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HEARING

BEFORE THE

SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

OF THE

COMMITTEE ON

RULES AND ADMINISTRATION

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 2911, S. 2911—Amdt. No. 1396, S. 2912,  
S. 2918, S. 2953, S. 2980, and S. 2987

BILLS TO AMEND THE FEDERAL ELECTION CAMPAIGN ACT  
OF 1971, AS AMENDED, TO RECONSTITUTE A FEDERAL  
ELECTION COMMISSION, AND FOR OTHER PURPOSES

FEBRUARY 18, 1976



Printed for the use of the  
Committee on Rules and Administration

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# FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS, 1976

WEDNESDAY, FEBRUARY 18, 1976

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

The subcommittee met, pursuant to notice, in room 301 of the Russell Senate Office Building, at 10:03 a.m., the Honorable Claiborne Pell (chairman of the subcommittee), presiding.

Present: Senators Pell, Clark, and Griffin.

Also present: Senators Cannon (chairman of the full committee), Williams, Allen, and Hugh Scott.

Subcommittee staff present: Edwin K. Hall, chief counsel; James F. Schoener, minority counsel; Mary G. Daly, secretary; Dolores Eaton, secretary; and Barbara Conroy, secretary (minority).

Full committee staff present: William McWhorter Cochrane, staff director; John P. Coder, professional staff member; Jack L. Sapp, professional staff member; Peggy Parrish, assistant chief clerk; Larry E. Smith, minority staff director; and Andrew D. Gleason, minority counsel.

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

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

Today our subcommittee will consider proposals to amend the Federal Election Campaign Act of 1971, as amended in 1974, necessitated by the Supreme Court's decision of January 30, 1976, in *Buckley v. Valeo*.

We are dealing here with matters of vital importance to our democratic system of government. It is the responsibility of Congress to assure the American people that political campaigns for Federal elective office will be conducted honestly, openly, and in a manner that protects the constitutional rights of every citizen to participate in our Nation's political processes.

In these hearings, the subcommittee will be seeking the best way to protect the integrity and fairness of our system of political campaigns.

As we are aware, during the 92d Congress the Federal Election Campaign Act was enacted to provide sweeping and thorough control over, and public disclosure of, receipts and expenditures in both Federal primary and general elections. The Federal Election Campaign Act Amendments of 1974, during the 93d Congress, amended the 1971 act extensively. The resulting law provided for overall limitations on campaign expenditures and political contributions; extensive reporting and recordkeeping requirements of candidates and political committees, and the creation of a Federal Election Commission with extensive powers to administer and enforce the act. The law also provided for the public financing of Presidential primary and general elections and conventions.

On January 30, the Supreme Court, in *Buckley v. Valeo*, upheld the contribution limitations, the recordkeeping and disclosure requirements of the act and the provisions for public financing of Presidential elections and conventions. However, the Court held that the expenditure limitations of the act were an unconstitutional violation of the first amendment and that the enforcement and administrative powers delegated to the Commission were unconstitutional because of the way in which its members were appointed.

The Supreme Court accorded de facto validity to all actions of the Commission prior to the date of its decision, and granted a stay for a period not to exceed 30 days of that part of its judgment that affects the authority of the Commission to exercise the duties and powers granted to it under the act.

The Court stated:

This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission, in the interim, to function de facto in accordance with the substantive provisions of the Act.

It is very important that the Congress act within the 30-day period set by the Supreme Court, but it is equally important that Congress act in an informed and deliberate manner. The testimony and statements presented at this hearing will be of valuable assistance to the Senate. We hope today to receive the views on the bills pending before the Senate as well as on the general impact of the Court's decision.

At this time I submit the aforementioned bills for inclusion in the record of the hearing.

[The texts of S. 2911, S. 2911—Amdt. No. 1396, S. 2912, S. 2918, S. 2953, S. 2980, and S. 2987 follow:]

94TH CONGRESS  
2D SESSION

# S. 2911

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 2, 1976

MR. SCHWEIKER (for himself, Mr. BEALL, Mr. CRANSTON, Mr. HASKELL, Mr. MATHIAS, Mr. MONDALE, and Mr. STAFFORD) introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

---

## A BILL

To amend the Federal Election Campaign Act to provide that members of the Federal Election Commission shall be appointed by the President, by and with the advice and consent of the Senate, and for other purposes.

- 1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That (a) the text of section 310 (a) (1) of the Federal  
4       Election Campaign Act of 1971 (2 U.S.C. 437c (a) (1))  
5       (hereinafter in this Act referred to as the "Act") is  
6       amended to read as follows: "There is established a com-  
7       mission to be known as the Federal Election Commission.  
8       The Commission is composed of the Secretary of the Senate  
9       and the Clerk of the House of Representatives, ex officio and

1 without the right to vote, and six members appointed by  
2 the President, by and with the advice and consent of the  
3 Senate. No more than three members appointed by the  
4 President may be affiliated with the same political party.”.

5 (b) (1) Subparagraph (A) and subparagraph (D) of  
6 section 310 (a) (2) of the Act (2 U.S.C. 437c (a) (2) (A),  
7 437c (a) (2) (D) ) each are amended by striking out “of  
8 the members appointed under paragraph (1) (A)”.

9 (2) Subparagraph (B) and subparagraph (E) of sec-  
10 tion 310 (a) (2) of the Act (2 U.S.C. 437c (a) (2) (B),  
11 437c (a) (2) (E) ) each are amended by striking out “of  
12 the members appointed under paragraph (1) (B)”.

13 (3) Subparagraph (C) and subparagraph (F) of sec-  
14 tion 310 (a) (2) of the Act (2 U.S.C. 437c (a) (2) (C),  
15 437 (a) (2) (F) ) each are amended by striking out “of  
16 the members appointed under paragraph (1) (C)”.

17 SEC. 2. (a) The terms of the persons serving as mem-  
18 bers of the Federal Election Commission upon the enact-  
19 ment of this Act shall terminate upon the appointment and  
20 confirmation of members of the Commission pursuant to this  
21 Act.

22 (b) The persons first appointed under the amendments  
23 made by the first section of this Act shall be considered to  
24 be the first appointed under section 310 (a) (2) of the Act  
25 (2 U.S.C. 437c (a) (2) ), as amended herein, for purposes

1 of determining the length of terms of those persons and their  
2 successors.

3 (c) The provision of section 310 (a) (3) of the Act  
4 (2 U.S.C. 437c (a) (3) ), forbidding appointment to the  
5 Federal Election Commission of any person currently elected  
6 or appointed as an officer or employee in the executive,  
7 legislative, or judicial branch of the Government of the  
8 United States, shall not apply to any person appointed  
9 under the amendments made by the first section of this Act  
10 solely because such person is a member of the Commission  
11 on the date of enactment of this Act.

12 SEC. 3. It is the sense of Congress that the importance  
13 of the Federal Election Commission and the orderly imple-  
14 mentation of Federal election campaign laws in this election  
15 year require that the appointments authorized by the amend-  
16 ments made by this Act be made as soon as possible after  
17 the enactment of this Act.

---

**IN THE SENATE OF THE UNITED STATES**

FEBRUARY 16, 1976

Referred to the Committee on Rules and Administration and ordered to be  
printed

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**AMENDMENTS**

Intended to be proposed by Mr. METCALF to S. 2911, a bill to amend the Federal Election Campaign Act to provide that members of the Federal Election Commission shall be appointed by the President, by and with the advice and consent of the Senate, and for other purposes, viz:

1       On page 2, line 4, insert the following immediately be-  
2 fore the quotation marks: "The Commission shall cease to  
3 exist on April 1, 1977."

4       On page 2, strike out lines 5 through 16, and insert the  
5 following in lieu thereof:

6       “(b) Paragraph 2 of section 310 (a) of such Act (2  
7 U.S.C. 437c (a) ) is amended to read as follows:

8       “(2) Any vacancy occurring in the membership of the  
9 Commission shall be filled in the same manner as in the case  
10 of the original appointment.”

**Amdt. No. 1396**

- 1 On page 2, strike out all after line 21 through page 3,
- 2 line 2.
- 3 On page 3, line 3, strike out "(c)" and insert in lieu
- 4 thereof "(b)".

94TH CONGRESS  
2D SESSION

# S. 2912

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 2, 1976

MR. KENNEDY (for MR. CLARK) (for himself, MR. HUGH SCOTT, MR. KENNEDY, MR. EAGLETON, MR. PHILIP A. HART, and MR. MATHIAS) introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

---

## A BILL

To abolish the office of member of the Federal Election Commission, to establish the office of member of the Federal Election Commission appointed by the President, by and with the advice and consent of the Senate, to provide public financing of primary elections and general elections to the Senate, and for other purposes.

- 1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Federal Election Cam-  
4       paign Reform Act of 1976".

1 TITLE I—REESTABLISHMENT OF THE FEDERAL  
2 ELECTION COMMISSION

3 REESTABLISHMENT OF FEDERAL ELECTION COMMISSION

4 SEC. 101. (a) The Federal Election Commission estab-  
5 lished by section 310(a) (1) of the Federal Election Cam-  
6 paign Act of 1971 (2 U.S.C. 437c) is abolished as of mid-  
7 night, February 29, 1976.

8 (b) The text of paragraph (1) of section 310(a) of  
9 the Federal Election Campaign Act of 1971 (2 U.S.C.  
10 437c) is amended to read as follows:

11 "There is established a commission to be known as the  
12 Federal Election Commission. The Commission is composed  
13 of the Secretary of the Senate and the Clerk of the House of  
14 Representatives, ex officio and without the right to vote, and  
15 six members appointed by the President by and with the ad-  
16 vice and consent of the Senate. No more than three of the  
17 members appointed by the President shall be affiliated with  
18 the same political party."

19 (c) The first sentence of paragraph (2) of section  
20 310(a) of such Act is amended to read as follows: "Mem-  
21 bers of the Commission shall serve for terms of six years,  
22 except that of the members first appointed—

23 "(A) two of the members, not affiliated with the  
24 same political party, shall be appointed for terms ending

1 on the April 30 first occurring more than eighteen  
2 months after the date on which they are appointed,

3 “(B) two of the members, not affiliated with the  
4 same political party, shall be appointed for terms ending  
5 two years after the April 30 on which the terms of the  
6 members referred to in subparagraph (A) end, and

7 “(C) two of the members, not affiliated with the  
8 same political party, shall be appointed for terms ending  
9 two years after the April 30 on which the terms of the  
10 members referred to in subparagraph (B) end.”.

11 (d) The amendments made by subsections (b) and (c)  
12 take effect on March 1, 1976, but, until the appointment and  
13 qualification of all of the members appointed under the  
14 amendment made by subsection (b), the members of the  
15 Federal Election Commission shall continue in office and the  
16 Commission shall carry out such of its functions as are con-  
17 sistent with the decision of the Supreme Court of the United  
18 States in the cases styled Buckley et al. against Valeo, Sec-  
19 retary of the United States Senate, et al. (Nos. 75-436 and  
20 75-437).

21 (e) (1) All personnel, liabilities, contracts, property,  
22 and records as are determined by the Director of the Office  
23 of Management and Budget to be employed, held, or used  
24 primarily in connection with any function carried out by the  
25 Federal Election Commission before its abolition are trans-

1   ferred to the Federal Election Commission established under  
2   the amendment made by subsection (b).

3       (2) (A) Except as provided in subparagraph (B) of  
4   this paragraph personnel engaged in functions transferred  
5   under this Act shall be transferred in accordance with appli-  
6   cable laws and regulations relating to the transfer of func-  
7   tions.

8       (B) The transfer of personnel pursuant to paragraph  
9   (1) shall be without reduction in classification or compensa-  
10   tion for one year after such transfer.

11       (f) (1) All laws relating to any function transferred  
12   under this section shall, insofar as such laws are applicable,  
13   remain in full force and effect. All orders, determinations,  
14   rules, regulations, permits, contracts, certificates, licenses, and  
15   privileges made, issued, or granted by any office or agency  
16   or in connection with any function transferred by this Act,  
17   and in effect at the time of the transfer, shall continue in  
18   effect to the same extent as if such transfer had not oc-  
19   curred, until modified, superseded or repealed.

20       (2) The provisions of this section shall not affect any  
21   proceedings pending at the time this section takes effect be-  
22   fore any agency, or part thereof, functions of which are trans-  
23   ferred by this section, but such proceedings, to the extent  
24   that they relate to functions so transferred shall be continued  
25   before the Commission.

1           (3) No suit, action, or other proceeding commenced by  
2 or against any office or agency or any officer of the United  
3 States acting in his official capacity shall abate by reason of  
4 any transfer made pursuant to this section, but the court on  
5 motion or supplemental petition filed at any time within  
6 twelve months after such transfer takes effect, showing a  
7 necessity for the survival of such suit, action, or other  
8 proceeding to obtain a settlement of the question involved,  
9 may allow the same to be maintained by or against the  
10 appropriate office or agency or officer of the United States.

11           (4) With respect to any function transferred by this  
12 section and exercised after the effective date of this Act,  
13 reference in any other Federal law to any agency, office, or  
14 part thereof or any officer so transferred or functions of which  
15 are so transferred shall be deemed to mean the Commission  
16 or officer in which such function is vested pursuant to this  
17 section.

18           (g) The persons first appointed under the amendments  
19 made by subsection (b) shall be considered to be the first  
20 persons appointed under section 310(a)(2) of the Act  
21 (2 U.S.C. 437c(a)(2)), as amended herein, for purposes  
22 of determining the length of terms of those persons and their  
23 successors.

24           (h) Nothing in the Act or in this Act shall be con-  
25 strued to prevent the appointment under section 102 of this

1 Act of any person who was a member of the Federal Elec-  
2 tion Commission on the day before the date of enactment  
3 of the Act.

4 SEC. 102. Section 320 of the Act (2 U.S.C. 439c)  
5 is amended by inserting before the period at the end thereof  
6 the following: “, \$10,000,000 for the fiscal year ending  
7 June 30, 1976, \$2,500,000 for the period from July 1, 1976,  
8 through September 30, 1976, and \$10,000,000 for the fiscal  
9 year ending September 30, 1977”.

10 TITLE II—PUBLIC FINANCING OF PRIMARY  
11 ELECTIONS AND GENERAL ELECTIONS FOR  
12 THE SENATE

13 SEC. 201. The Federal Election Campaign Act of 1971,  
14 as amended, is amended by adding at the end thereof the  
15 following new title:

16 “TITLE V—PUBLIC FINANCING OF PRIMARY  
17 ELECTIONS AND GENERAL ELECTIONS FOR  
18 THE SENATE

19 “DEFINITIONS

20 “SEC. 501. For purposes of this title, the term—

21 “(1) ‘candidate’, ‘Commission’, ‘contribution’,  
22 ‘expenditure’, ‘political committee’, ‘political party’, or  
23 ‘State’ has the meaning given it in section 301 of this  
24 Act;

1           “(2) ‘authorized committee’ means the principal  
2 campaign committee of a candidate under section 302 of  
3 this Act or any political committee authorized in writing  
4 by that candidate to make or receive contributions or to  
5 make expenditures on his behalf;

6           “(3) ‘general election’ means any regularly sched-  
7 uled or special election held for the purpose of electing  
8 a candidate to the office of Senator;

9           “(4) ‘primary election’ means (A) an election,  
10 including a runoff election, held for the nomination by a  
11 political party of a candidate for election to the office of  
12 Senator, or (B) a convention or caucus of a political  
13 party held for the nomination of such candidate;

14           “(5) ‘eligible candidate’ means a candidate who is  
15 eligible, under section 502, for payments under this  
16 title;

17           “(6) ‘major party’ means, with respect to an elec-  
18 tion for the office of Senator—

19           “(A) a political party whose candidate for  
20 election to that office in the preceding general elec-  
21 tion for that office received, as the candidate of that  
22 party, 25 per centum or more of the total number  
23 of votes cast in that election for all candidates for  
24 that office, or

1           “(B) if only one political party qualifies as a  
 2           major party under the provisions of subparagraph  
 3           (A), the political party whose candidate for election  
 4           to that office in that election received, as the candi-  
 5           date of that party, the second greatest number of  
 6           votes cast in that election for all candidates for that  
 7           office (if such number is equal to 15 per centum or  
 8           more of the total number of votes cast in that elec-  
 9           tion for all candidates for that office) ; and

10           “(7) ‘minor party’ means, with respect to an elec-  
 11           tion for the office of Senator, a political party whose can-  
 12           didate for election to that office in the preceding general  
 13           election for that office received, as the candidate of that  
 14           party, at least 5 per centum but less than 25 per centum  
 15           of the total number of votes cast in that election for all  
 16           candidates for that office.

17                           “ELIGIBILITY FOR PAYMENTS

18           “SEC. 502. (a) To be eligible to receive payments un-  
 19           der this title, a candidate for the office of Senator shall  
 20           agree—

21                   “(1) to obtain and to furnish to the Commission  
 22                   any evidence it may request about his campaign expend-  
 23                   itures and contributions;

24                   “(2) to keep and to furnish to the Commission any  
 25                   records, books, and other information it may request;

1           “(3) to permit an audit and examination by the  
2       Commission under section 506 and to pay any amounts  
3       required under section 506; and

4           “(4) to furnish statements of campaign expendi-  
5       tures and proposed campaign expenses required under  
6       section 507.

7           “(b) Every such candidate shall certify to the Commis-  
8       sion the—

9           “(1) the candidate and his authorized committees  
10       will not make campaign expenditures greater than the  
11       applicable limitation under subsection (c) of section 608  
12       of title 18, United States Code; and

13           “(2) no contributions will be accepted by the can-  
14       didate or his authorized committees in violation of section  
15       608(h) of title 18, United States Code.

16           “(c) (1) To be eligible to receive any payments under  
17       section 505 for use in connection with a primary election  
18       campaign, a candidate shall certify to the Commission that  
19       he is seeking nomination by a political party for election  
20       to the office of Senator and he and his authorized committees  
21       have received contributions for that campaign equal in  
22       amount to the lesser of—

23           “(A) 20 percent of the maximum amount he may  
24       spend in connection with his primary election campaign

1 under subsection (c) of section 608 of title 18, United  
2 States Code; or

3 “(B) \$125,000.

4 “(2) To be eligible to receive any payments under sec-  
5 tion 505 for use in connection with a primary runoff election  
6 campaign, a candidate shall certify to the Commission that  
7 he is seeking nomination by a political party for election  
8 to the office of Senator, and that he is a candidate for such  
9 nomination in a runoff primary election. Such a candidate  
10 is not required to receive any minimum amount of contribu-  
11 tions before receiving payments under this title.

12 “(d) To be eligible to receive any payments under sec-  
13 tion 505 for use in connection with a general election cam-  
14 paign, a candidate shall certify to the Commission that—

15 “(1) he is the nominee of a major or minor party  
16 for election to the office of Senator; or

17 “(2) in the case of any other candidate, he is seek-  
18 ing election to such office and he and his authorized  
19 committees have received contributions for that campaign  
20 in a total amount of not less than the campaign fund  
21 required under subsection (c) of a candidate for nom-  
22 ination for election to that office, determined in accord-  
23 ance with the provisions of subsection (e).

24 “(e) In determining the amount of contributions re-  
25 ceived by a candidate and his authorized committees for  
26 purposes of subsection (c) (1) or subsection (d) (2)—

1           “(1) no contribution received by the candidate or  
2 any of his authorized committees as a subscription, loan,  
3 advance, or deposit, or as a contribution of products or  
4 services, shall be taken into account; and

5           “(2) no contribution from any person shall be taken  
6 into account to the extent that it exceeds \$100 when  
7 added to the amount of all other contributions made  
8 by that person to or for the benefit of that candidate in  
9 connection with his campaign.

10          “(f) Agreements and certifications under this section  
11 shall be filed with the Commission at the time required by  
12 the Commission.

13                           “ENTITLEMENT TO PAYMENTS

14          “SEC. 503. (a) (1) Every eligible candidate for the  
15 office of Senator is entitled to payments in connection with his  
16 primary election campaign in an amount which is equal to  
17 the amount of contributions he accepts for that campaign.

18          “(2) For purposes of paragraph (1), no contribution  
19 from any person shall be taken into account to the extent  
20 that it exceeds \$100 when added to the amount of all other  
21 contributions made by that person to or for the benefit of  
22 that candidate for his primary election campaign.

