such peril that a loyalty oath was required. A finding that the regulation was indeed "necessary and proper" would relieve a court of discovering "less onerous methods" of regulation for the legislative record would be clear that none existed. Of course, such a legislative finding would not be conclusive; rather it would be reviewable by the courts; nevertheless, such a procedure would alleviate the burden of the court in assuming a function analogous to that of the legislature.

In the end, we must have faith in the judicial adoption and use maintain of the ad hoc balancing test, keeping in mind Samuel Madison's commentary when adoption of the first ten amendments was being considered by Congress:

> If they are incorporated in the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for the Constitution by the declaration of rights.[127]

The Supreme Court does not function as a legislature when it safeguards the first amendment. Its role is much narrower. In effect, it

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126. The absolutist or *laissez-faire* system of expression "assumed that if the dissenter could speak or write somewhere, society at large somehow would find the message and respond to it." Barron, *An Emerging First Amendment Right of Access to the Media?* 37 GEO. WASH. L. REV. 487, 491 (1969). Barron's suggestion that "[t]he First amendment must be read to require opportunity for expression," [*Id.* at 509] when applied to political campaigns, justifies governmental intervention which insures that political debate by the poor as well as by the wealthy can take place.

127. 1 ANNALS OF CONG. 139 (1789).

adopts the Alexander Meiklejohn description of the first amendment:

> If that amendment means anything, it means that certain substantive evils which, in principle, Congress has a right to prevent, must be endured if the only way of avoiding them is by the abridging of that freedom of speech upon which the entire structure of our free institutions rests.[128]

When freedom of political expression is restricted beyond the necessity of promoting a legitimate governmental interests, a court must strike down the regulation as destructive of the fundamental, constitutional principles of this democracy. This is true even if the regulation serves such a laudable purpose as opening the political process to those with less resources. A court need not support an "elections for sale" approach to congressional regulation of the election process in order to invalidate contribution, expenditure or disclosure provisions. It need only recognize its constitutional role.

IV. Conclusion

The Federal Election Campaign Act of 1971, like prior attempts to mitigate the undue influence of wealth, is fraught with constitutional difficulties. Its effectiveness as a regulatory mechanism is contingent upon the propriety of restrictions on first amendment interests. Since these restrictions cannot be sustained, additional congressional response must be forthcoming.

The fundamental assumption underlying past attempts to limit the influence of wealth on campaigns is that there is something evil about the speech of the wealthy. Such an assumption both misconceives the nature of the problem and contravenes the first amendment. With respect to the latter, the first amendment prohibits infringement on speech, where such infringement is based on the identity of the speaker. With respect to the former, the problem may stem more from the scarcity of political money than from the participation in campaigns by the wealthy.[129] Participation by the wealthy becomes undesirable only when campaigns are so under-financed that a candidate must "sell his soul" in exchange for financial support. The candidate who receives a large number of small contributions will not feel the need to bargain his political independence away in exchange for large contributions. To attack the problem of the undue influence of wealthy consistently with the first amendment, Congress should establish a mechanism which encourages financing from as many diverse sources as possible. Such a

128. A. Meiklejohn, Political Freedom 44 (1948).

129. *See Hearings, supra* note 3, at 93 (statement of Dr. Herbert E. Alexander).

mechanism would receive strong philosophical support from the first amendment because it would foster greater political expression without unconstitutionally restricting the political expression of the wealthy.

The Revenue Act of 1971,[130] which provides a system of tax check-offs for financing presidential campaigns, approximates the type of mechanism which Congress should establish. It insures that no "major" candidate will be cut short of funds to the point of political strangulation. However, it does so while attaching a condition limiting the total amount of expenditures that a candidate accepting the check-off can make.[131] This condition suffers from the same constitutional infirmity as a limitation on expenditures. To be constitutionally permissable, the Act should not require a candidate to forsake a possible future exercise of first amendment rights. Thus, the legislation should protect against under-financing and at the same time, not prohibit spending above a certain level.

Such a mechanism would not eliminate the possibility that the wealthy few could exert undue influence on a candidate. It would, however, attempt to limit the frequency with which a wealthy individual could exact promises from a candidate in exchange for his support. Nor would such a mechanism directly limit the spiralling cost of elections. It would, however, enable a candidate who is being greatly outspent by an opponent, to draw the voting electorate's attention to this fact. In the hearings on the Federal Election Campaign Act of 1971, reference was made to the fact that seventy-eight per cent of the American people desire to see such spiralling costs curbed.[132] These people can take the most effective steps in reducing that cost, by voting against those candidates whose expenditures are too excessive. Such an exercise of voting preference would be both effective and consistent with the first amendment.

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130. Int. Rev. Code of 1954, §§ 41, 218, 642, 9001-9013, 9021. The amendments provide that beginning in 1972, each taxpayer may voluntarily designate one dollar of his tax payment to be allocated in a fund for the presidential and vice-presidential candidate for each major party or to be earmarked for a bi-partisan fund. *Id.* §§ 9001-9013, 9021.

131. A candidate who accepts public funds and receives enough money to meet his entire allowance under the formula may not accept or spend money from private sources. *Id.* § 9003. The amount of money a presidential candidate is entitled to receive is contingent upon whether he qualifies as a major or minor party candidate. *Id.* §§ 9004(a)(1),(2),(3).

132. *Hearings, supra* note 7, at 9.


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