23          “(b) (1) Every eligible candidate for the office of  
24 Senator who is nominated by a major party is entitled to  
25 payments for use in his general election campaign in an

1 amount which is equal to the applicable limitation for that  
2 campaign in subsection (c) of section 608 of title 18, United  
3 States Code (relating to limitations on expenditures).

4 “(2) Every eligible candidate for the office of Senator  
5 who is nominated by a minor party is entitled to payments  
6 for use in his general election campaign in an amount which  
7 bears the same ratio to the amount of payments to which a  
8 candidate of a major party for the same office is entitled  
9 under this subsection as the total number of popular votes  
10 received by the candidate of that minor party for that office  
11 in the preceding general election bears to the average num-  
12 ber of popular votes received by the candidates of major  
13 parties for that office in the preceding general election.

14 “(3) (A) A candidate who is eligible under section  
15 502(d) (2) to receive payments under section 505 is en-  
16 titled to payments for use in his general election campaign  
17 in an amount equal to the amount determined under sub-  
18 paragraph (B).

19 “(B) If a candidate whose entitlement is determined  
20 under this paragraph received, in the preceding general elec-  
21 tion held for the office to which he seeks election, 5 per  
22 centum or more of the total number of votes cast for all  
23 candidates for that office, he is entitled to receive payments  
24 for use in his general election campaign in an amount (not  
25 in excess of the applicable limitation under subsection (c) of

1 section 608 of title 18, United States Code) equal to an  
 2 amount which bears the same ratio to the amount of pay-  
 3 ments to which a candidate of a major party for the same  
 4 office is entitled under this subsection as the total number of  
 5 popular votes received by the candidate for that office in  
 6 the preceding general election bears to the average number  
 7 of popular votes received by the candidates of major parties  
 8 for that office in the preceding general election. The entitle-  
 9 ment of a candidate who, in the preceding general election  
 10 held for that office, was the candidate of a major or minor  
 11 party shall not be determined under this paragraph.

12 “(4) An eligible candidate who is the nominee of a  
 13 minor party or whose entitlement is determined under sec-  
 14 tion 502 (d) (2) and who receives 5 per centum or more of  
 15 the total number of votes cast in the current election is en-  
 16 titled to payments under section 505 after the election for  
 17 expenditures made or incurred in connection with his gen-  
 18 eral election campaign in an amount (not in excess of the  
 19 applicable amount under subsection (c) of section 608 of  
 20 title 18, United States Code) equal to—

21 “(A) an amount which bears the same ratio to the  
 22 amount of the payment under section 505 to which the  
 23 nominee of a major party was or would have been  
 24 entitled for use in his campaign for election to that office  
 25 as the number of votes received by the candidate in that

1 election bears to the average number of votes received by  
2 all major party candidates for that office in that election,  
3 reduced by

4 “(B) any amount paid to the candidate under sec-  
5 tion 505 before the election.

6 “(c) Notwithstanding the provisions of subsections (a)  
7 and (b), no candidate is entitled to the payment of any  
8 amount under this section which, when added to the total  
9 amount of contributions received by him and his authorized  
10 committees and any other payments made to him under this  
11 title for his primary or general election campaign, exceeds  
12 the amount of the expenditure limitation applicable to him  
13 for that campaign as specified under subsection (c) of sec-  
14 tion 608 of title 18, United States Code.

15 “CERTIFICATIONS BY COMMISSION

16 “SEC. 504. (a) On the basis of the evidence, books,  
17 records, and information furnished by each candidate eligible  
18 to receive payments under section 505, and prior to examina-  
19 tion and audit under section 506, the Commission shall  
20 certify from time to time to the Secretary of the Treasury  
21 for payment to each candidate the amount to which that  
22 candidate is entitled.

23 “(b) Initial certifications by the Commission under  
24 subsection (a), and all determinations made by it under this  
25 title, shall be final and conclusive, except to the extent that

1 they are subject to examination and audit by the Commission  
2 under section 506. Notwithstanding the preceding sentence,  
3 such certifications and determinations by the Commission  
4 are subject to judicial review in accordance with the provi-  
5 sions of section 9041 of the Internal Revenue Code of 1954.

6 "PAYMENTS TO ELIGIBLE CANDIDATES; SENATE

7 ELECTION ACCOUNT

8 "SEC. 505. (a) The Secretary of the Treasury shall  
9 maintain in the Presidential Election Campaign Fund estab-  
10 lished by section 9006 (a) of the Internal Revenue Code of  
11 1954, in addition to any other account which he maintains  
12 under such section, a separate account to be known as  
13 the Senate Election Account. The Secretary shall de-  
14 posit into the account, for use by the candidate of any politi-  
15 cal party who is eligible to receive payments under section  
16 502 and this section, the amount available after the Secre-  
17 tary determines that amounts for payments for Presidential  
18 general elections, Presidential primary elections, and Presi-  
19 dential nominating conventions under subtitle H of such  
20 Code are available for such payments. In addition to the  
21 amounts appropriated to the fund under section 9006 (a) of  
22 such Code, there are authorized to be appropriated to the  
23 fund such additional amounts as may be necessary to carry  
24 out the provisions of this title and subtitle H of such Code.  
25 Amounts remaining in the fund after a Presidential general

1 election shall not be transferred to the general fund of the  
2 Treasury.

3 “(b) Upon receipt of a certification from the Com-  
4 mission under section 504, the Secretary of the Treasury  
5 shall pay the amount certified by the Commission to the  
6 candidate to whom the certification relates.

7 “(c) If the Secretary of the Treasury determines that  
8 the moneys in the account are not, or may not be, sufficient  
9 to pay the full amount of entitlement to all candidates eligible  
10 to receive payments, he shall reduce the amount to which  
11 each candidate is entitled in accord with the procedures  
12 established under subtitle II of the Internal Revenue Code  
13 of 1954 for Presidential elections.

14 “EXAMINATION AND AUDITS; REPAYMENTS

15 “SEC. 506. (a) After each election for the office of  
16 Senator, the Commission shall conduct a thorough examina-  
17 tion and audit of the campaign expenditures of all candidates  
18 for such office who received payments under this title for use  
19 in campaigns relating to that election.

20 “(b) (1) If the Commission determines that any por-  
21 tion of the payments made to an eligible candidate under  
22 section 505 was in excess of the aggregate amount of the  
23 payments to which the candidate was entitled, it shall so  
24 notify that candidate, and he shall pay to the Secretary of

1 the Treasury an amount equal to the excess amount. If the  
2 Commission determines that any portion of the payments  
3 made to a candidate under section 505 for use in his primary  
4 election campaign or his general election campaign was not  
5 used to make expenditures in connection with that campaign,  
6 the Commission shall so notify the candidate and he shall  
7 pay an amount equal to the amount of the unexpended por-  
8 tion to the Secretary. In making its determination under  
9 the preceding sentence, the Commission shall consider all  
10 amounts received as contributions to have been expended  
11 before any amounts received under this title are expended.

12 “(2) If the Commission determines that any amount of  
13 any payment made to a candidate under section 505 was  
14 used for any purposes other than—

15 “(A) to defray campaign expenditures, or

16 “(B) to repay loans the proceeds of which were  
17 used, or otherwise to restore funds (other than contri-  
18 butions to defray campaign expenditures which were  
19 received and expended) which were used, to defray  
20 campaign expenditures,

21 it shall notify the candidate of the amount so used, and the  
22 candidate shall pay to the Secretary of the Treasury an  
23 amount equal to such amount.

24 “(3) No payment shall be required from a candidate  
25 under this subsection in excess of the total amount of all

1 payments received by the candidate under section 505 in  
 2 connection with the campaign with respect to which the  
 3 event occurred which caused the candidate to have to make  
 4 a payment under this subsection.

5 “(c) No notification shall be made by the Commission  
 6 under subsection (b) with respect to a campaign more than  
 7 eighteen months after the day of the election to which the  
 8 campaign related.

9 “(d) All payments received by the Secretary under  
 10 subsection (b) shall be deposited by him in the fund.

11 “INFORMATION ON EXPENDITURES AND PROPOSED

12 EXPENDITURES

13 “SEC. 507. (a) Every candidate shall, from time to  
 14 time as the Commission requires, furnish to the Commission  
 15 a detailed statement, in the form the Commission prescribes,  
 16 of—

17 “(1) the campaign expenditures incurred by him  
 18 and his authorized committees prior to the date of the  
 19 statement (whether or not evidence of campaign ex-  
 20 penditures has been furnished for purposes of section  
 21 504), and

22 “(2) the campaign expenditures which he and his  
 23 authorized committees propose to incur on or after the  
 24 date of the statement.

1       “(b) The Commission shall, as soon as possible after it  
2 receives a statement under subsection (a), prepare and make  
3 available for public inspection and copying a summary of the  
4 statement, together with any other data or information which  
5 it deems advisable.

6                               “REPORTS TO CONGRESS

7       “SEC. 508. (a) The Commission shall, as soon as  
8 practicable after the close of each calendar year, submit a  
9 full report to the Senate setting forth—

10               “(1) the expenditures incurred by each candidate,  
11 and his authorized committees, who received any pay-  
12 ment under section 505 in connection with an election;

13               “(2) the amounts certified by it under section 504  
14 for payment to that candidate; and

15               “(3) the amount of payments, if any, required  
16 from that candidate under section 506, and the reasons  
17 for each payment required.

18 Each report submitted pursuant to this section shall be  
19 printed as a Senate document.

20       “(b) The Commission is authorized to conduct exami-  
21 nations and audits (in addition to the examinations and audits  
22 under sections 504 and 506), to conduct investigations, and  
23 to require the keeping and submission of any books, records,  
24 or other information necessary to carry out the functions  
25 and duties imposed on it by this title.

1 "PENALTY FOR VIOLATIONS

2 "SEC. 509. Violation of any provision of this title is  
3 punishable by a fine of not more than \$50,000, or imprison-  
4 ment for not more than five years, or both.

5 "EFFECTIVE DATE

6 "SEC. 510. The provisions of this title shall take effect  
7 on the date of enactment, except that the provisions appli-  
8 cable to primary elections for the Senate shall take effect on  
9 January 1, 1977."

94TH CONGRESS  
2D SESSION

# S. 2918

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 3, 1976

Mr. KENNEDY (for himself, Mr. HUGH SCOTT, and Mr. EAGLETON) introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

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## A BILL

To enable the Comptroller General to carry out, until April 30, 1976, the functions of the Federal Election Commission with respect to the public financing of Presidential election campaigns and national nominating conventions.

- 1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That the Comptroller General of the United States shall  
4       carry out the functions of the Federal Election Commission  
5       under subtitle H of the Internal Revenue Code of 1954.  
6       SEC. 2. This Act shall expire on April 30, 1976.

94TH CONGRESS  
2D SESSION

# S. 2953

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 16, 1976

Mr. MANSFIELD introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

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## A BILL

To amend the Federal Election Campaign Act of 1971 to provide for its administration by a Federal Election Commission appointed in accordance with the requirements of the Constitution.

- 1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*  
3        That (a) the text of paragraph (1) of section 310 (a) of the  
4        Federal Election Campaign Act of 1971 (2 U.S.C. 437c)  
5        is amended to read as follows: "There is established a com-  
6        mission to be known as the Federal Election Commission.  
7        The Commission is composed of the Secretary of the Senate  
8        and the Clerk of the House of Representatives, ex officio and  
9        without the right to vote, and six members appointed by the

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1 President by and with the advice and consent of the Senate.  
2 No more than three of the members appointed by the Pres-  
3 ident shall be affiliated with the same political party.”

4 (b) Paragraph (2) of section 310 (a) of such Act is  
5 amended—

6 (1) by striking out “under paragraph (1) (A)” in  
7 subparagraph (A) and subparagraph (D),

8 (2) by striking out “under paragraph (1) (B)” in  
9 subparagraph (B) and subparagraph (E), and

10 (3) by striking out “under paragraph (1) (C)” in  
11 subparagraph (C) and subparagraph (F).

94TH CONGRESS  
2D SESSION

# S. 2980

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 17, 1976

Mr. BUCKLEY introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

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## A BILL

To amend the Federal Election Campaign Act to provide for the constitutional reinstatement of the Federal Election Commission, to establish the Election Law Section in the Department of Justice, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Federal Campaign Act  
4       Amendments of 1976".

5       SECTION 1. (a) Paragraph (b) (1) of section 608 of  
6       title 18, United States Code, relating to limitations on con-  
7       tributions, is amended to read as follows:

8       “(b) (1) No person or organization shall make contribu-  
9       tions to any candidate, party, or political committee which,  
10      in the aggregate, exceed—

1           “(A) \$50,000, in the case of a candidate for elec-  
2           tion to the office of President of the United States;

3           “(B) \$25,000, in the case of a candidate for elec-  
4           tion to the office of United States Senator;

5           “(C) \$10,000, in the case of a candidate for the  
6           office of Representative; or

7           “(D) \$100,000, in the case of a party or political  
8           committee.

9       Notwithstanding anything in this section to the contrary,  
10       the limitation of contributions for any year after 1976 shall  
11       be equal to the amount enumerated for each of the respec-  
12       tive recipients in paragraphs (b) (1) (A), (b) (1) (B),  
13       (b) (1) (C), and (b) (1) (D), multiplied by the ratio  
14       which the Consumer Price Index for the year in which the  
15       contribution is made bears to the Consumer Price Index  
16       for 1976.”.

17       (b) Paragraphs (b) (2) and (b) (4) of section 608  
18       of title 18, United States Code, are hereby repealed.

19       (c) Paragraph (b) (3) of section 608 of title 18,  
20       United States Code, is redesignated as paragraph (b) (2),  
21       and is amended by deleting “\$25,000” and inserting in lieu  
22       thereof “\$100,000, multiplied by the ratio which the Con-  
23       sumer Price Index for the year in which the contributions  
24       are made bears to the Consumer Price Index for 1976”.

25       (d) Paragraphs (b) (5) and (b) (6) of section 608

1 of title 18, United States Code, are redesignated as para-  
2 graphs (b) (3) and (b) (4), respectively.

3 (e) Section 608 of title 18, United States Code, relat-  
4 ing to limitations on expenditures and contributions, is  
5 amended by deleting paragraphs (c), (d), (e), (g), (h),  
6 and (i), and inserting in lieu thereof the following:

7 “(c) No candidate or political committee, or officer,  
8 agent, or employee thereof, shall knowingly accept any con-  
9 tribution made in violation of the provisions of this section.

10 “(d) Any person who violates any provision of this  
11 section shall be fined not more than \$25,000 or imprisoned  
12 not more than one year, or both.”.

13 (f) Paragraph (a) of section 608 of title 18, United  
14 States Code, is repealed. In lieu thereof the following is  
15 inserted:

16 “(a) For purposes of this section, contributions made  
17 for any candidate nominated by a political party for elec-  
18 tion to the office of Vice President of the United States  
19 shall be considered to be contributions made for the candi-  
20 date of such party for election to the office of President of  
21 the United States.”.

22 SEC. 2. (a) Section 434 of title 2, United States Code,  
23 is amended by deleting “\$100” wherever it shall appear,  
24 and inserting in lieu thereof “the threshold amount (as  
25 defined in section 435)”.

1 (b) Section 435 of title 2, United States Code, is  
2 amended to read as follows:

3 **“§ 435. Disclosure thresholds**

4 “(a) Notwithstanding any other provisions in this title  
5 to the contrary, a political committee or candidate shall  
6 not be required to disclose the source of any contribution  
7 not exceeding the following threshold amounts:

8 “(1) \$1,000, in the case of a candidate for election  
9 to the office of President of the United States, or a  
10 political committee making contributions to a candidate  
11 for election to the office of President of the United  
12 States;

13 “(2) \$500, in the case of a candidate for election  
14 to the office of United States Senator, or a political  
15 committee making contributions to a candidate for elec-  
16 tion to the office of United States Senator; or

17 “(3) \$250, in the case of a candidate for election  
18 to the office of Representative, or a political committee  
19 making contributions to a candidate for election to the  
20 office of Representative.

21 In the case of a political committee making contributions  
22 to candidates for more than one of the offices enumerated  
23 above, then the lowest applicable amount shall apply.

24 “(b) Every person who makes expenditures for com-  
25 munication that expressly advocates the election or defeat

1 of a clearly identified candidate, other than by contribution  
2 to a political committee, party, or candidate (as defined in  
3 section 431 of this title) in an aggregate amount in excess  
4 of \$2,500 within a calendar year shall file with the Commis-  
5 sion a statement containing the information required by this  
6 section. Statements required by this subsection shall be filed  
7 on the date on which reports by political committees are  
8 filed, but need not be cumulative.

9 “(c) Notwithstanding anything contained in this section  
10 to the contrary, the President shall, every four years com-  
11 mencing four years from the effective date of this section,  
12 review the amounts contained in this section, and shall adjust  
13 each amount by multiplying it by the ratio which the Con-  
14 sumer Price Index for that year bears to the Consumer  
15 Price Index for 1976.”

16 (c) Subsection (c) of section 432 of title 2, United  
17 States Code, is amended by deleting “\$10” and inserting in  
18 lieu thereof “\$100”.

19 (d) Paragraph (a) (7) of section 438 of title 2, United  
20 States Code, is amended by deleting “\$100” and inserting  
21 in lieu thereof “the threshold amount (as defined in section  
22 435)”.

23 (e) Paragraph (2) of section 302 (c) of the Federal  
24 Election Campaign Act of 1971 is amended by deleting “and,  
25 if a person’s contribution aggregate more than \$100, the

1 account shall include occupation, and the principal place of  
2 business (if any) ;” and inserting in lieu thereof a semicolon.

3 (f) Section 308 of the Federal Campaign Act of 1971 is  
4 repealed.

5 (g) Paragraph 304 (e) of the Federal Campaign Act of  
6 1971 is repealed.

7 SEC. 3. (a) Paragraph (e) of section 301 of the Federal  
8 Election Campaign Act of 1971, relating to definitions, and  
9 paragraph (e) of section 591 of title 18, United States Code,  
10 relating to definitions, are amended to read as follows:

11 “(e) (1) The term ‘contribution’ means:

12 “(A) a gift, subscription, loan, advance, or deposit  
13 of money or anything of value for the purpose of—

14 “(i) influencing the nomination for election, or  
15 election, of any person to Federal office or for the  
16 purpose of influencing the results of a primary held  
17 for the selection of delegates to a national nominat-  
18 ing convention of a political party, or

19 “(ii) influencing the result of an election held  
20 for the expression of a preference for the nomination  
21 of persons for election to the office of President of  
22 the United States,

23 made knowingly by a person or organization or the agent  
24 thereof to a recipient who is a candidate, party, or politi-  
25 cal committee, or the agent thereof.

1           “(B) a contract, promise, or agreement, whether  
2           express or implied, enforceable or unenforceable, which  
3           is entered into by a person or organization, and by which  
4           such person or organization knowingly contracts to make  
5           a contribution to a recipient who is a candidate, party,  
6           or political committee, for the purpose of—

7           “(i) influencing the nomination for election, or  
8           election, of any person to Federal office or for the  
9           purpose of influencing the results of a primary held  
10          for the selection of delegates to a national nominat-  
11          ing convention of a political party, or

12          “(ii) influencing the result of an election held  
13          for the expression of a preference for the nomina-  
14          tion of persons for election to the office of Presi-  
15          dent of the United States;

16          “(C) funds received by a party or political com-  
17          mittee which are transferred to such committee or party  
18          from another political committee or party;

19          “(D) the employment of money or anything else  
20          of value, and any agreement to so employ, made know-  
21          ingly by any person at the express direction and with  
22          the consent and prior knowledge of a candidate, party,  
23          or political committee, for the purpose of—

24          “(i) influencing the nomination for election, or  
25          election, of any person to Federal office or for the

1 purpose of influencing the results of a primary held  
2 for the selection of delegates to a national nominat-  
3 ing convention of a political party, or

4 “(ii) influencing the result of an election held  
5 for the expression of a preference for the nomination  
6 of persons for election to the office of President of  
7 the United States; and

8 “(E) payment, by any person other than a candi-  
9 date, party, or political committee, of compensation  
10 for the personal services of another person which are  
11 rendered to such candidate, party, or political commit-  
12 tee without charge for any such purpose.

13 “(2) The term ‘contribution’ does not include—

14 “(A) the value of services provided without com-  
15 pensation by individuals who volunteer a portion or all  
16 of their time on behalf of a candidate or political com-  
17 mittee;

18 “(B) the use of real or personal property and the  
19 cost of invitations, food, and beverages, voluntarily pro-  
20 vided by an individual to a candidate in rendering vol-  
21 untary personal services on the individual’s residential  
22 premises for candidate-related activities;

23 “(C) the sale of any food or beverage by a vendor  
24 for use in a candidate’s campaign at a charge less than  
25 the normal comparable charge, if such charge for use

1 in a candidate's campaign is at least equal to the cost  
2 of such food or beverage to the vendor;

3 " (D) any unreimbursed payment for travel ex-  
4 penses made by an individual who on his own behalf  
5 volunteers his personal services to a candidate;

6 " (E) the payment by a State or local committee  
7 of a political party of the costs of preparation, display,  
8 or mailing or other distribution incurred by such com-  
9 mittee with respect to a printed slate card or sample  
10 ballot, or other printed listing, of three or more candi-  
11 dates for any public office for which an election is held  
12 in the State in which such committee is organized, ex-  
13 cept that this clause shall not apply in the case of costs  
14 incurred by such committee with respect to a display of  
15 any such listing made on broadcasting stations, or in  
16 newspapers, magazines, or other similar types of general  
17 public political advertising;

18 " (F) any payment made or obligation incurred  
19 by a corporation or a labor organization which, under  
20 the provisions of the last paragraph of section 610 of  
21 title 18, United States Code, would not constitute an  
22 expenditure by such corporation or labor organization;

23 or

24 " (G) any payment made to a political committee

1 not making contributions (as otherwise defined in this  
2 section).

3 “(3) A contribution to a person or organization author-  
4 ized by the candidate to receive contributions or make  
5 expenditures on behalf of the candidate shall be deemed a  
6 contribution to the candidate.

7 “(A) A person shall be deemed to be authorized  
8 by a candidate to receive contributions or make expendi-  
9 tures on behalf of the candidate if there has been prior  
10 written or oral request or consent by the candidate or  
11 his agents that the person or organization receive con-  
12 tributions or make expenditures on behalf of the candi-  
13 date, and if the person or organization is acting pursuant  
14 to that consent or request.

15 “(B) A person or organization required to file a  
16 report under section 434 of title 2, United States Code,  
17 shall state in the report the identity of any candidate  
18 who has authorized that person or organization to re-  
19 ceive contributions or make expenditures on behalf of  
20 his candidacy.”

21 (b) Paragraph (d) of section 591 of title 18, United  
22 States Code, relating to the definition of “political commit-  
23 tee,” is amended to read as follows :

24 “(d) ‘political committee’ means any committee,  
25 club, association, or other group of persons which makes

1 contributions during a calendar year in an aggregate  
2 amount exceeding \$1,000, and is registered in accord-  
3 ance with the guidelines promulgated by the Election  
4 Law Section of the Department of Justice.”.

5 (c) Paragraph (d) of section 301 of the Federal Cam-  
6 paign Act of 1971, relating to definitions, is amended to  
7 read as follows:

8 “(d) ‘political committee’ means any committee,  
9 club, association, or other group of persons which make  
10 contributions during a calendar year in an aggregate  
11 amount exceeding \$1,000, and is registered in accord-  
12 ance with the guidelines promulgated by the Election  
13 Law Section of the Department of Justice.”.

14 (d) Paragraph (9) of section 9002 of the Internal  
15 Revenue Code of 1954 is amended to read as follows:

16 “(9) ‘political committee’ means any committee,  
17 club, association, or other group of persons which makes  
18 contributions during a calendar year in an aggregate  
19 amount exceeding \$1,000, and is registered in accord-  
20 ance with the guidelines promulgated by the Election  
21 Law Section of the Department of Justice.”.

22 (e) Paragraph (8) of section 9032 of the Internal  
23 Revenue Code of 1954 is amended to read as follows:

24 “(8) ‘political committee’ means any committee,  
25 club, association, or other group of persons which make

1 contributions during a calendar year in an aggregate  
2 amount exceeding \$1,000, and is registered in accord-  
3 ance with the guidelines promulgated by the Election  
4 Law Section of the Department of Justice.”.

5 SEC. 4. (a) Section 310 of the Federal Election Cam-  
6 paign Act is amended by—

7 (1) deleting section 310 (a) (1) and (2) and  
8 inserting in lieu thereof the following:

9 “(a) (1) There is established a commission to be  
10 known as the Federal Election Commission. The Com-  
11 mission is composed of the Secretary of the Senate and  
12 the Clerk of the House of Representatives, ex officio  
13 and without the right to vote, and six members ap-  
14 pointed by the President with the advice and consent  
15 of the Senate: *Provided, however,* That no more than  
16 three members of the Commission at one time shall be of  
17 the same political party.

18 “(2) Members of the Commission shall serve for  
19 terms of six years, except that of the members first  
20 appointed—

21 “(A) two of them shall be appointed for a  
22 term ending on the April 30 first occurring more  
23 than two years after the date on which they are  
24 appointed;

1           “(B) two of them shall be appointed for a term  
2           ending on the April 30 first occurring more than  
3           four years after the date on which they are ap-  
4           pointed; and

5           “(C) two of them shall be appointed for a term  
6           ending the April 30 first occurring more than six  
7           years after the date on which they are appointed.

8           An individual appointed to fill a vacancy occurring other  
9           than by the expiration of a term of office shall be ap-  
10          pointed only for the unexpired term of the member he  
11          succeeds.”.

12          (2) deleting subsection (b) ; and

13          (3) redesignating subsections (c), (d), (e), and  
14          (f) as subsections (b), (c), (d), and (e), respectively.

15          (b) (1) Sections 311, 312, 313, 314, 315, and 316  
16          of the Federal Election Campaign Act of 1971 are repealed.

17          (2) Title III of the Federal Election Campaign Act of  
18          1971 is amended by inserting immediately after section 309  
19          the following new sections:

20          “POWERS OF THE FEDERAL ELECTION COMMISSION

21          “SEC. 311. (a) The Federal Election Commission shall  
22          have authority under this section to—

23                  “(1) receive and review reports filed under this  
24                  title;

1           “(2) certify candidates for receipt of funds under  
2           chapters 95 and 96 of the Internal Revenue Code of  
3           1954;

4           “(3) conduct audits in accordance with the provi-  
5           sions of chapters 95 and 96 of the Internal Revenue  
6           Code of 1954;

7           “(4) make public information which has been pro-  
8           vided to it under the provisions of this title;

9           “(5) develop forms to be employed in filing reports  
10          in accordance with the provisions of this title;

11          “(6) compile and maintain a cumulative index of  
12          reports and statements filed with it, which shall be pub-  
13          lished in the Federal Register at regular intervals and  
14          which shall be available for purchase directly or by mail  
15          for a reasonable price;

16          “(7) prepare and publish from time to time special  
17          reports listing those candidates for whom reports were  
18          filed as required by this title and those candidates for  
19          whom such reports were not filed as so required;

20          “(8) prepare and publish an annual report in-  
21          cluding compilations of (A) total reported contribu-  
22          tions and expenditures for all candidates, political com-  
23          mittees, and other persons during the year; (B) total  
24          amounts expended according to such categories as it

1 shall determine and broken down into candidate, party,  
2 and nonparty expenditures on the National, State, and  
3 local levels; (C) total amounts contributed according  
4 to such categories of amounts as it shall determine and  
5 broken down into contributions on the National, State,  
6 and local levels for candidates and political committees;  
7 and (D) aggregate amounts contributed by any con-  
8 tributor shown to have contributed in excess of the  
9 threshold amounts defined in section 435 of this title;

10 “(9) prepare and publish such other reports as it  
11 may deem appropriate;

12 “(10) preserve reports and statements required to  
13 be filed under this title for a period of ten years from  
14 date of receipt, except that reports and statements  
15 relating solely to candidates for the House of Repre-  
16 sentatives shall be preserved for only five years from  
17 the date of receipt; and

18 “(11) report apparent violations of law to the ap-  
19 propriate law enforcement authorities.

20 “(b) The Commission shall encourage, and cooperate  
21 with, the election officials in the several States to develop  
22 procedures which will eliminate the necessity of multiple  
23 filings by permitting the filing of copies of Federal reports  
24 to satisfy the State requirements.

## 1                   “THE ELECTION LAW SECTION

2           “SEC. 312. (a) There is established in the Department  
3 of Justice a section to be known as the Election Law  
4 Section.

5           “(b) The Election Law Section shall be an independent  
6 section responsible directly to the Attorney General.

7           “(c) The Election Law Section shall have the power—

8                   “(1) to enforce the Federal election laws con-  
9 tained in this title, title 18, and the Internal Revenue  
10 Code;

11                   “(2) to issue guidelines and advisory opinions  
12 concerning the Federal election laws;

13                   “(3) to seek to obtain compliance with the Fed-  
14 eral election laws by informal methods of conference,  
15 conciliation, and persuasion;

16                   “(4) to conduct investigations concerning possible  
17 violations of the Federal election laws;

18                   “(5) to initiate (through civil proceedings for in-  
19 junctive, declaratory, or other appropriate relief), defend,  
20 or appeal any civil action in the name of the United  
21 States for the purpose of enforcing the provisions of the  
22 Federal election laws; and

23                   “(6) to initiate criminal proceedings against per-  
24 sons or organizations suspected of violating the criminal  
25 provisions of the Federal election laws.



1 to believe a violation of this title, title 18, or the Internal  
2 Revenue Code has occurred, he shall refer such apparent  
3 violation to the Election Law Section.

4 “(c) Upon a proper showing in a United States dis-  
5 trict court having venue that such person has engaged in  
6 such acts or practices, the court shall grant such civil or  
7 criminal relief as this Act shall provide, or as the court in  
8 the exercise of its equitable powers shall deem appropriate.

9 “(d) Any action brought under this section shall be  
10 advanced on the docket of the court in which filed, and put  
11 ahead of all other actions (other than actions brought under  
12 this section).

13 “ADVISORY OPINIONS

14 “SEC. 314. (a) Upon written request to the Election  
15 Law Section by any person substantially affected or likely  
16 to be substantially affected by the operation of the Federal  
17 election laws, the Election Law Section shall render an  
18 advisory opinion, in writing, within a reasonable time with  
19 respect to whether any specific transaction or activity by  
20 such individual, candidate, or political committee would  
21 constitute a violation of this Act, or chapter 95 or chapter  
22 96 of the Internal Revenue Code of 1954, or of section 608,  
23 610, 611, 613, 615, 616, or 617 of title 18, United States  
24 Code.

25 “(b) (1) Notwithstanding any other provision of law,

1 any person who acts in good faith in accordance with the  
2 provisions and findings of an advisory opinion or guideline  
3 promulgated by the Election Law Section shall be presumed  
4 to be in compliance with the provisions of this Act, of chap-  
5 ter 95 or 96 of the Internal Revenue Code of 1954, or of  
6 section 608, 610, 611, 613, 615, 616, or 617 of title 18,  
7 United States Code, with respect to which such advisory  
8 opinion or guideline was promulgated.

9       “(2) Notwithstanding any other provision of this title  
10 to the contrary, noncompliance with an advisory opinion or  
11 guideline promulgated by the Election Law Section shall  
12 create no presumption of compliance or noncompliance with  
13 the provisions of this Act, of chapter 95 or 96 of the  
14 Internal Revenue Code of 1954, or of section 608, 610,  
15 611, 613, 614, 615, 616, or 617 of title 18, United States  
16 Code, with respect to which the advisory opinion or guide-  
17 line was promulgated.

18       “(c) Any request made under subsection (a) shall be  
19 made public by the Election Law Section. The Election Law  
20 Section shall, before rendering an advisory opinion with  
21 respect to such request, provide any interested party with an  
22 opportunity to transmit written comments to the Election  
23 Law Section with respect to such request.

24       “(d) All advisory opinions and guidelines promulgated  
25 by the Election Law Section shall be made public by publi-

1 cation in the Federal Register within a reasonable time  
2 following issuance.”.

3 (c) Title III of the Federal Campaign Act of 1971 is  
4 amended—

5 (1) by striking out “Commission” in section  
6 302 (d) and inserting in lieu thereof “Election Law  
7 Section”;

8 (2) by amending section 304, relating to reports  
9 by political committees and candidates by striking out  
10 “Commission” where it appears in paragraphs (12)  
11 and (13) of subsection (b) and inserting in lieu thereof  
12 “Election Law Section”; and

13 (3) by amending section 306 (a), (b), and (c),  
14 relating to requirements respecting reports and state-  
15 ments, by striking out “Commission” wherever it shall  
16 appear and inserting in lieu thereof “Election Law  
17 Section”.

18 (d) Section 304 (a) (3) of the Federal Election Cam-  
19 paign Act of 1971 is amended by deleting the final sentence,  
20 and by deleting “Commission” wherever it shall appear and  
21 inserting in lieu thereof “Election Law Section”.

22 (e) Paragraphs (b) and (c) of section 309 of the  
23 Federal Election Campaign Act of 1971 are amended to  
24 read as follows:

25 “(b) A political committee may maintain a petty cash

1 fund out of which it may make expenditures not in excess  
2 of \$100 to any person in connection with a single purchase  
3 or transaction. A record of petty cash disbursements shall  
4 be kept in accordance with requirements established by the  
5 Election Law Section, and such statements and reports  
6 thereof shall be furnished to the Commission as may be  
7 required.

8 “(c) A candidate for nomination for election, or for  
9 election, to the office of President of the United States may  
10 establish one such depository in each State, which shall be  
11 considered as his campaign depository for such State by his  
12 principal campaign committee and any other political com-  
13 mittee authorized by him to receive contributions or to make  
14 expenditures on his behalf in such State. The campaign de-  
15 pository of the candidate of a political party for election to  
16 the office of Vice President of the United States shall be  
17 the campaign depository designated by the candidate of  
18 such party for election to the office of President of the United  
19 States.”.

20 (f) Section 318 of the Federal Election Campaign Act  
21 of 1971 is amended by striking out the final sentence.

22 (g) Section 320 of the Federal Campaign Act of 1971  
23 is amended by striking out “Commission” and inserting in  
24 lieu thereof “Commission and Election Law Section”.

1 (h) Section 407 of the Federal Election Campaign  
2 Act of 1971 is repealed.

3 AMENDMENTS TO THE INTERNAL REVENUE CODE

4 SEC. 5. (a) Section 9032 (4) of the Internal Revenue  
5 Code of 1954 is amended to read as follows:

6 “(4) (1) The term ‘contribution’ means:

7 “(A) a gift, subscription, loan, advance, or de-  
8 posit of money or anything of value for the purpose of—

9 “(i) influencing the nomination for election,  
10 or election, of any person to Federal office or for  
11 the purpose of influencing the results of a primary  
12 held for the selection of delegates to a national  
13 nominating convention of a political party; or

14 “(ii) influencing the result of an election held  
15 for the expression of a preference for the nomination  
16 of persons for election to the office of President of  
17 the United States

18 made knowingly by a person or organization or the  
19 agent thereof to a recipient who is a candidate, party,  
20 or political committee, or the agent thereof;

21 “(B) a contract, promise, or agreement, whether  
22 express or implied, enforceable or unenforceable, which  
23 is entered into by a person or organization, and by  
24 which such person or organization knowingly contracts

1 to make a contribution to a recipient who is a candi-  
2 date, party, or political committee, for the purpose of—

3 “(i) influencing the nomination for election, or  
4 election, of any person to Federal office or for the  
5 purpose of influencing the results of a primary held  
6 for the selection of delegates to a national nominat-  
7 ing convention of a political party; or

8 “(ii) influencing the result of an election held  
9 for the expression of a preference for the nomina-  
10 tion of persons for election to the office of President  
11 of the United States;

12 “(C) funds received by a party or political com-  
13 mittee which are transferred to such committee or party  
14 from another political committee or party;

15 “(D) the employment of money or anything else  
16 of value, and any agreement to so employ, made know-  
17 ingly by any person at the express direction and with  
18 the consent and prior knowledge of a candidate, party,  
19 or political committee, for the purpose of—

20 “(i) influencing the nomination for election, or  
21 election, of any person to Federal office or for the  
22 purpose of influencing the results of a primary held  
23 for the selection of delegates to a national nominat-  
24 ing convention of a political party, or

1           “(ii) influencing the result of an election held  
2           for the expression of a preference for the nomination  
3           of persons for election to the office of President of  
4           the United States; and

5           “(E) payment, by any person other than a candi-  
6           date, party, or political committee, of compensation for  
7           the personal services of another person which are ren-  
8           dered to such candidate, party, or political committee  
9           without charge for any such purpose.

10          “(2) The term ‘contribution’ does not include—

11           “(A) the value of services provided without com-  
12           pensation by individuals who volunteer a portion or all  
13           of their time on behalf of a candidate or political com-  
14           mittee;

15           “(B) the use of real or personal property and the  
16           cost of invitations, food, and beverages, voluntarily pro-  
17           vided by an individual to a candidate in rendering vol-  
18           untary personal services on the individual’s residential  
19           premises for candidate-related activities;

20           “(C) the sale of any food or beverage by a vendor  
21           for use in a candidate’s campaign at a charge less than  
22           the normal comparable charge, if such charge for use  
23           in a candidate’s campaign is at least equal to the cost of  
24           such food or beverage to the vendor;

1           “(D) any unreimbursed payment for travel ex-  
2           penses made by an individual who on his own behalf  
3           volunteers his personal services to a candidate;

4           “(E) the payment by a State or local committee of  
5           a political party of the costs of preparation, display, or  
6           mailing or other distribution incurred by such committee  
7           with respect to a printed slate card or sample ballot, or  
8           other printed listing, of three or more candidates for any  
9           public office for which an election is held in the State in  
10          which such committee is organized, except that this  
11          clause shall not apply in the case of costs incurred by  
12          such committee with respect to a display of any such  
13          listing made on broadcasting stations, or in newspapers,  
14          magazines, or other similar types of general public  
15          political advertising;

16          “(F) any payment made or obligation incurred by  
17          a corporation or a labor organization which, under the  
18          provisions of the last paragraph of section 610 of title  
19          18, United States Code, would not constitute an expendi-  
20          ture by such corporation or labor organization; or

21          “(G) any payment made to a political committee  
22          not making contributions (as otherwise defined in this  
23          section).

24          “(3) A contribution to a person or organization author-

1 ized by the candidate to receive contributions or make ex-  
2 penditures on behalf of the candidate shall be deemed a  
3 contribution to the candidate.

4 “(A) A person shall be deemed to be authorized by  
5 a candidate to receive contributions or make expendi-  
6 tures on behalf of the candidate if there has been prior  
7 written or oral request or consent by the candidate or  
8 his agents that the person or organization receive con-  
9 tributions or make expenditures on behalf of the candi-  
10 date, and if the person or organization is acting pursuant  
11 to that consent or request.

12 “(B) A person or organization required to file a  
13 report under section 434 of title 2, United States Code,  
14 shall state in the report the identity of any candidate  
15 who has authorized that person or organization to re-  
16 ceive contributions or make expenditures on behalf of  
17 his candidacy.”

18 (b) Sections 9009 (c) and 9039 (c) of the Internal  
19 Revenue Code of 1954 are repealed.

20 (c) Section 9008 is amended in subsection (d) by  
21 striking “Commission” wherever it shall appear and insert-  
22 ing in lieu thereof “Election Law Section”.

23 (d) Section 9039 (b) is amended to read as follows:

24 “(b) GUIDELINES, ETC.—The Election Law Section  
25 is authorized to prescribe guidelines and to conduct investi-

1 gations relating to the enforcement of this chapter. The Com-  
 2 mission is authorized to conduct examinations and audits  
 3 (in addition to the examinations and audits required by sec-  
 4 tion 9038 (a) ) and to require the keeping and submission  
 5 of any books, records, and information which it determines  
 6 to be necessary to carry out its responsibilities under this  
 7 chapter.”.

8 (e) Section 9040 of the Internal Revenue Code of 1954  
 9 is amended by striking out “Commission” wherever it shall  
 10 appear and inserting in lieu thereof “Election Law Section”.

11 (f) Section 9035 is amended to read as follows:

12 “(a) No candidate receiving funds under this chapter  
 13 shall knowingly incur qualified campaign expenses in excess  
 14 of the expenditure limitation prescribed by this section.

15 “(b) The expenditure limitation on candidates receiving  
 16 funds under this chapter shall be equal to—

17 “(1) \$10,000,000, in the case of a candidate for  
 18 nomination for election to the office of President of the  
 19 United States, except that the aggregate of expenditures  
 20 under this paragraph in any one State shall not exceed  
 21 16 cents multiplied by the voting age population of the  
 22 State or \$200,000, whichever is greater.

23 “(2) \$20,000,000, in the case of a candidate for  
 24 election to the office of President of the United States.

25 “(c) For purposes of this section—

1           “(1) expenditures made by or on behalf of any  
2 candidate nominated by a political party for election  
3 to the office of Vice President of the United States shall  
4 be considered to be expenditures made by or on behalf  
5 of the candidate of such party for election to the office  
6 of President of the United States; and

7           “(2) an expenditure is made on behalf of a candi-  
8 date, including a Vice-Presidential candidate, if it is  
9 made by—

10           “(A) an authorized committee or any agent  
11 of the candidate for the purposes of making any  
12 expenditure; or

13           “(B) any person authorized or requested by  
14 the candidate, an authorized committee of the candi-  
15 date, or an agent of the candidate to make the  
16 expenditure.

17           “(d) The limitations imposed by this section shall apply  
18 separately with respect to each election.

19           “(e) The Election Law Section shall prescribe guide-  
20 lines under which any expenditure by a candidate for Presi-  
21 dential nomination for use in two or more States shall be  
22 attributed to such candidate’s expenditure limitation in each  
23 State, based on the voting age population in each State  
24 which can reasonably be expected to be influenced by such  
25 expenditure.

1       “(f) (1) At the beginning of each calendar year (com-  
2 mencing in 1976), as there become available necessary data  
3 from the Bureau of Labor Statistics of the Department of  
4 Labor, the Secretary of Labor shall certify to the Commission  
5 and the Election Law Section and publish in the Federal  
6 Register the per centum difference between the price index  
7 for the 12 months preceding the beginning of such calendar  
8 year and the price index for the base period. Each limitation  
9 established by subsection (b) and subsection (g) shall be  
10 increased by such per centum difference. Each amount so  
11 increased shall be the amount in effect for such calendar year.

12       “(2) For purposes of paragraph (1) —

13               “(A) the term ‘price index’ means the average  
14 over a calendar year of the Consumer Price Index (all  
15 items—United States city average) published monthly  
16 by the Bureau of Labor Statistics; and

17               “(B) the term ‘base period’ means the calendar  
18 year 1974.

19       “(g) Notwithstanding other provisions of this section to  
20 the contrary, the national committee of a political party and  
21 a State committee of a political party, including any subordi-  
22 nate committee of a State committee, may, even if authorized  
23 by the candidate to receive contributions and make expendi-  
24 tures on behalf of his candidacy, make expenditures in con-  
25 nection with the general election campaign of that candidate

1 without reducing the amount which that candidate may  
2 spend under subsection (b): *Provided*, That the national  
3 committee of that political party may not make expenditures  
4 in excess of 2 cents multiplied by the voting age popula-  
5 tion of the United States.

6 “(h) During the first week of each calendar year, the  
7 Secretary of Commerce shall certify to the Commission and  
8 the Election Law Section and publish in the Federal Register  
9 an estimate of the voting age population of the United States,  
10 of each State, and of each congressional district as of the 1st  
11 day of July next preceding the date of certification. The term  
12 ‘voting age population’ means resident population, 18 years  
13 of age or older.”.

14 (g) Section 9009 (b) is amended to read as follows:

15 “(b) GUIDELINES, ETC.—The Election Law Section is  
16 authorized to prescribe guidelines and to conduct investiga-  
17 tions relating to the enforcement of this chapter. The Com-  
18 mission is authorized to conduct examinations and audits (in  
19 addition to the examinations and audits required by section  
20 9007 (a) ) and to require the keeping and submission of any  
21 books, records, and information which it determines to be  
22 necessary to carry out its responsibilities under this chapter.”.

23 (h) Sections 9010 and 9011 (b) are amended by strik-  
24 ing out “Commission” wherever it shall appear and inserting  
25 in lieu thereof “Election Law Section”.

1           (i) The heading for section 9010 is amended by strik-  
2   ing out "COMMISSION" and inserting in lieu thereof "ELEC-  
3   TION LAW SECTION".

4           (j) Section 9002 (11) is amended by striking out  
5   "Commission prescribes by rules and regulations" and insert-  
6   ing in lieu thereof "Election Law Section prescribes in its  
7   guidelines".

8           (k) Section 9003 is amended by striking the final sen-  
9   tences in subsections (b) and (c) and inserting in lieu  
10   thereof the following: "Such certification shall be made  
11   within such time prior to the day of the Presidential elec-  
12   tion as the Election Law Section shall prescribe through its  
13   guidelines."

94TH CONGRESS  
2D SESSION

# S. 2987

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 18, 1976

MR. GRIFFIN introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

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## A BILL

To establish the offices of members of the Federal Election Commission as officers appointed by the President, by and with the advice and consent of the Senate, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled.*

3       That this Act may be cited as the "Federal Election Cam-  
4       paign Act Amendments of 1976".

5       SEC. 2. (a) The text of paragraph 1 of section 310 (a)  
6       of the Federal Election Campaign Act of 1971 (hereinafter  
7       the "Act") (2 U.S.C. 437c (a)) is amended to read as  
8       follows: "There is established a Commission to be known  
9       as the Federal Election Commission. The Commission is  
10      composed of six members, appointed by the President, by

1 and with the advice and consent of the Senate. No more than  
2 three of the members shall be affiliated with the same poli-  
3 tical party.”

4 (b) (1) Subparagraph (A) and subparagraph (D) of  
5 section 310 (a) (2) of the Act (2 U.S.C. 437c (a) (2) (A),  
6 437c (a) (2) (D)) each are amended by striking out “of  
7 the members appointed under paragraph (1) (A)”.

8 (2) Subparagraph (B) and subparagraph (E) of sec-  
9 tion 310 (a) (2) of the Act (2 U.S.C. 437c (a) (2) (B),  
10 437c (a) (2) (E)) each are amended by striking out “of  
11 the members appointed under paragraph (1) (B)”.

12 (3) Subparagraph (C) and subparagraph (F) of sec-  
13 tion 310 (a) (2) of the Act (2 U.S.C. 437c (a) (2) (C),  
14 437 (a) (2) (F)) each are amended by striking out “of the  
15 members appointed under paragraph (1) (C)”.

16 SEC. 3. (a) The terms of the persons serving as mem-  
17 bers of the Federal Election Commission upon the enact-  
18 ment of this Act shall terminate upon the appointment and  
19 confirmation of members of the Commission pursuant to this  
20 Act.

21 (b) The persons first appointed under the amendments  
22 made by the first section of this Act shall be considered to  
23 be the first appointed under section 310 (a) (2) of the Act  
24 (2 U.S.C. 437c (a) (2)), as amended herein, for purposes

1 of determining the length of terms of those persons and  
2 their successors.

3 (c) The provision of section 310 (a) (3) of the Act (2  
4 U.S.C. 437c (a) (3) ), forbidding appointment to the Federal  
5 Election Commission of any person currently elected or ap-  
6 pointed as an officer or employee in the executive, legislative,  
7 or judicial branch of the Government of the United States,  
8 shall not apply to any person appointed under the amend-  
9 ments made by the first section of this Act solely because  
10 such person is a member of the Commission on the date of  
11 enactment of this Act.

12 (d) Section 310 (a) (4) of the Act (2 U.S.C. 437c (a)  
13 (4) ) is amended by striking out “ (other than the Secretary  
14 of the Senate and the Clerk of the House of Representa-  
15 tives) ”.

16 (e) Section 310 (a) (5) of the Act (2 U.S.C. 437c (a)  
17 (5) ) is amended by striking out “ (other than the Secretary  
18 of the Senate and the Clerk of the House of Representa-  
19 tives) ”.

20 SEC. 4. All actions heretofore taken by the Commission  
21 shall remain in effect until modified, superseded, or repealed  
22 according to law.

23 SEC. 5. The provisions of chapter 14 of title 2, the  
24 United States Code, of section 608 of title 18, and of chapters

1 95 and 96 of title 26 shall not apply to any election, as  
2 defined in section 301 of the Act (2 U.S.C. 431 (a) ), that  
3 occurs after December 31, 1976, except runoffs relating to  
4 elections occurring before such date.

Senator PELL. Senator Clark?

**STATEMENT OF HON. DICK CLARK, MEMBER, SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS**

Senator CLARK. Thank you very much, Mr. Chairman. As a new member of this subcommittee, I am pleased to join with you today as we begin considering legislation to amend the Federal Election Campaign Act in the aftermath of the Supreme Court's decision in the case of *Buckley v. Valeo*. It was in hearings before this subcommittee more than 2 years ago that the 1974 Campaign Act was born. I am hopeful that this subcommittee, under your leadership, will again play a major role in the effort to insure clean, fair, and honest elections.

As one of the authors of the 1974 Campaign Act, I am greatly encouraged by the Court's recent decision. For the Court upheld the constitutionality of what are, in my judgment, the three most critical elements of that law: Full public disclosure of campaign contributions and expenditures; limitations on the campaign contributions from individuals and organizations; and—most important of all—public financing of elections.

It is true that the Court's decision requires that some changes be made. But I believe that presents a golden opportunity to make real progress in the fight to achieve tough campaign law enforcement and further diminish the influence of the wealthy and the special interests in the political process.

That is why I will urge the subcommittee to report favorably S. 2912, which I have introduced, with a bipartisan group of our colleagues. The details of S. 2912 will be spelled out in a few minutes by Senator Kennedy and Senator Scott, who have joined with me in sponsoring this legislation, and who have been in the forefront of the campaign reform effort for many years.

But I would like to touch on two major points, Mr. Chairman, in this opening statement.

The Court's ruling against the composition of the Federal Election Commission makes it imperative that we proceed to reconstitute that body so that it can be truly independent and capable of enforcing election laws with real clout. Recent events make clear that campaign regulation cannot be left to a commission that is under the thumb of those who are to be regulated. But neither is it acceptable to return enforcement to the sole control of the Department of Justice, where violations of the Corrupt Practices Act and other past election statutes were scrupulously ignored for years.

I believe, rather, that the Federal Election Commission must be allowed to continue its work as an independent executive branch agency. The Commission has had its problems—largely because it was faced with administering a new and complex law with inadequate funding and very little support. But in my judgment the loud protests against the FEC that have been heard in these halls are ample proof that the Commission is doing its job. After all, we are the people whose activities the FEC is charged to regulate. And if every Commission action over the past months had been received in Congress with un-

qualified support, or even quiet acceptance, we would have known that the FEC had failed.

Mr. Chairman, as you know, the original Senate version of the 1974 Campaign Act called for a Presidentially appointed commission, subject to the advice and consent of the Senate, as required by the Constitution. The Court's ruling makes adoption of such a commission an absolute necessity.

But we cannot stop there. Just as urgent, in the wake of *Buckley v. Valeo*, is the need to extend public financing to campaigns for Congress.

The Supreme Court decision makes clear that only in the context of a system of public financing can any limitations be placed on campaign expenditures. Only with public financing can we place any checks on what rich candidates can spend on their own behalf.

Twice in the 93d Congress the Senate passed legislation to establish congressional public financing. If the need was great then, it is far greater today. For with public financing of the 1976 Presidential campaign, and with limits on campaign spending struck down by the Court, the 1976 congressional elections are in grave danger of literally being flooded with money from rich "fat cats" and special-interest groups.

Mr. Chairman, the Court's unequivocal ruling in favor of the constitutionality of public financing of elections should end—once and for all—the lingering doubts about our efforts to halt the treachery of the private dollar in public's business. We have a green light to proceed without delay to the adoption of public financing for congressional campaigns. Only public financing can prevent the Congress from becoming an exclusive preserve for the wealthy and those with access to wealth.

Mr. Chairman, I would like to close with a brief comment on the message on campaign legislation which President Ford sent to Congress 2 days ago. The President asked, first, for action to reconstitute the FEC—and I am certainly glad, as I think most of the Members of the Congress are, to have the President's support on that issue.

But, second, the President asked—and I quote—"that we limit through the 1976 elections the application of those laws administered by the Commission."

The President, it seems, wants us simply to wipe the slate clean.

Well, Mr. Chairman, I can only wonder at whether President Ford is serious about retreating from all the progress we have made in recent years to prevent the kind of abuses which Watergate epitomized. If so, I am afraid he is totally out of tune with the Congress and, I think, with the country.

Thank you, Mr. Chairman.

Senator PELL. Thank you, Senator Clark. We are privileged to have the chairman of the full committee with us, Senator Cannon, and I wonder if he has some remarks he would care to make.

Senator CANNON. Thank you, Mr. Chairman. I have no remarks at this time.

Senator PELL. Thank you very much for being at the hearing.

Senator PELL. Our first witnesses today will be Senators Hugh Scott and Kennedy. If they would care to come forward. If you would care to sit up here, Senator Scott, as a member of the committee.

STATEMENT BY HON. HUGH SCOTT, A U.S. SENATOR FROM THE  
COMMONWEALTH OF PENNSYLVANIA, AND HON. EDWARD M.  
KENNEDY, A U.S. SENATOR FROM THE COMMONWEALTH OF  
MASSACHUSETTS, JOINTLY

Senator SCOTT. Thank you, Mr. Chairman, Senator Cannon, Senator Clark. It is a pleasure for Senator Kennedy and myself to appear this morning before this subcommittee, to offer our suggestions with respect to appropriate Senate action in the wake of the Supreme Court's recent decision on the Election Reform Act of 1974.

The principal action we favor is set out in S. 2912, cosponsored by Senator Kennedy and myself, with Senator Clark, now pending before the committee. And that legislation would accomplish two major goals. It would reconstitute the Federal Election Commission to meet the constitutional defect found by the Supreme Court in *Buckley v. Valeo*. And it would extend to Senate campaigns the provisions on public financing of elections now applicable only to Presidential elections.

The establishment of the FEC as an independent agency to enforce the Federal election laws was one of the key victories of the 1974 reforms. Fortunately, the constitutional defect found by the Supreme Court in the establishment of the Commission can be easily cured by legislation. As President Ford's statement yesterday indicates, there is broad bipartisan support for enacting such legislation as promptly as possible, so that the Commission may continue its important work and so that the 1976 Presidential and congressional elections may proceed with minimal disruption and dislocation.

Title I of the bill is intended to accomplish this result. It proposes to reconstitute the Federal Election Commission as an independent agency within the executive branch, with its six members nominated by the President and confirmed by the Senate.

In the 1974 act, Congress established the Commission to administer and enforce the Federal election laws. The Supreme Court, in its decision on the Commission, found no fault with this purpose—only with the method of choosing Commission members. The Court ruled that the combined congressional-Presidential appointment method violated the separation-of-powers doctrine—specifically, the "Appointments Clause" of the Constitution, which denies Congress the power to appoint officers of the United States with executive functions. This bill, by eliminating the congressional appointment power and requiring the members of the Commission to be appointed solely by the President with the advice and consent of the Senate, will remedy the constitutional defect found by the Court and will establish the Commission on a sound constitutional basis.

And I may add that I believe it is a better bill than other bills which have been offered in that it more clearly defines the powers, functions, and duties of the Commission.

In fact, as originally approved by the Senate in 1974, the election reform law did not contain the congressional appointment power. Now, by approving the proposed change, the Senate is simply returning to the version of the Commission it initially approved.

An unsatisfactory alternative would be to return to the pre-Watergate system—with the Clerk of the House and the Secretary of the Senate administering the campaign law and the Attorney General enforcing it. We believe that would be a serious mistake. Each of these officers has other important duties to perform. Their record of implementing the election laws in the past is persuasive evidence that more vigorous administrative, investigative, and enforcement machinery is needed. In addition, a system that requires employees of Congress to implement the laws under which Members of Congress are elected, creates at least the appearance of conflict of interest. In our view, the most satisfactory way to insure that the Federal election laws are fairly and firmly implemented is to reconstitute the Federal Election Commission as the vigorous and independent enforcement agency that Congress intended in 1974.

For similar reasons, we urge the committee to resist efforts that would reconstitute the Commission but would strip it of some or all of its principal investigative and enforcement powers. The restoration of public confidence in the election process requires an active watchdog in this area, not a toothless lapdog.

We also take this opportunity to express our satisfaction with the effective and expeditious way the present Commission has carried out its complex and sometimes thankless task. Obviously, there have been growing pains. Inevitably, some actions by the Commission have put it on a collision course with Congress. But we think on the whole that the frequent sounds of pain emanating from some corners of Congress over the Commission are a sign that the medicine prescribed in the 1974 reforms is working well, a sign that the abuses infecting and corrupting our election system are actually being cured, and a sign that the Federal Election Commission is the right doctor for the job.

Finally, we would make three additional points on the legislation to reconstitute the Commission:

1. In technical respects, the legislation should facilitate a smooth transition to the new Presidentially appointed Commission. The bill we have introduced deals with a number of these areas, such as the provisions for continuity of the Commission's actions and resources, and the provisions enabling the President to reappoint the current members of the new Commission. We have also included an authorization for the Commission at the \$10 million annual level approved by the Senate last year but stalled awaiting conference for many months.

2. We feel it would be unwise to place any time limit on the Commission's existence or on the current election laws. Such a step would, we believe, play into the hands of those who wish to weaken the enforcement agency and destroy the 1974 reforms. And I would add parenthetically here, that the President has made clear to the leadership of both parties that his purpose in proposing a termination act was to give the Congress full leeway to proceed with new and substantive legislation. I happen to believe that that is not necessary, that our action will accomplish the purpose, and that we do need permanent legislation. The President has not taken a position against permanent legislation in any degree, but has proposed that the power remain with the Congress as, of course, it does. It is better that we have the permanent legislation now.

The act has now passed a difficult constitutional test in the Supreme Court. With the exception of the expenditure limits struck down by the Court, all of the other major provisions have survived essentially intact. If changes in the law are necessary, there will be ample opportunity to enact them next year, after the experience of the 1976 elections. But to set a firm date now for expiration of the act would, in my judgment, be unwise and unjustified.

3. One of the most immediate problems in the aftermath of the Supreme Court's decision is the danger that the Presidential primary campaigns may be disrupted, because of the expiration on February 29 of the Commission's executive powers, including the authority to certify the eligibility of Presidential primary candidates for matching public funds.

Senator Kennedy and I have suggested, as a stopgap measure, that the Comptroller General may be given authority until April 30 to carry out the functions of the Commission with respect to the public financing provisions of the law, should that become necessary. We hope, however, that Congress can enact the pending legislation in time to meet the Supreme Court's February 29 deadline. If not, it is possible that the Court may stay its order for an additional period, so that legislation may be completed without disrupting the flow of public funds to the candidates in the Presidential primaries. What is clear, however, is that the pressure of the imminent deadline should not become an excuse for compromising other important goals, such as a strong Federal Election Commission or public financing of congressional elections.

Title II of our bill would establish public financing for Senate campaigns in a manner parallel to the Presidential public financing provisions upheld by the Supreme Court in *Buckley v. Valeo*. Essentially all of these provisions for congressional elections were approved by the Senate in 1973. They were approved again in 1974, after the Senate broke a filibuster under the old two-thirds procedure on the Senate floor.

As adopted by the Senate in 1973 and 1974, the public financing provisions applied to both Senate and House elections. The provisions we are now proposing would apply only to Senate elections. We are hopeful that the House of Representatives will enact public financing for its own elections, but we feel it is appropriate at this time that such a measure should originate in the House rather than in the Senate. In fact, a major current effort in the House is underway. The pending House legislation already has strong bipartisan support, with cosponsorship representing more than half the Members of the House, and we look forward to its success.

In accordance with the Presidential model, the public financing of Senate elections would function as follows under the bill we have proposed:

First, full public funding would be available for candidates of major parties in general elections for the Senate. A major party is defined as a party whose candidate received 25 percent or more of the vote in the preceding election. These provisions would go into effect for the general election in 1976.

Each candidate of a major party would receive public funds equal to the amount of the spending ceiling specified under the 1974 act—generally 12 cents a voter, or \$150,000, whichever is greater. No candidate would be required to accept public funds. Any candidate could choose to rely on private funds, or he could use a mix of funds, partly public and partly private. However, in accordance with the Court's ruling, any candidate using public funds would be subject to the expenditure limitations in the law.

Partial public financing would be available for minor party candidates in general elections, based on the party's showing in the preceding election. A minor party candidate would also be eligible for funding retroactively after the current election, on the basis of his showing in that election. In general, a minor party is defined as a party whose candidate received 5 percent or more, but less than 25 percent, of the vote in the preceding election or the current election.

Second, a system of matching grants of public funds would be established for Senate primary elections. Candidates who raise a threshold sum—20 percent of the spending limit for Senate races—generally 8 cents a voter or \$100,000, whichever is greater—would be eligible to receive matching grants of public funds for each private contribution of \$100 or less. These provisions would go into effect for the primary elections in 1978.

The cost of the title will be modest. We estimate it at \$34 million for each biennial Senate election, or about \$17 million a year. Probably it could be funded through the existing dollar checkoff, although the bill contains an authorization for additional appropriations, if necessary.

We know that the dollar checkoff is working well for Presidential elections. Each year, as the checkoff becomes more familiar, increasing numbers of taxpayers are using their tax forms to provide the funds for public financing.

In 1972, the first year of the checkoff, only 3 percent of the taxpayers used it, largely because the checkoff was on a separate IRS form that taxpayers overlooked. In 1973, participation jumped to 13 percent, after the IRS put the checkoff on page 1 of the tax return. In 1974, participation jumped again, to a remarkable 24 percent, as taxpayers became more familiar with the new procedure. And according to preliminary information recently available on 1975 tax returns now being received by IRS, participation is rising once again, with 26 percent of the returns filed so far using the checkoff.

The growing public acceptance of public financing of Presidential elections offers important encouragement for extending this reform to congressional elections. The Supreme Court's decision is a clear green light for Congress to adopt public financing for all elections to Federal office. To stop now, after achieving reform for Presidential elections, would leave the job half done, and perpetuate a double standard for elections that Congress should not tolerate. Now that the Supreme Court has affirmed the constitutionality of this reform, the time is ripe to take this next important step toward clean, honest, and open elections.

Since public financing is already available for Presidential elections, the need for action on congressional elections is especially

urgent. Under the 1974 act, Presidential campaigns will be largely insulated from the influence of special-interest money and massive private spending. But all that private money and all that special influence are still there, looking for fresh fields to conquer.

That is why we believe public financing for congressional elections is needed now. The danger is that without reform, the 1976 congressional elections will be swamped with special-interest money, as big contributors and organized interest groups vie with one another to gain new footholds in the Senate and House, and increase their already powerful sway over Congress and its work.

Public financing guarantees a fairly financed election for every candidate to Federal office. And it guarantees that once elected, a successful candidate will take his oath of office with no strings attached. Gone will be the possibility of dubious relationships created for the benefit of those who may have an interest in his votes and his other actions once he is in Congress.

Moreover, the Supreme Court's recent action outlawing spending limits provides an additional reason and a new agency for public financing of congressional elections. The effect of the court's decision is to eliminate any spending limits, but to leave in place the \$1,000 and \$5,000 limits on contributions by individuals and political committees, respectively. As a result, Senate and House candidates of modest means have a new and greater vulnerability to wealthy challengers or to challengers with wealthy friends. As the court's decision makes clear, such challengers and their friends may spend unlimited resources of their own to win an election. Yet candidates of modest means will be required to raise their funds under the strict contribution limits of the act.

We believe that public financing is the best antidote to the wealthy opponent problem in Senate and House elections. With public financing, candidates of modest means would have a ready source of funds to finance their campaigns. And, as the Supreme Court's decision makes clear, spending limits can be constitutionally imposed as a condition of receiving public funds, so that the likely result of adopting public financing of congressional elections will be to achieve reasonable limits on campaign spending for all candidates, rich and poor alike.

And the cost of the reform is extremely small—\$17 million a year for public financing of Senate elections. To us that is the wisest single investment the hard-pressed American taxpayer can make in the future of the country. From that reform alone can flow many benefits in every aspect of our work, as Members of Congress become more responsive to the country and its needs.

The debate is well known and familiar to us all. The issue is whether elections belong to all the people or just the wealthy and special interests. In 1974, Congress achieved a major breakthrough for reform in the financing of Presidential elections. If public financing is right for Presidential elections, it is right for Senate and House elections, too. And the sooner we accept that fact, the sooner we shall have a Congress responsive to the people, and the healthier our democracy will be.

Thank you, Mr. Chairman.

Senator KENNEDY. Mr. Chairman, the statement that Senator Scott has presented is in behalf of both of us. I would like to just very, very briefly, because I know you have a full range of witnesses this morning, mention a couple of matters which we consider to be of great urgency and importance.

But before I do, I could not let the opportunity pass without recognizing the extraordinary contributions, in terms of election reforms, that have been made by this committee. Under Senator Cannon, who has been the spearhead on this committee, and also on the floor—and, I might say, in some tough bargaining with the House of Representatives—much of what was voted on and presented by the Senate of the United States was defended and I think all of us who are interested in this issue are in his debt. We are also in your debt, Senator Pell, for chairing these hearings and for continuing to present this issue in a very important and intelligent and rational way to the American people. The work that has been done in this committee has been excellent.

My colleague, Senator Scott, who has presented our joint statement this morning, is really the father of the Federal Election Commission. He has sponsored this concept for a number of years. It can, in and of itself, provide a very important contribution to insuring the integrity of the election system. He has also been a leader on public financing, both in the Presidential election system and hopefully—if the position which he and I, and Senator Clark and others, including Senator Mathias and Senator Eagleton, have taken is accepted—in the extension of public financing to Senatorial elections and Congressional elections. And, of course, we pay tribute to the prime sponsor of S. 2912, the legislation, which we are testifying in favor of today, your junior member of this committee, Senator Clark, who has been so effective in this whole area.

So we know we are talking to members of a committee that are extremely familiar with this issue. We know these matters have been discussed within the committee and on the floor of the Senate. We urge your favorable consideration of the proposals which we put forward here today, and which have, as Senator Scott mentioned, been debated and discussed at length in this committee and on the floor of the Senate and on the floor of the House of Representatives.

As Senator Clark pointed out, the decision of the Supreme Court is encouraging. It recognized three very important points.

First of all, it recognized the constitutionality of public financing of Presidential campaigns. And, having recognized that, I think we have to ask ourselves whether we are going to let an opportunity pass to provide for the public financing of senatorial campaigns and congressional campaigns. As a matter of comity, I think we have to recognize our limitations in the Senate in adopting a proposal for the House of Representatives. But we should not let an opportunity like this go by to deal with Senate elections, after the Supreme Court of the United States has ruled, recognizing the constitutionality of public financing. After we in the Congress have looked over the whole series of Watergate scandals, we cannot say we are going to provide public financing

for the Presidency, but we think our own house is in good order without that reform.

I think it is important for us to act. And I think, quite frankly, it is the wisest investment of American taxpayers' money. You and I have often heard, both on the floor of the Senate and in our committees, the criticism—why should we use the American taxpayers' funds for this? After all, it is politics. But you and I and the Members of this body understand that the special, powerful, private interests use their contributions to make their influence felt on various issues that, in effect, require the spending of billions of taxpayers' dollars.

So it is imperative, I think, that we consider public financing for the Senate.

Second, in the Supreme Court decision, we are gratified that the Court upheld the limitations on contributions although we regret that Court rejected the limitations on expenditures. The latter is an extremely complex, involved first amendment issue, but we would hope that this committee might be able to make some recommendations to close these new loopholes—and I am sure that Senator Clark and Senator Scott and I would endorse them warmly.

Finally, the Supreme Court has invited us to remedy the imperfections in the Federal Election Commission. I am completely satisfied that if the Senate-House conference had accepted what had originally been passed by the Senate, the Commission would have been upheld by the Supreme Court. And so it seems to us that going back to what was initially recommended by Senator Scott and the other Members of that bipartisan effort makes sense now, to remedy the separation-of-powers defect which was found by the Supreme Court.

So I am very hopeful, Mr. Chairman, that we can pass this legislation. It is timely legislation. It is important. It will restore the integrity of the election process for Members of the Senate and House, and make the election of Senators and Congressmen accountable to the people rather than dependent upon the large financial contributors, which have much too much influence in a democratic society.

I would also like to say how much we appreciated the representation of Mr. Archibald Cox in defending the Senate's position in the Supreme Court. We feel he did an outstanding job, and I think represented not only the positions that were taken by those that had introduced the legislation, but generally of the Senate as a whole. And we were, of course, very much honored to have his participation.

Senator PELL. Thank you very much, Senators, for presenting your views.

As we look into the legislation, there is a good deal of nitty-gritty that has to be examined, to see how it would be implemented, how it will survive, whether it will fly.

One question that comes up here is in connection with the President's proposal to take away the ex officio representation of the Secretary of the Senate and the Clerk of the House. And I was wondering if you felt that that was correct or not. I notice your bill has their representation in, the President has proposed that it be knocked out.

Do you have a view?

Senator KENNEDY. I think they should be part of the Commission, but not voting members. I think having their expertise, knowledge,

and understanding is useful for the Commission. As ex officio members, they can provide their expertise and make it available to the Commission.

Senator SCOTT. I don't think they have interposed any objection to being nonvoting members. Mr. Valeo doesn't make that point in his letter to the chairman of the committee.

Senator PELL. Thank you.

Senator Griffin?

Senator GRIFFIN. I want to thank both of you for your testimony and for the leadership that you have provided in the past on this very important subject.

I would like to ask a practical question about the length of time that we have to deal with this subject. As I make the computation, it is 11 days.

Regardless of how we feel as individuals about the public financing of Senate races, I think we would have to agree that it is controversial.

Do you think it is realistic that within 11 days we can pass a bill that will not only reconstitute the Commission and provide for the Presidential appointment of the members, but also include such a controversial provision as this public financing of Senators' elections?

Senator KENNEDY. I think there are two important points, perhaps three important points, that are to be made.

First of all, the legislation which we are sponsoring is legislation which has already passed the Senate. Actually, it is legislation on which we broke a filibuster in 1974. It has passed the Senate twice. It was reported favorably by this committee. So it is not a new debate, not a new discussion, not a new issue.

Second, we have provided an option, if we are unable to act for an interim period up to April 30, so that GAO would be able to continue the process. And we feel that could be an alternative to meet the time pressures.

And, finally, I don't think it is inconceivable that we could get an additional stay by the Supreme Court. They have done that in the redistricting cases for up to a period of 2 years, I understand. Obviously the most we would ask for is perhaps a few more weeks. I don't think that that possibility ought to be discounted—I think the Court would need to be impressed by the progress on our legislation in the House and Senate, but I do think we have some flexibility on it.

I would hope that we could move expeditiously, but I think there are these options which are available to us.

Senator GRIFFIN. I thank the Senator for that response. I think it is good to have your response on the record, because I rather suspect this is a question that is on a lot of people's minds.

Thank you.

Senator PELL. Senator Clark?

Senator CLARK. Just one question, Senator Kennedy. Is it not true that the only way that we can have expenditure limitations in congressional elections is to pass legislation which would establish public financing? Without that, the lid is off and we have no limit of any kind—isn't that true?

Senator KENNEDY. The Senator is absolutely correct. It is clear, as the Supreme Court has stated.

Senator PELL. I would like to interpolate a thought here. The lid is off anyway if they don't accept it. So I think the general public should be aware of that.

Senator KENNEDY. The lid, though, rather interestingly, Mr. Chairman, is on because I think the immediate record of all the Presidential candidates who are in the race now is that they have accepted public funds. So the limits are on. And I think it would be an extraordinary Member of the Congress or Senate who would go the independent route. I think, given the climate and atmosphere of this time, woe to the candidate who says that he is not going to go the public-financing route. Even those who go the private route would probably feel bound by the limits anyway.

Senator PELL. I would agree with you, those of us who are frugal New Englanders would probably keep it under the ceiling.

Senator Cannon?

Senator CANNON. Thank you, Mr. Chairman. First, I want to thank Senator Kennedy for his very kind remarks. We spent a lot of time trying to develop the bill that we did get out. And that raises a question in my mind.

I am sure that both of you are well aware of the difficulties we encountered. Do you think realistically there is an opportunity to get a bill through in a reasonably short period of time—when I say through, through both Houses of Congress—providing for public financing of congressional elections?

Senator KENNEDY. The interesting points in the House are these. First of all, a majority of Members of the House have actually co-sponsored a bill for public financing of House elections—so this is impressive. And, second, I have also been impressed by what has been happening in the House among a number of different Members about the value of the Federal Election Commission.

Even Mr. Hays, who has been outspoken in his opposition, has been more willing recently to accept a Federal Election Commission. Obviously we have different views about what its powers should be—but I do think that in the period of the last few days, there has been some extremely interesting movement. And I am very hopeful that, with a strong position by the Senate, there would be an opportunity to meet the deadline and also to act on public financing.

Senator SCOTT. I would like us to try it. I think that public opinion is moving very strongly in favor of public financing, and I would hope we could try it.

I do want to thank the chairman and the members for the work they did on the original bill—really magnificent work was done under the chairman's leadership. And serving on the committee, I was greatly impressed at how well he guided the conferees in very difficult situations. And while we didn't get all we wanted, we did get the basic law and we got some important advances out of that bill.

Senator CANNON. I thank the Senator for his kind remarks. Let me ask this—if it came to a choice between the question of public financing of congressional races and the extension of the life of the Commission independently, what would be the position of the Senator? In other words, should we hold fast—if the Senate passes it, should we hold fast and have no bill at all, or should we try to find an inter-

mediate ground extending the life of the Commission, and consider this as two separate issues?

Senator KENNEDY. Well, Mr. Chairman, I feel very strongly that the Members of the Senate as well as the House ought to have an opportunity to express their views on both these important issues. I think we have an important responsibility to carry this issue as far as we can in terms of advancing the public interest. Obviously, we do not want to disrupt the national Presidential campaign, in which candidates have undertaken this effort with the idea of being able to participate in public financing.

So I think that would be unfair and unwise. But I do feel that we have a very basic and fundamental and important responsibility to present this issue to our membership in the Senate and go to conference with a strong position and make every legitimate effort to work out any differences and adjustments with the House.

Senator SCOTT. The Senator has expressed my views.

Senator CANNON. Both of you have certainly pointed out the danger of unlimited spending and why it would be better to go to public financing of congressional races. However, that still leaves unanswered, as I understand it, both in your bill and, importantly, by the decision of the Supreme Court, the question of independent spending, of unlimited spending on the part of individuals or groups, either supporting or in opposition to the particular candidate.

And I wonder if you have any suggestive thoughts as to whether there is or is not any way to arrive at this one defect that would still remain in the law?

Senator SCOTT. Well, I think that it is extremely difficult to meet that. I think we should, in the committee, ask advice of counsel, possibly outside counsel as well, as to whether there is any way to cure this most unfortunate loophole which the Court has left in the bill.

I think it was by far the worst part of the Court's decision. And if there is any way by which limitations can be imposed, other than those which we do impose by virtue of accepting the matching fund.

Senator CANNON. No, I am referring to the spending by others.

Senator SCOTT. That is what I meant.

Senator CANNON. In other words, someone independent from the candidate.

Senator SCOTT. If we could impose limitations on outside spending, I would be in favor of it. I think the committee might be well advised to get advice of counsel. I do not know any way by which the Congress can overrule that part of the Supreme Court's decision other than by the matching funds provision.

It is going to be extremely difficult to change that part of the Supreme Court's ruling in view of the wording they use in the opinion. But I would like to see something tried.

Senator KENNEDY. I would just say one word on it. I am a strong supporter of imposing whatever limitations we can, Mr. Chairman. I do recognize the first amendment questions. I hope that perhaps we may be able to address the problem. It is enormously complex, although I do think there may be some opportunity to move in this area.

At least, we can require disclosure. I think we have every right to expect that, any time individuals are spending money, we are entitled

to very clear notice as to who is spending, how much is being spent, and who receives the benefit.

I think there are efforts in this area which can be important in terms of public notification.

I think with regard to the proliferation of various committees, I think there are probably areas here where the committees can move. We have some ideas, perhaps some suggestions, which we could submit.

Senator CANNON. You both recall, of course, that we had the first amendment question very well in mind during our conference, and we were aware of the problems. But we did take a shot at some of the proposed limitations in the event that they would be upheld.

I have a question as to why you have the provision that the public financing is voluntary rather than mandatory, because if you still have it so that an individual can come in and not accept public financing, that individual can spend unlimited under that provision of the law. Why wouldn't you be better off to require it, make it a mandatory provision?

Senator SCOTT. I am wondering whether we wouldn't run into the Constitution on that, that is what has bothered me about it.

Senator KENNEDY. I would say that I myself would favor it. We could make it mandatory. What we were attempting to do was to track what has been recognized by the Supreme Court in terms of constitutionality.

As you know, we debated that issue at some length in the Senate in 1973 and 1974. I myself would favor making it required, but it does seem to me that we are on completely solid ground from the constitutional point of view in the way that we have proceeded.

Senator CANNON. Now, do I understand your bill—well, first let me ask about the effective date. I think our analysis here showed the effective date for the primaries, January 1977—but I notice that Senator Scott read from his statement January 1978.

Which is correct?

Senator SCOTT. It should be 1977.

Senator CANNON. And your bill would provide that for the general elections it would take effect this year.

Senator KENNEDY. Yes.

Senator CANNON. Now, do I correctly understand that the matching provision would relate only to primary elections and would be in amounts—contributions of \$100 or less—that would be eligible for matching funds, and that there would be no matching fund required for the general election, but simply the maximum amount, according to the formula, would be made available; is that correct?

Senator SCOTT. That is my understanding.

Senator KENNEDY. The Senator is correct.

Senator CANNON. Now, what happens under the provisions of your bill if there are not sufficient funds earmarked through the dollar checkoff provision to take care of the Presidential races and Congressional races? Is there a pro rata between them or do you take care of the Presidential races first and then pro rate insofar as the money is available for the Congressional races?

Senator KENNEDY. Well, as you know, Senator, the first year that we had the checkoff, we had 3-percent participation. Now, in the ad-

vance payments of taxes in 1976, it is already up to 26 percent. We believe that there is an increasing appreciation of its importance, and that there will be increasing funds for it. And, as we pointed out, we are talking about \$34 million for Senate elections on a biennial basis, which is a reasonable amount—\$17 million a year.

We also provide an appropriation to make up any shortfall if there is one. If not, it would have to be pro rated.

Senator CANNON. But do you provide for any pro rata in—

Senator KENNEDY. I think there is a provision for pro rating, Senator.

Senator CANNON. You believe that if there isn't one in there, there should be.

Senator SCOTT. There should be if there isn't one.

Senator KENNEDY. There should be a provision in there, and it should follow after the Presidential elections. The Presidential elections come first and it should be pro rated after that.

Senator CANNON. In your proposal, you have an authorization for \$10 million for the Federal Election Commission. They are operating on the basis of \$5 million now, and I am wondering why you use the \$10 million figure. Do you have some justification as to additional funds that may be needed? They are proceeding on the basis of \$5 million now.

Senator KENNEDY. I think the figure was the one that the Senate passed before. We would be guided by this committee's judgment, but the figure was taken from the previous Senate bill.

Senator CANNON. Well, I wondered if you had any specific information, because before we were sort of shooting in the dark, we didn't know what would be required—and the rate now of spending, or at least the rate of money made available to the Commission, is at the \$5 million rate at the present time. And there are some people in the Congress who feel the Commission has had too much money already, that they have gone far afield, beyond the limits that Congress originally envisioned, in developing their rules and regulations and advisory opinions, as you well know.

So that may be a controversial issue at some point in the development of this legislation.

Now, what would you envision would happen with respect to candidates who have already raised funds in this particular year, if this should pass and be made effective immediately? What happens there with respect to the candidate's funds on hand who is a candidate in the November election?

Senator KENNEDY. We are open to suggestions on it. I think it is a very fair, practical question—we would be wide open on it.

Senator CANNON. There are many congressional races who have raised funds and probably more than enough to meet the spending limit of the primary election. And I was just curious to know what would happen to those funds, those unused funds, then, if one were to go to public financing.

The committee I am sure can—

Senator KENNEDY. Give some thought to it. I would expect that most of the moneys that have been raised have been for primary races, but, of course, there are cases where that wouldn't be so—and

we would be guided by both the Commission's and the committee's judgment on that.

Senator SCOTT. I would like to respectfully suggest to those Senators who may propose simply the reconstitution of the Federal Election Commission that they look at the details of our bill. We think that we have tried to be somewhat specific as to the authority and the powers, and we may have gone further than some of the other bills. We think it is desirable that we should, and we hope that those introducing other bills will give some consideration to this.

Senator CANNON. In other words—is it title I of your bill?

Senator SCOTT. Title I, yes.

Senator CANNON. You have imposed some limitations on the authority of the Commission beyond the broad limitations that they were exercising under in the previous period of time.

Senator SCOTT. Yes. We are making the authority, we think, somewhat clearer than it is made in some of the other bills offered and on which testimony will be given.

Senator CANNON. Thank you, Mr. Chairman.

Senator PELL. Thank you, Senator Cannon. There is one further question I wanted to ask both of you, your opinion on, at the suggestion of committee counsel, because it is a question presently before the Commission. When we come to the single-issue candidates, whether it is antiabortion or proabortion or gun control or SST, do you think they should be able to qualify for public matching funds, or should they demonstrate a broader spectrum of interest?

Senator SCOTT. I don't believe that you would have a right to exclude them if they come under the qualification of minor candidates, because you would be excluding them on the basis of their ideas. Because a Democrat or a Republican presumably holds certain ideas—a vegetarian's ideas may be different, but they are still ideas. I don't think we ought to get into the realm of ideas and the realm of exclusion of ideas.

Senator KENNEDY. I would agree, Mr. Chairman. I do feel that, you go back over recent times, some might say that those involved in the 1968 campaign were involved in a one-issue matter about ending the war in Southeast Asia. I would be strongly opposed toward providing any kind of limitation.

If they can qualify, no matter what their views are, then they ought to be eligible for public funds.

I would be strongly opposed to trying to exclude those we think are one-issue candidates. If they can meet the qualifications, they ought to be eligible.

Senator CANNON. If the Senator would yield, I don't think there is any way we could constitutionally pick and choose who could or could not be candidates or be eligible, beyond the constitutional limitations.

I think a limitation based on the issues would clearly fall of its own weight.

Senator SCOTT. The Constitution didn't even contemplate parties in the first place.

Senator CANNON. Incidentally, Chairman Hays' name was mentioned earlier, and I have just been notified that he is holding a press conference at 2 p.m. today on the FEC.

Senator PELL. Thank you. I would agree with both of you in connection with your response to my question regarding a one-issue candidate, which essentially was the situation in the 1968 campaign—and the 1972 campaign, too.

So I thank you very much.

Senator GRIFFIN. Mr. Chairman.

Senator PELL. Senator Griffin?

Senator GRIFFIN. Mr. Chairman, if I could just comment. I want to indicate that I introduced the President's proposal today (S. 2987), and I want to indicate that as a result of listennig to your testimony and studying your proposal, I see at least two features in here that I want to indicate agreement with.

One is the matter of the ex officio service of the Secretary of the Senate and the Clerk of the House of Representatives—this may be an unfortunate omission in the President's bill. If it is constitutional, I believe I would be in favor of that change.

And then also I notice in your bill you provide the six-member Commission—the terms of two would expire every 2 years. In other words, it would be staggered. No one President after the initial appointment would be able to appoint a whole Commission again. I think that is a desirable feature that the terms of any Commission be staggered.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

Senator SCOTT. Thank you.

Senator PELL. Thank you very much indeed.

**STATEMENTS OF HON. RICHARD S. SCHWEIKER, A U.S. SENATOR FROM THE COMMONWEALTH OF PENNSYLVANIA, AND HON. WALTER F. MONDALE, A U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator PELL. Our next witnesses will be Senators Schweiker and Mondale who will be testifying on S. 2911. Senators, welcome, and proceed as you will.

Senator SCHWEIKER. Thank you, Mr. Chairman and members of the committee. With the committee's permission, I would like to insert my full statement into the record, in view of the schedule you have.

Senator PELL. Without objection, your written statement will be inserted in the hearing record in its entirety.

[The written statement of Senator Schweiker follows:]

**STATEMENT OF HON. RICHARD S. SCHWEIKER, A U.S. SENATOR FROM THE COMMONWEALTH OF PENNSYLVANIA**

Mr. Chairman, I appreciate the opportunity to appear this morning to discuss our bill, S. 2911, to reconstitute the Federal Election Commission.

We in the Congress have been handed what is really a pretty simple problem by the Supreme Court. We passed an election reform law in 1974 which contained a great many provisions. One of those said that the law would be administered by a Commission with six members, two chosen by the President, two by the House leadership, and two by the Senate leadership. This Commission would receive reports, issue rules and regulations, give advisory opinions, certify federal campaign matching funds, and investigate apparent violations of the law.

On January 30, the Supreme Court handed down its decision in *Buckley v. Valeo*, the major challenge to the constitutionality of the election law. Some parts of the law were upheld, and others were found to be unconstitutional.

With regard to the Federal Election Commission, the Court said that the make-up approved by Congress could not stand. The laws of our country, under the Constitution, must be administered by "Officers of the United States" appointed by the President and subject to confirmation by the Senate. Four of the six members of the FEC are presently approved by Congress, not by the President, however, and all six are subject to approval, not by the Senate alone, but by both the House and the Senate. This set-up, the Court concluded, makes the FEC in effect a Congressional body, with no more power than Congress could give to one of its Committees.

Specifically, the Court held the Commission could exercise only the informational functions granted to it under the law. It could no longer :

- (a) Certify any public matching funds for the Presidential election ;
- (b) Issue any binding advisory opinions ;
- (c) Issue any binding regulations interpreting the law ; or
- (d) Hold any administrative hearings or exercise any civil enforcement powers.

The Court recognized the chaos that would result if the FEC were killed outright, and so it gave Congress 30 days, until the end of February, to reconstitute the Commission in a constitutionally valid fashion.

In response to this decision, I immediately introduced S. 2911 to reconstitute the Federal Election Commission. We believe this bill will promptly resolve the problem created by the Court's decision.

The bill is very simple. Let me outline its provisions. Section One recreates the Commission with six members appointed for staggered six-year terms by the President, subject to the advice and consent of the Senate, and two members, the Secretary of the Senate and the Clerk of the House, serving ex officio and without vote. No more than three members appointed by the President may be from any political party.

Section Two of our bill provides for a transition between the present Commission and the new Commission. It is our intent that the terms of the old Commissioners expire on the appointment of their successors, and that the present Commissioners be eligible for appointment to the new Commission although we take no position on whether they should be named. We believe our bill adequately provides for continuity and provides the authority required for staff and files to be carried over to a new Commission.

Finally, Section Three urges the President to act as quickly as possible to fill the positions created by our bill so that the orderly implementation of the Federal election campaign laws may be continued.

Mr. Chairman, this last point is what this controversy is all about. Despite all the other issues which have been raised since the Supreme Court's decision, the overriding, primary concern of all of us must be the assurance that the election laws are not thrown into further disarray. We must re-establish a mechanism to administer the federal campaign matching funds and, perhaps most important, to give authoritative interpretation and enforcement of the election laws by an independent body.

The simplest and most effective way to do this, particularly at this time in an election year, is to reconstitute the Federal Election Commission. The Commission has assembled a staff which has acquired expertise by administering the Federal election law for the last several months. Given the success of the first legal attack on this law, we should not overlook the fact that the Court has indicated that it approves of a Presidentially-appointed Commission. Any other proposal could bring about a new lawsuit, and the possibility of another crisis later in the election year.

Let's look briefly at some of the other alternatives which have been suggested, either before this Committee or in the press in the past few weeks. One approach has been to gut the Commission, by taking all enforcement powers for Congressional elections out of the Commission and leaving it only the job of certifying the matching funds. The law would then theoretically be enforced by the Congress.

This approach really puts election law back into a pre-Watergate posture. In the public's eye, giving the 535 Members of Congress power to enforce the election laws would be like giving enforcement of the antitrust laws over to Fortune's 500 corporations. This country would not stand for it. We decided

in 1974 that an independent body must implement these laws to assure that they are enforced impartially. The Congress cannot forget that the appearance of justice is an important part of justice itself, and we should not place ourselves in the indefensible position of seeking to have our activities beyond independent review.

Another proposal has been to transfer the administration of the Presidential matching money to the General Accounting Office, either temporarily or permanently, and let the rest of the law lapse. The Comptroller General has answered this proposal very effectively by pointing out that the GAO does not have the staff or the expertise to administer this law, and that this transfer would be very disruptive. I would like to insert a copy of a letter from the Comptroller General in the record at this point. (See letter addressed to Chairman Cannon by Comptroller General Staats, which letter may be found on p. 148 of these hearings.) In addition to not maintaining smooth administration of the matching funds, this proposal would stop all new rules and regulations from being issued.

This is an important point. We have seen the law chopped in half by the Supreme Court. All the rules and regulations previously issued by the Commission should be reexamined to see if they are still valid. To take away the power to make rules and advisory opinions from the FEC will require every candidate for federal office in the country to act without guidance in this complex legal situation, not knowing whether his actions are within the law until he finds out he is under indictment by some state attorney general or the U.S. Justice Department. The orderly administration of the election laws does not simply mean handing out public funds on an expeditious basis; it includes giving candidates the guidelines needed to stay within the law.

Another proposal has been to address public financing and "loophole closing" at this time. I have favored public financing of Congressional races in the past, and I think that we should make another effort to take big money out of our political system. But these are complicated issues which cannot be dealt with properly in the short period of time remaining for us in February. We are learning a lot about public financing in its first trial run at the Presidential level, and there are some things about it which we may want to take another look at. The problem of loopholes is even more complex. There is no possibility that a comprehensive bill on this subject would move quickly enough through the Congress to meet the Court's deadline.

Further campaign reform must be addressed, but not under the deadline pressure we now face. I hope that this Committee will schedule early hearings on the questions of Congressional public financing and revisions in the substance of the campaign laws, with a view toward reporting out a bill later in the spring if possible.

Mr. Chairman, the President has asked the Congress to reconstitute the Commission, and the Comptroller General thinks it is the best way to go. The American Bar Association and Common Cause agree that this Commission must be renewed before the end of February. Our bill, which will do just that, has 13 cosponsors in the Senate, and an identical bill has 56 in the House. We ask this Committee to send S. 2911 to the floor so that the American people will know that we care about the orderly and fair administration of the election law, and also to show that Congress can indeed get a job done on time.

Thank you. I would be happy to answer any questions you might have.

Senator SCHWEIKER. I will try just to summarize, Mr. Chairman, some of the important points of the bill that we are proposing.

I think it is important, Mr. Chairman, to consider the time factor in the problem at hand. We have less than 11 days to solve a very serious problem. And having served in the House of Representatives for four terms. I am not very optimistic that they are going to pass any other part of a bill except the bill that Senator Mondale and I are proposing today.

In my judgment there is no way the House is going to accept the public financing. We battled this for many months—your committee has led the fight, you have done the work, and after months and months of work and effort, it was scratched in conference.

So I think we are somewhat deluding ourselves if we think that we can get public financing, or really anything else that might be desirable, into this bill. I happen to be a sponsor of public financing, I am all for it, I strongly support it, I will fight for it—but not at this time and place.

I think also that it is important to realize that if we lose everything, what happens? First, if the FEC goes out of commission, in addition to not having public matching funds for Presidential elections, they cannot issue any binding advisory opinions, they cannot issue any binding regulations interpreting the law, they cannot hold any administrative hearings or exercise any civil enforcement powers. In short, we have organized chaos. And the Supreme Court recognized this—that is why they gave us 30 days to get it straightened out. So I think it is important to put our priorities where they should be.

Second, as was mentioned earlier, and I would like to reemphasize it, this committee led the way in the Senate, led the way in the Congress, in 1974 when we decided that we wanted an independent body to implement these laws so that they are impartially enforced. And the Congress cannot forget that the appearance of justice is just as important as part of justice itself.

I don't believe that we should place ourselves in the indefensible position of seeking to have our activities beyond independent review. We should not look like we are having the fox guarding the chicken coop. And that is what would happen if FEC expires.

Our bill has broad support. President Ford indicated that he supports this concept, the ABA convention assembled in Philadelphia just passed a resolution endorsing this concept—and I would like to include that in the record, Mr. Chairman, if that would be all right.

Senator PELL. Without objection, it will be included.

[The resolution referred to follows:]

AMERICAN BAR ASSOCIATION REPORT TO THE HOUSE OF DELEGATES  
SPECIAL COMMITTEE ON ELECTION REFORM

RECOMMENDATION

Resolved, that the American Bar Association urges the Congress to immediately enact legislation to reconstitute and to preserve an independent Federal Election Commission and, it is, further

Resolved, that the President of the United States and the Senate are urged, through their respective powers of appointment and confirmation, to recognize the importance of some continuity in the membership of a reconstituted Federal Election Commission and, it is, further

Resolved, that the American Bar Association urge Congress to continue its attempts to fashion a fair and equitable election law consistent with the principles adopted by the American Bar Association at its August, 1975 meeting.

Passed by the ABA House of Delegates, February 17, 1976.

REPORT

After extensive activity in the area of federal election reform in the years since its creation in 1973, the ABA Special Committee on Election Reform has withheld any major effort this year pending the decision of the United States Supreme Court in the case of *Buckley v. Valeo*. The *Buckley* case dealt with a very wide range of constitutional issues resulting from enactment of the Federal Election Campaign Act Amendments of 1974 and was before the Court on an expedited appeal.

The *Buckley v. Valeo* opinion, announced on January 29, 1976, held invalid the procedure for appointment of the Federal Election Commission. However,

the opinion recognized the very critical work being done by the Federal Election Commission and allowed it to continue its existence until March 1, during which time Congress could consider possible alternatives for reconstituting the Commission. The necessary action itself is relatively simple, in that the appointments must be made by the President pursuant to Article II, Section 2 of the Constitution of the United States.

In August, 1975, the ABA House of Delegates took a position favoring an independent commission and the following language was included in the statement of principles concerning election reform:

Federal election laws should be administered by a single, independent agency entrusted with effective enforcement power and the resources to discharge its responsibilities.

The ABA Special Committee on Election Reform recommends that the suggested resolutions be adopted so as to impress upon Congress and the President the importance of not disrupting in mid-campaign the Federal Election Commission machinery and staff. The committee also feels that the independence of the Commission is essential for the integrity of its operation and that this independence be viewed by Congress as primary to any other criteria it may consider in reconstituting the Commission.

Respectfully submitted

TALBOT D'ALEMBERTE, *Chairman.*  
 CHARLES G. ARMSTRONG.  
 JOHN D. FEERICK.  
 DANIEL L. GOLDEN.  
 WILLIAM D. RUCKELSHAUS.  
 STEPHEN I. SCHLOSSBERG.  
 EARL SNEED.  
 WILLIAM P. TRENKLE, Jr.

Senator SCHWEIKER. Common Cause also indicates their support for this. We have some 15 Senate cosponsors, some 65 House cosponsors—and I think that this is really what we need to do to the problem at hand.

That is all I have, Mr. Chairman.

Senator PELL. Thank you.

Senator MONDALE. Thank you very much, Mr. Chairman and members of the committee. I would ask that my full statement appear in the record as though read.

Senator PELL. Without objection, it will be done.

[The written statement of Senator Mondale follows:]

STATEMENT OF HON. WALTER F. MONDALE, U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. Chairman, I appreciate the opportunity to appear this morning to discuss S. 2911, our bill to reconstitute the Federal Election Commission.

I am pleased to join with Senator Schweiker in sponsoring S. 2911. As you well know, a little over two weeks ago the Supreme Court ruled that the exercise of certain executive functions by the Federal Election Commission, as presently constituted, is unconstitutional.

The Court held that unless the Commission was reconstituted with members appointed by the President with the advice and consent of the Senate it would lose its enforcement and rulemaking authority. S. 2911 seeks to accomplish the clear mandate of that decision and reconstitute a Presidentially appointed independent Federal Election Commission.

Near the end of the Watergate era, a period in which we witnessed the resignation of both the President and his Vice President under a storm of political corruption, the Congress took a historic step in establishing an independent commission to monitor and regulate the infusion of money into the political process. The public outcry was loud and the movement toward political reform had great impetus. We ought not let this noble experiment die just because in the wake of the Supreme Court decision we have no Watergate scandal on the front pages of our newspapers and on our television screens.

Unless the Congress acts immediately to restore the Commission's regulatory authority, the upcoming Presidential primaries will be conducted without answers to at least two critically important questions.

First, "How much money can a candidate accept in contributions from a wealthy wife or husband or a wealthy family member?" The Court held that a wealthy candidate could spend as much of his own money as he chose, but left the question of contributions from family members subject to an uncertain Congressional definition.

Second, "What constitutes an 'independent' expenditures by a wealthy individual or a heavily endowed union or corporate political action committee in behalf of a candidate?" The Court struck down the \$1,000 limit on such campaign expenditures, but left the definition of "independent expenditure" to be determined by another agency.

In addition to these two pressing questions, many more critical ones will surely arise as we approach the election. If the Commission's regulatory authority lapses on March 1, no other body is prepared to decide which expenditures are "independent" and which are not, and no other agency is prepared to draft guidelines to check the unlimited flow of money into political campaigns under the guise of independent activity.

Those who feel that the Supreme Court's decision is being violated could always take their case to court, but the primaries would almost certainly be over before a decision could be reached. A ruling by the Justice Department could take less time, but their legal staff does not have the expertise that the FEC's staff has gained over this nine month period.

In addition to interpreting the law, we must have an agency to ensure that our own efforts to achieve reform are being carried out. One of the most pressing reasons for reconstituting the Commission immediately is to ensure that the Presidential candidates are not left without matching funds. These candidates have run their campaigns in good faith and in reliance on the fact that these funds would be available. We must see that they get the funds they are entitled to under the law. It would be tragic not only for them but for the entire political process if Congressional delay in reconstituting the Commission prevents these candidates from receiving the matching funds to which they are entitled and perhaps thereby influence the outcome of the Presidential nominating contests. This is an urgent matter, and therefore I want to stress the need to reconstitute the Commission before the March 1 deadline.

Given the history of weak enforcement of campaign financing laws and the extensive evidence of misuse of law enforcement agencies for political purposes, it is no wonder that the public watches with some skepticism our efforts to reconstitute this Commission.

Even with the most conscientious and well-intentioned Clerk of the House and Secretary of the Senate, the public is certain to question the objectivity and zeal of their enforcement efforts involving persons to whom they owe their jobs. During the Watergate investigation, the public did not begin to have confidence that the whole truth would be unearthed until the authority was shifted from the Justice Department, whose attorney general owed his job to the President, to an independent special prosecutor. The same principle is involved here.

I have been a long-time supporter of public financing of Congressional elections. I have introduced a bill calling for public financing and am hopeful that the Rules Committee will see that this important question is dealt with during this session of Congress, even though it may not become effective until the 1978 elections.

It is my own feeling, however, that the importance of reconstituting the FEC is so great that perhaps this is not the best time to take up public financing as a provision of this legislation. I do hope, however, that there will be an opportunity later this spring to deal with Congressional public financing.

On February 24 the first Presidential primary will be held and on March 16, the first Congressional primary is scheduled. We cannot afford to wait until the extended debate these reforms deserve has run its course. We must have a commission to assist the over 1,000 Federal candidates, their staffs, and the network of volunteers all of whom need the guidance of an independent commission to understand and abide by the mandates of the sweeping and often complex reforms we have written into the campaign law.

The Commission is one of the most important and far-reaching experiments in our political history. Nine months is not an adequate trial period. While the commission is not perfect, it must be given a chance to prove that we can reform our system of campaign financing in a responsible and sensible manner.

Senator MONDALE. I am please to join with Senator Schweiker in sponsoring S. 2911 to amend and extend the FEC. I think there are two or three very crucial reasons why we must immediately amend and extend the Commission.

Mr. Dooley said around the turn of the century that it is not clear that the Constitution follows the flag, but it is clear that the Supreme Court follows the election returns. And that may be true. But I think, as good as that decision was, it is clear that none of them had ever run for public office, because they drew distinctions that may make sense in legal theory but that are just unbelievably difficult to manage and interpret in the real life of American politics. For example, they said that a candidate could spend as much as he had running for office, leaving the question open as to how much a family might contribute. And it is only through the reconstitution of this Commission that we can possibly sort out an area of what could be tremendous abuse and something that could contribute enormously to cynicism in this country.

Second, the Supreme Court said that a wealthy individual or a heavily endowed union or corporate political action committee, if it was called, quote, independent, could spend as much as it pleased on behalf of a candidate. Now, that provision, unless properly policed and interpreted, could go far toward the destruction of the fine work of this committee and the Senate to try to bottle up the compromising and corrupting influence of big money in American politics. And without the immediate re-creation of this Commission to sort out these questions and to interpret them in a way that makes sense, those two exceptions written into the Court could be mischievous to the ultimate degree.

In addition to that, there are over 1,000 candidates running for Congress, probably more committees than that, each with questions that must be answered if this law is going to make sense. And it is only the Commission that can answer those questions.

And for those reasons, I think we must immediately reconstitute the Commission on a constitutional basis.

Finally, it is only the Commission that can distribute matching funds under the public financing provisions of the law. The candidates that are now running for President, without the reconstitution of this Commission, would be left without matching funds. These candidates have run their campaigns in good faith and in reliance that these funds would be made available. And I think it would be tragic if we failed to reconstitute the institution essential to the distribution of those moneys.

Finally, may I say, I think the American people look on all of us in this whole process with a great deal of skepticism. They have seen in recent years example after example of utterly outrageous abuse of money, which compromises and occasionally corrupts the sacred process of freedom in our society.

If we fail to immediately reconstitute this Commission and correct what is really a minor but essential constitutional flaw, I think we will be contributing enormously to this sense of cynicism and despair which is found in too much abundance in American life today.

I join with Senator Schweiker in believing that we should not put the public financing provisions on this particular measure. But if we

do, I hope we will proceed on the basis of a matching grant rather than a direct total Treasury contribution, as contemplated by an alternative provision.

Congressman Burton in the House, as I understand, has such a bill introduced—and now there are over 225 cosponsors. Last time when we tried the direct total Treasury contribution to candidates, we met with stonewall opposition from the House—and I would hope for many reasons—first of all, it is more hopeful in the House; second, it is through a match that we can prevent giving massive funds to frivolous candidates; and thirdly, I think people feel a lot better about these public financing provisions if, through a checkoff, and if, through a match, they have something to say about how much money a candidate is going to get.

So that I would hope that we would extend the Commission for the reasons given. I would hope that we would try to find another vehicle for public financing for congressional campaigns that I feel to be crucial, particularly in the light of the Supreme Court decision, which leaves us no other way in which to impose essential ceilings.

But if we do, I hope we do it through some kind of private matching system, rather than a direct total Treasury grant.

Senator SCHWEIKER. Mr. Chairman, I have a written statement from Senator Cranston who is tied up at another meeting, and he would like to include his statement as one of our principal cosponsors.

Senator PELL. Without objection, it will be included in the record. [The written statement of Senator Cranston follows:]

STATEMENT OF HON. ALAN CRANSTON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Mr. Chairman, the 1976 elections were to give us the first opportunity to test the 1974 Federal Elections Campaign Act and the effectiveness of public financing of the Presidential election in combating the insidious influence of big money in our political processes.

Instead, as a result of the Supreme Court's January 30 decision in *Buckley v. Valeo*, we now face the prospect of uncertainty and chaos in those same elections.

After February 29, the independent agency which was to administer and enforce the 1974 law and its public financing system—the Federal Elections Commission—will cease to exist as an enforcement and rulemaking body unless it can be re-established in accordance with the Appointments Clause of the Constitution. If no action is taken to fill the void, the FEC becomes an informational service at best. Moreover, effective enforcement and rulemaking, as well as administration of the public financing system for the 1976 elections will be nonexistent.

It must be pointed out that the Supreme Court found no problem with the FEC's purpose. Its objection was to the means of choosing the FEC's members.

If we can reconstitute the FEC, by giving the power to appoint the Commissioners to the President with the advice and consent of the Senate, we can insure an orderly federal elections process in 1976 and a fair opportunity to evaluate the public financing system.

For that reason, I urge your favorable consideration of S. 2911, which will reestablish the Federal Elections Commission and which expresses the sense of the Senate that appointments under the new procedure be made as speedily as possible to allow for "the orderly implementation of Federal election campaign laws."

As you well know, I have been a strong supporter of efforts to reform the federal elections process by placing reasonable controls over our elections processes. As a leader of the bipartisan group of Senators who spearheaded the fight for public financing in the 93d Congress, I appeared before this Subcommittee in September 1973 to enumerate certain basic principles we felt must be included in any package of public financing and election reform. Among these

basic principles was: "administration of campaign financial reporting and disclosure laws and regulations by an independent elections commission with enforcement powers."

A strong enforcement agency is essential.

However, in all this discussion of the Federal Elections Commission, there is one point that we should not fail to consider: We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission. That concern led to Congressional adoption of the present method of selecting Commission members. Perhaps we should consider extending the life of the FEC for only a year and a half so that the Subcommittee, in the non-election year of 1977, will be able to take another look at how the Commission has handled enforcement and whether it should be changed, particularly in the aftermath of its implementation of the law in 1976.

Senator PELL. Senator Griffin?

Senator GRIFFIN. Thank you, Mr. Chairman. I must say that I think I generally agree with the approach that you are presenting. One thing that concerns me is whether and when Congress will get around to doing something about the enormous loopholes that have been left by the Supreme Court's decision. I rather agree with this statement in *Buckley v. Valeo* by Chief Justice Burger. He said:

By dissecting the act bit by bit and casting off vital parts, the Court fails to recognize that the whole of this act is greater than the sum of its parts. Congress intended to regulate all aspects of Federal campaign finances, but what remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.

Certainly the matter of unlimited expenditures by an individual or by special interest groups and associations, as the Senator from Minnesota has pointed out, is or should be a matter of very grave concern.

Even though I voted against public financing before, I am also one of those that thinks that that subject should be reconsidered by the Congress, especially after we have the experience of public financing for Presidential candidates in this election.

I do question at this late stage, in this election year, whether we should attempt to provide for public financing in this election. I think that not only the problem that Senator Cannon has raised confronts us—the fact that some candidates have already raised money—but I think we have to take into account the fact that different States have different primary dates and filing dates.

It seems to me to change the rules at this late stage is of questionable wisdom. One might wonder whether people would have run for the office in this year if they had known there would be public financing. It might be an entirely different situation than it would be if we were to suddenly pass this bill and provide matching public funds.

All of this is leading me to this question: Could your bill carry the additional suggestion or provision of the President that would provide an expiration date following this election which would in effect compel the Congress to take a whole new look at what we have done in light of the Supreme Court's decision?

I don't know whether either of you want to comment on that or not. I think it is an interesting suggestion, one that would more or less force the legislative branch of Government to do what we hope it will do, but which it may not.

Senator MONDALE. Senator Griffin, I introduced a proposal for a commission to study the way in which we nominate the Presidents. It is one of the anomalies of our society that something as crucial as that—how we finance them, how we nominate them, State rules, party rules and the rest—have just grown up without any cohesive overall plan whatsoever. It was one of the great failures of the Founding Fathers to in anyway anticipate that problem. And now we don't have a system—we have 55 different systems.

And I understand the President responded favorably to the general notion of finally taking a fundamental look at that problem. And I think it would make sense to perhaps couple that with a similar thorough review of the whole system by which we nominate and elect other Federal officers, including the public financing provision.

Now, of course, this committee has been the key committee for many, many years, the best students of election problems are to be found right here. Whether that review should be conducted by some outside group or whether the committee would make it part of its ongoing work is really for you to decide.

Senator SCHWEIKER. Mr. Chairman, I would like to respond, too. I agree with Senator Griffin's question that we do need a prod, and I think that one way to handle this could be to take our bill and to put a July 1, 1977, expiration date on it. This would get us through this election, it would get us through the final reporting, which is the first quarter of next year, and would give an administration and a new Congress some 6 months to come up with something. I wouldn't favor a date earlier than that because we would make it hard to deal with the problem in Congress.

Now, second, I would like to respond to the first part of your question, Senator, and that is about the wreckage that the Supreme Court has left us—and I happen to think it is a serious wreckage of this law. I think that to go through this wreckage without an FEC would just be utter chaos—no one will know where to go, no one will know what they are doing, no one will know what is legal—it would be utter chaos.

So that while we have a wreckage, we have a chance to salvage a little bit of that wreckage by reconstituting the FEC. Fortunately, I am not running this year, but I don't know what somebody does as a candidate to determine what he is doing legally, if we don't have something like the FEC. I think that is very important.

Senator GRIFFIN. Thank you very much.

Senator PELL. Senator Clark?

Senator CLARK. Just one question. I appreciate your statement very much. I think we—most all of us at any rate—are in agreement that we need a reconstitution of the Commission.

I would like to ask you about the public financing provision. Both of you in the past, I know, have supported public financing—and I think your statement indicates that you think we ought to turn to that question very soon. But understandably you are reluctant to go ahead with that now, as you say, because you feel it might endanger the reconstitution of the Commission.

But it does seem to me that there is a real hope now, for the first time, that the House of Representatives will pass congressional public

financing. Now, you mentioned, I think, Senator Mondale, the fact that the Burton bill now has 240 sponsors.

Supposing that before we act in the Senate, the House adopts the Burton proposal, which, as I understand it, will be attached to a reconstituted Commission. Suppose that bill comes to us with public financing in it and a full power reconstituted Commission.

Would you then support in the Senate public financing?

Senator MONDALE. I would strongly support it. I said in my statement that I think we ought to choose a different vehicle for public financing, but I also said, if there is public financing being proposed, I am going to join the fight for it and I am going to fight for a matching system.

And one of my reasons for doing so is that it is much easier, I believe, to get House support on a matching basis than on a direct Treasury grant of the kind that we adopted last time.

There is not much mystery about public financing any more, there is no need for all kinds of thorough studies. This committee has been dealing with the public financing issue. The chairman of the committee, I think, probably knows more about this issue than any man in America; he has been working with it for at least a decade and perhaps more. We have debated the dollar checkoff at least since the middle sixties. We have had an enormous amount of experience with all of these matters now.

I think if we can do both, that would be a different problem. But above all we have got to get this Commission reconstituted, because if we let that fail I think the American public will think that we used artifice and tricks to bring that disaster about.

Senator CLARK. And, Senator Schweiker, would you, if the House were to pass public financing—let's say the Burton bill or some other—and came to us before we act, do you feel that you could support public financing and a reconstituted—

Senator SCHWEIKER. Yes, Senator Clark, I would certainly support it very strongly, because my objection is not to the principle, my objection is to the practicality of it. The answer is a strong yes.

I have to say, having served in the House, they used to have a phenomenon they called the disappearing quorum over in the House in the old days—and I sort of suspect that when that FEC vote comes up on public financing, you are going to see the disappearing quorum at work during this election year. I hope I am wrong, but that is the basis for my position now.

Senator CLARK. Thank you.

Senator PELL. Senator Cannon?

Senator CANNON. Thank you, Mr. Chairman. I think there is a good possibility, in light of what has transpired, to something happening along the lines that have been suggested here, that the House may well act before we complete our action over here. And if they should act with a public financing provision in the congressional races, then, certainly, in the light of the action the Senate took before, we would have no problem getting it in.

I think, Senator Mondale, I am inclined to agree with you. I think that the general elections perhaps should also be on the matching fund basis, rather than just the primary—although I recognize the rationale

for it, that the primary is where one would demonstrate adequate support to come under a matching provision in the event there were a lot of candidates in.

But I think a limit on the amount of the matching provision, such as \$100 or less, to me would give it more appeal from the matching standpoint in the general elections than just this right-out grant—and as well I keep in the back of my mind the question I asked Senators Kennedy and Scott, if there is a possibility that there may not be adequate funds if this were to take effect this year, adequate funds to finance both the Presidential races and the congressional races—I would certainly prefer to see the Presidential races taken care of in light of the fact that we have gotten a start down that road.

Senator MONDALE. Senator Griffin mentioned the possibility of maybe beginning the public financing of congressional races in the next election. I think that might be a good compromise.

But if we have a chance to act this year, I very much hope we do. And the reason I come down so strongly on the matching principle—and I am glad to hear you support that—is that I think there is something very powerful to the psychology of the American public continuing to have something to say about how much money a candidate gets and of forcing a candidate to go around and plead for funds; as long as you keep the amount that any person can contribute to an amount that couldn't possibly corrupt a candidate, all you are doing is forcing him to go around and get a lot of support, as a condition for getting public support.

And I think the public senses that and feels very strongly about it. I think the key to the success of public financing is to be found to a great extent in the checkoff in the tax returns; the public likes the notion that they have something to say about how much money would be set aside and that they can exercise that option on an ongoing basis. If you just take it out of the Treasury as a direct grant, not only do you increase opposition in the House, but you also, I think, undermine that sense of public control that is so important.

Senator SCHWEIKER. I want to say that I concur with Senator Mondale on that. I think, if we go the route of public financing and had complete Treasury financing, we would really take the sense of participation out of the whole American system. And if there is one key principle that I think that has made our country strong, it is that participatory role.

And I think it is important to keep participation in the system somehow, somewhere. I think that is a very valid point and I really strongly support that point.

Senator CANNON. Thank you, Mr. Chairman.

Senator PELL. Thank you, Senator Cannon. Incidentally, I notice that on November 16, 1973, I introduced a bill, S. 2718, that was exactly like yours with the matching provisions in it up to \$100, but it was lost—those provisions were lost somewhere on its way to passage.

So I support this concept.

Senator GRIFFIN. Mr. Chairman, if I might put in the record the last dates for filing and the date of primary elections, State by State for congressional elections for this year—I think it might be of some

interest in terms of the practicality of passing a public financing bill for this year. I do have it for 1974—what I will put in will be for 1976.

[The information referred to follows:]

## II. CONGRESSIONAL PRIMARIES

State	Primary date	Last day for filing <sup>1</sup>	State	Primary date	Last day for filing <sup>1</sup>
Illinois	Mar. 16	Dec. 15	Missouri	do.	Apr. 27
Pennsylvania	Apr. 27	Feb. 17	Tennessee	Aug. 5	June 3
Texas	May 1	Feb. 2	Georgia	Aug. 10	June 9
Alabama	May 4	Mar. 1	Louisiana	Aug. 14	June 18
District of Columbia	do.	Mar. 5	North Carolina	Aug. 17	May 28
Indiana	do.	Mar. 15	Alaska	Aug. 24	June 1
Nebraska	May 11	Mar. 12	Oklahoma	do.	July 7
West Virginia	do.	Feb. 7	Georgia	Aug. 31 <sup>2</sup>	
Maryland	May 18	Mar. 8	Arizona	Sept. 7	July 9
Arkansas	May 25	Apr. 6	Connecticut	do.	Aug. 6
Kentucky	do.	Mar. 31	Florida	do.	July 20
Oregon	do.	Mar. 16	North Dakota	do.	July 24
Alabama	June 1 <sup>2</sup>		Delaware	Sept. 11	Sept. 1
Mississippi	do.	Apr. 2	Colorado	Sept. 14	July 31
Montana	do.	Apr. 22	Massachusetts	do.	July 6
New Mexico	do.	Mar. 2	Minnesota	do.	July 20
South Dakota	do.	Apr. 16	Nevada	do.	July 21
Texas	June 5		New Hampshire	do.	July 16
California	June 8	Mar. 12	New York	do.	July 29
Iowa	do.	Apr. 2	North Carolina	do.	
Arkansas	do.		Rhode Island	do.	June 10
Maine	do.	Apr. 1	Utah	do.	May 10
New Jersey	do.	Apr. 29	Vermont	do.	Aug. 5
Ohio	do.	Mar. 25	Wisconsin	do.	July 13
South Carolina	do.	( <sup>3</sup> )	Wyoming	do.	July 31
Virginia	do.	Apr. 9	Washington	Sept. 21	July 30
Mississippi	June 22 <sup>2</sup>		Oklahoma	do.	
South Carolina	do.		Louisiana	Sept. 25 <sup>2</sup>	
Idaho	Aug. 3	June 7	Florida	Sept. 28 <sup>2</sup>	
Kansas	do.	June 20	Hawaii	Oct. 2	Aug. 18
Michigan	do.	June 15			

<sup>1</sup> Last day for filing declarations or petitions of candidacy (dates may vary due to statutory changes).

<sup>2</sup> Runoff date.

<sup>3</sup> Filing deadline is 2 weeks after State conventions close; convention closing dates are unknown at the time of publication.

Senator GRIFFIN. I might just point out that in 1974—and I assume it would be the same—the filing date in North Carolina was February 25, the filing date in Ohio was February 6 and in a number of States it is March. Of course, it seems to me it would be very difficult to—

Senator SCHWEIKER. If the Senator would yield, the Pennsylvania deadline was yesterday. We closed out our filing for all offices.

Senator CANNON. If the Senator would yield, I think one of the first primaries is in early March, the primary itself.

Senator CLARK. Would the Senator yield for a question, I am not sure that I understand the significance of that point. The bill that Senator Kennedy and I and Senator Scott have offered would in no way apply to primary elections. It would only apply to the general election.

Senator GRIFFIN. But some of the bills would apply on a national basis to primaries—

Senator SCHWEIKER. If I might respond, I think a lawsuit could be filed on the basis that they didn't know the ground rules when the things were started. They didn't know that they were going to

have public financing, so their rights were violated because they didn't have the same opportunity that now all of a sudden the others are given.

And I think someone who didn't file could ask——

Senator CLARK. You mean in the general election?

Senator SCHWEIKER. Yes, on the basis that he was not aware he could participate on the same basis others now can who will get an after-the-fact award. I think that would be grounds for some kind of a suit right there.

Senator PELL. Thank you very much indeed, Senators.

And our next witness will be Senator Buckley on S. 2980, the bill that is introduced in the House by Representative Steiger.

Senator Buckley?

#### STATEMENT OF HON. JAMES L. BUCKLEY, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator BUCKLEY. Thank you, Mr. Chairman. I welcome the opportunity to discuss my bill, which was introduced yesterday. It is now 2½ weeks since the Supreme Court handed down its decision, and since then a number of bills have been introduced more or less as emergency measures that are intended to deal with only the most obvious of the gaps left by the decision.

None of these measures, I submit, addresses the full range of problems created by the Supreme Court decision, especially in congressional races.

We need to do substantially more than simply reconstitute the Federal Election Commission so that public subsidies may continue to flow to Presidential candidates. The Supreme Court's elimination of limits on individual spending has accentuated the inequities already ingrained in the Federal Election Campaign Act. They, too, must be addressed on an urgent basis.

Finally, there is broad agreement, based on actual experience with the act, that a number of its provisions are unwieldy and unduly burdensome. These can easily be corrected at this time if only we will take the trouble to do so.

Yesterday, Congressman William Steiger of Wisconsin and I introduced in our respective Houses a bill that will restructure the Federal Election Commission along constitutional lines, reallocate its responsibilities in a more efficient manner, adjust some of the major inequities in the law as it has survived the Court's decision, and make certain modifications that we believe will simplify the administration of the Federal Election Campaign Act, as amended. In preparing our bill, we have consulted with our coplaintiffs in *Buckley v. Valeo*. Our bill represents a consensus that cuts across partisan and ideological lines. It is the only bill before this committee that attempts to address all the major problems that have been precipitated by the Supreme Court's decision.

Our bill does not seek to change features of the act, such as the public financing of Presidential campaigns, which the plaintiff's in *Buckley v. Valeo* found objectionable, but which the Supreme Court left standing. Rather, we seek only to make those corrections in the law that are urgently required as a result of the Supreme Court's de-

cision, while correcting some of the widely noted defects in the law that have become apparent since its enactment.

Specifically, our bill is addressed to the following deficiencies:

#### 1. THE INEQUITIES AMONG CANDIDATES

The Supreme Court's rejection of limitations on expenditures by candidates and independent individuals and groups has dramatically magnified the inequities that exist under the law between different classes of candidates. On the one hand, wealthy candidates or candidates having the support of well-organized, well-financed political action groups, such as the AFL-CIO's Committee on Political Education, can now spend unlimited sums in the promotion of their candidacies. On the other hand, candidates without private means or without the support of such groups are limited to contributions that may not exceed \$1,000 from individuals or \$5,000 from political action committees. In practice, this has provided enormous handicaps in raising the kind of seed money that is especially important in launching the campaign of a candidate who is relatively unknown.

Our bill will help redress this imbalance by raising the limitations on individual and committee contributions to the following levels: \$50,000 in the case of a Presidential candidate, \$25,000 in the case of senatorial candidates, and \$10,000 in the case of a candidate for the House of Representatives. These limitations are high enough to enable middle- and lower-income candidates to raise the money necessary to launch successful campaigns. Any possibility of abuse will, in our opinion, be checked by the effective enforcement of the disclosure provisions.

I would at this time point out that unless we substantially raise the limits on individual contributions, candidates for Congress running this year will face the danger of losing substantial control over their own campaigns. The \$1,000 and \$5,000 contribution limitations will no longer keep individuals on political committees from spending as much as they want on behalf of candidates they want to support. It will merely prevent them from coordinating their expenditures with the candidate's campaign. In other words, each one of us running for office this year could see chaos in their promotion of a single cause.

#### 2. THE FEDERAL ELECTION COMMISSION

Aside from the fact that the Supreme Court has found the method of appointing the Federal Election Commission to be unconstitutional, the Commission in practice has been found to reflect all the deficiencies that are to be found in too many other agencies that are clothed with very broad rulemaking and enforcement responsibilities. Arbitrary and at times capricious requirements impose excessive legal and book-keeping costs on candidates without serving any apparent public service. We have also vested in the Commission extraordinarily broad powers over a most sensitive area of national life.

I suppose there is some sort of poetic justice in having Members of the Congress finally made subject to the kind of bureaucratic harassment and regulatory uncertainties and costs to which the Congress routinely has subjected so many others in American society.

Nevertheless, our bill seeks to remedy this situation by allowing the functions currently delegated to the FEC to be reallocated between a reconstituted commission and a new election law section to be established in the Department of Justice. Our bill would vest the enforcement powers for the Federal election laws not with an independent election czar, but with appointive officials within the traditional enforcement arm of the Federal Government. The election law section would be headed by a Director and Deputy Director of different political parties who would be appointed by the President, with the advice and consent of the Senate. They would serve for 4-year terms and could be removed only for cause. We believe, in short, that this mechanism would insulate this section from political direction by an incumbent President.

This arrangement would leave audit, review, and certification responsibilities with the new Federal Election Commission while assigning the functions of enforcement, the issuance of advisory opinions, and the conduct of civil and criminal litigation to the new election law section of the Justice Department. This is the more normal arrangement, and we believe it represents better policy.

### 3. RECORDKEEPING AND DISCLOSURE

The current disclosure and bookkeeping provisions of the Federal Election Campaign Act impose costs that cannot be justified by any consideration of public policy. I speak of the current requirements that a record be kept of each contributor giving over \$10 and that disclosure be made of each contribution in excess of \$100.

With respect to the recordkeeping provisions, it is simply irrational to suppose that any candidate for national office will be influenced by a \$100 contribution, let alone an \$11 contribution. The only possible effect of the current provision is to discourage contributions by individuals reluctant to be identified with minor parties or unpopular causes. It does not in any way affect the problem of corruption in public office. Our bill would substantially lighten the current recordkeeping burden by limiting such records to contributions in excess of \$100.

It is just as irrational to assume that candidates for national office could be bribed by the \$101 contributions that must now be reported. The amount of money required to have a corruptive influence on a candidate for political office depends on the relative size of the contribution to the overall financial requirements of the campaign. In order to ameliorate the effect of disclosure provisions on public participation in a campaign, our bill would adopt various disclosure thresholds which would be calibrated to the office sought. Specifically, we would establish those thresholds at \$1,000 in the case of a candidate for the Presidency, \$500 in the case of a candidate for the Senate, and \$250 in the case of a candidate for the House of Representatives. And I hope that no one suggests that any of us could be bought for lower sums.

### 4. MISCELLANEOUS PROVISIONS

The present rules appear unduly restrictive with respect to contributions to and from political parties and committees. There is also a great deal of uncertainty as to what constitutes a contribution to

a particular candidate. Our bill incorporates language which will (a) remove some of the arbitrary restrictions that have been placed on the traditional role of parties and committees, thereby broadening the diversity of groups that can have an input on the electoral process, and (b) provide for necessary statutory guidelines for determining what constitutes a contribution. This will serve to remove many of the uncertainties that now exist in the law, and will facilitate the conduct of campaigns as well as the work of the election law section that would be charged under our bill with the enforcement of Federal election laws.

As I stated at the outset, the Supreme Court's decision in *Buckley v. Valeo* requires corrective action that is significantly broader in scope than the reconstitution of the Federal Election Commission. Inequities have been magnified which the Congress must address if we are not to establish two classes of candidates facing vastly different problems in financing and launching their political campaigns. Furthermore, the fact that some legislative action is necessary at this time provides us with a unique opportunity to correct the deficiencies that have been widely noted, deficiencies which add materially to the cost and complexity of political campaigns without serving any identifiable public purpose.

The American people have a right to expect that we will utilize this opportunity to effect something more than incremental changes intended to preserve the status quo. They have a right to expect their representatives in Congress to enact real election reform that will remove provisions whose net effect is to protect the wealthy or special-interest candidate from successful challenge, to say nothing of incumbent Members of Congress.

I thank you, Mr. Chairman. There has been distributed a synopsis of the legislation we introduced yesterday. And I would be happy to answer any questions you may have.

Senator PELL. Thank you, Senator Buckley. It is particularly appropriate that you are presenting your legislation, that you are here, since it was your suit that precipitated the Supreme Court decision.

Senator BUCKLEY. I like to think it was the first amendment that precipitated that.

Senator PELL. I have no questions.

Senator Griffin?

Senator GRIFFIN. Senator Buckley, I think your point about the effect of that part of the Supreme Court's decision which lifts and leaves without limit expenditures by an individual or a special-interest group takes away from the candidate effective control of his campaign is a very significant point, one that needs a lot of thought and study by this Congress.

As I was reading over your statement, you talk about another group that might support a candidate. I can also conceive of a special-interest group that might not support a candidate but spend all of its time and unlimited resources opposing the other candidate.

Wouldn't that be a very nice situation for the fellow who happened to be the beneficiary of that? He wouldn't have to say anything against his opponent at all perhaps—that would all be done for him, with unlimited resources, by a group that just wants to spend all of its time attacking the other party in the race.

Senator BUCKLEY. Well, this is exactly what can happen. And, as a matter of fact, I was elected in a three-cornered race and there were some people who spread all kinds of full-page ads around New York saying don't vote for Buckley and didn't express any other preference.

But this is precisely the sort of thing that we are now going to see forced by having unlimited expenditures declared constitutional by the Supreme Court while suppressing the ability of individuals, who would probably much rather send their \$10,000 or \$15,000 into the campaign headquarters.

Senator GRIFFIN. Thank you for the statement.

Senator PELL. Senator Clark?

Senator CLARK. Senator Buckley, just a couple of questions.

As I understand your first proposal, it would really allow what I would consider at any rate rather massive increases in the contribution limits for both individuals and groups. For example, you would raise the contribution limit for the Senate races to \$25,000.

Don't you think that in fact a Senator might be very much inclined to treat constituents who give \$25,000 somewhat differently than those who give a dollar, or who give nothing?

I guess what I am saying is, aren't we in a sense opening the way for the kind of influence peddling that the law was really intended to prevent?

Senator BUCKLEY. I don't think so. No. 1, I think that full disclosure is the appropriate protection—let people draw their own conclusions. No. 2, in my experience, on the basis of one campaign, I get more pressure and so forth from people who gave \$5 than anyone who gave more than \$5,000. I really haven't seen it.

No. 3, I would point out—

Senator CLARK. I wasn't thinking so much of the pressure on you as rather the way in which the Senator himself or herself looks upon that problem.

Senator BUCKLEY. My belief, Senator Clark, is that the corruption in this body comes not from people who have given money but from people who say we represent a bloc of 10,000 voters on this issue or another. I think you and I have seen more votes in the Senate warped by that than the fact that somebody may have given \$5,000 in a past campaign.

Senator CLARK. Why have a \$25,000 limit, then? Why have any?

Senator BUCKLEY. The submission we have put in represents a consensus among the plaintiffs who have different points of view. I personally would just as soon see the lid taken off, because I do believe the disclosure is the thing that alerts the public and arms the opposition.

Senator CLARK. Well, I share the view that that is the most important single factor.

Senator BUCKLEY. But I would also like to pursue one step further the suggestion that this is the only way we avoid the abuses advertised in Watergate. I think it is a curious fact, and not generally cited, that most of the members of the Watergate Committee voted against the legislation we are talking about. They didn't think it was responsive to what they saw to be the problems.

Senator CLARK. Well, let me pursue this \$25,000 contribution further. You say on the top of page 9, and I think quite accurately: "The amount of money required to have a corruptive influence on a candidate for political office depends on the relative size of the contribution to the overall financial requirements of the campaign."

Now, again, I don't like to use personal examples, but in a matter of this kind you are reluctant to use someone else's campaign. In my own case, I think I spent \$250,000. Now, one contribution of \$25,000 would be one-tenth of the entire campaign expenditure. Or, to put it in another way, 10 people could have financed my entire campaign under the limitations that you are suggesting.

That seems to me to be pretty excessive in terms of the possibility of opening it up to real influence.

What is your response to that?

Senator BUCKLEY. I really don't think that people are subject to that kind of influence. Maybe I am naive, maybe I am thinking of my own experience—and also, I must confess, I am talking in the perspective of a \$2 million campaign rather than a \$250,000 campaign.

Certainly, \$25,000 in the case of one of the larger populated States would not—in the case of yours, maybe it should be a percentage of the thing. But here is the problem that I see—and I felt it very strongly. I could not have launched my campaign without having received a \$50,000 loan. I will say that quite simply—and the guy has never asked anything from me since then. I needed seed money. I couldn't open an office until I put down \$15,000. I couldn't get the telephone company to even look in and decide how to fit the switchboard unless I put another \$15,000 down. Especially if you are a political unknown, you need what is known as seed money to establish some kind of plausibility.

We have the fact that Julian Bond ought to be a Presidential candidate today. He is not a Presidential candidate for the simple reason that he could not accept money that would have been tendered to him in amounts more than \$1,000.

Senator CLARK. Well, I think what you are saying points up the great differences within the country. I think it is true that I never had a contribution in excess of \$3,000 and had little trouble getting started, even though being totally unknown.

But I think it is true that passing a law that fairly applies to every State in the Union and every congressional district is complicated.

Well, last—or second, I think I have three questions—another of your recommendations is to return the enforcement of the campaign law to the Justice Department, at least as I read your testimony.

Now, for more than 40 years, the Department, I think, failed miserably to enforce the old Corrupt Practices Act. And my question is, what makes you think that the Justice Department would do any better this time around?

Doesn't your proposal really return to the old system that didn't work effectively?

Senator BUCKLEY. I don't think so. First of all, I think that one of the principal problems under the old system was that this sort of case got to the bottom of the pile. We would constitute a body that had no

other responsibility but to monitor, give the advisory opinions and prosecute.

No. 2, the Director and Deputy Director would not be serving at the pleasure of a President.

No. 3, there would be supervision by a politically independent director and deputy director, and those two people couldn't be from the same party.

No. 4, the Election Commission would have the authority under our bill to finger areas that they think required investigation.

In other words, there is plenty of opportunity to place the heat on the election body to see that it does its job.

But I do believe that the better practice, the more prudent practice, is to have the law enforcement agency of the Government do the enforcement of the laws.

Senator CLARK. But it is going to be exclusively under the control of the Attorney General and the administration in power.

Senator BUCKLEY. I don't believe that would be the case with two independent people of two different parties.

Senator CLARK. Well, lastly, your proposal, as I understood your testimony, sets a \$500 limit on disclosure of campaign contributions in Senate elections. I agree with your first statement, at least in part, that the most important single factor in election reform is disclosure—I think that is even more important than contribution limitations, in my judgment. I believe strongly in limitations, but disclosure is the most important.

Why have such a high figure? Don't you think in fact that the public would have a very strong interest—and a right—in knowing whether, let us say, a Senate candidate received contributions from, let's say, 50 oil company executives of \$450 each? Wouldn't that be an easy way to hide enormous contributions, by simply having a great number of different executives contribute slightly less than \$500?

Senator BUCKLEY. Well, perhaps again it is the scale of looking at a \$2 million campaign versus another. These contributions simply are not that significant. The paperwork is very significant. I think you are going to find out, if you are talking about an industry slant or something of this sort, you have your political action committees of various industries that we will quickly identify. And also, incidentally, I happen to be among those who believe that money is given, whether it be by AFL-CIO or milk producers or oil executives, to candidates whom they believe to share the same points of view on public policy. So that it frankly does not disturb me that a particular Senator might receive large numbers of contributions from wheat farmers. This does not indicate a corruptive influence but, rather, reflects a confluence of points of view.

Senator CLARK. I share that view, but I think what I am really saying is that if disclosure is the key to cleaning up election problems, then why not have a little more of it? Why not put it down at least to a \$100 contribution so you avoid this kind of—

Senator BUCKLEY. Well, two things. First of all, what purpose is being served, public curiosity, or are we talking about thresholds that could raise questions as to corruption? When you started talking about

that \$500 figure, I thought probably you were going to suggest it was much too low.

But, then, on the other side of the case, you have two considerations. No. 1, sheer paperwork and cost. I am bumping into this thing right now—the mechanical difficulties.

No. 2, there is a chilling factor, there is a chill factor in terms of contributions. There are unpopular causes. There are people who work at the Chase Manhattan Bank that may want to support the Socialist Marxist party that wants to nationalize Chase Manhattan Bank. If you have too small a threshold, you are just going to drive these people out of the political process.

Senator CLARK. Well, again, let me stop, but maybe it is a difference in size. In 1972, prior to the disclosure law, I remember filing every contribution of a dollar or more—and I had one person do it—and I just did not find it to be that kind of burden.

But, again, maybe it is a different size—

Senator BUCKLEY. It has been multiplied now. I was filing, I think, \$10 or more under New York State law, but now you have to keep all kinds of different books and cross checks—and you have to find out whether that guy who gave in August had given back in April, this sort of thing.

Senator CLARK. Thank you very much.

Senator PEEL. Senator Cannon?

Senator CANNON. I must say, Senator Buckley, that I agree with Senator Clark on his approach to the limitation on the senatorial candidates, or congressional candidates. I think—under the old law, the limit there was \$5,000, although you could give to more than one committee. But this was the law when we determined that we needed to do something about it, to reduce the effect of big money. And therefore I think the limitation we have in there for the congressional races is much more realistic than what you suggested. However, in the Presidential race, I am curious as to why you would want to raise the limit there when the Presidential candidates are all under the public financing provision—and apparently no one has had any trouble qualifying under that provision.

So what is the purpose of going to a \$50,000 limit on a contribution to a Presidential campaign?

Senator BUCKLEY. You are thinking, Senator, I think, almost exclusively in terms of Republicans and Democrats—and probably people who are pretty well known to start with. Julian Bond said he withdrew for the simple reason he couldn't raise the necessary money to get himself started. Senator Eugene McCarthy is a candidate for the President of the United States.

There are enormous institutional difficulties of getting mobilized. I believe that Senator McGovern would not have been his party's candidate for the Presidency if a few people didn't have confidence in him early and didn't give him a start.

Senator CANNON. I see. You are really talking about the seed-money problem—

Senator BUCKLEY. Exactly.

Senator CANNON. Where the Presidential candidate sends out a mailer that may cost him \$50,000 to mail, and he has to go out and

solicit funds with a \$1,000 limit on it first, and that may create a problem.

Senator BUCKLEY. And I think the thrust of what I was trying to say earlier—and I think what this dramatizes, Senator Cannon—is that whether you like it or not, the Supreme Court has lifted the lid on individual spending by a wealthy candidate or groups interested in that candidate. This exaggerates the difficulties faced by someone without wealth or who doesn't represent such a constituency. Something has got to be done in simple justice to establish equity that will facilitate an unknown raising money.

Senator CANNON. You don't have any provision in here for financing congressional races.

Senator BUCKLEY. No, I don't.

Senator CANNON. Do you support that kind of approach? What are your views on it?

Senator BUCKLEY. I do not support it. I was interested that Senator Schweiker was saying that we want to encourage participation in the political process and that, therefore, we ought to have matching funds. Well, if that is good, why not go all the way and let part of the test of the viability of a candidate be his ability to go out and establish a sufficient interest to get support.

One of the things we need to fear, if we institute public financing, especially across the board, is you will encourage an awful lot of bland candidates. You have got to say what you believe in order to establish a reason, especially if you are an unknown, to establish a reason for somebody to support you, to have confidence in you.

There is also the fact that any system of public financing is inherently discriminatory when you get into the third-party area. I hope, incidentally, that you will ask Dr. Ralph Winter for some observations this afternoon. He has been a student of that and an effective one.

I might also like to suggest to this committee that the Supreme Court has not necessarily endorsed and found constitutional the provision for public support. I believe if you read the decision carefully you will find the suggestion an invitation for people to come back later with a factual story to tell that could demonstrate whether or not this has created unfair obstacles to a third-party candidate.

Another thing you might observe is that the Supreme Court decision dealt only with fifth amendment arguments and did not—somehow ignored or did not cope—with first amendment arguments against public financing.

And, finally, lest one go overboard, in effect utilizing public subsidies to bribe Members of the Congress to forfeit their constitutional rights of expression, as defined by the Supreme Court—one thing that the Supreme Court failed to remind itself of is a series of decisions that declared that any such attempt to bribe an individual into forfeiting constitutional rights is in itself unconstitutional. And I would cite the cases in which the Supreme Court has disallowed residency requirements—

Senator CANNON. Say that last one again there, I missed it.

Senator BUCKLEY. The Supreme Court has said in effect that it is unconstitutional to bribe somebody to forego a constitutional right.

And this doctrine was enunciated in, among other cases, the cases that threw out residency requirements for the granting of welfare.

Senator CANNON. There is one suggestion you made here I must say that I completely agree with you on, and that is where you say with respect to the recordkeeping provisions—it is certainly onerous to require that a record of a contributor giving over \$10 must be maintained, even though the disclosure figure doesn't apply till you get to the \$100 threshold. And I see absolutely no useful purpose, unless, as you suggest, to satisfy somebody's curiosity, as to why you have a recordkeeping provision for persons that contribute \$10. Many people, through the mailer approach, send in a \$10, \$15, or \$25 contribution—and the recordkeeping part of that alone is just horrendous when it comes to keeping those records on hand for absolutely no useful purpose.

The purpose, it seems to me, comes about in the disclosure provision, which applies at the \$100 and above level. And while you suggest a higher one there, I think the figure that we have fixed for disclosure there is good, but I would certainly support a move to change that recordkeeping provision of the interim amounts of money from \$10 up to the \$100 level.

Senator BUCKLEY. Thank you.

Senator CANNON. Thank you very much, Mr. Chairman.

Senator PELL. Thank you very much. I agree with Senator Cannon on that point about the recordkeeping, too. Also in connection with your thought that disclosure is the most important element here, we all are in agreement. The sad thought is we never gave just disclosure a full cycle to work because it was on April 7, 1972, that disclosure came into being, and before that there was not disclosure. So we have never had an election yet where you have had just disclosure to see what sort of break that is.

But obviously if 10 percent of your money comes from the Mafia, that will not be looked at kindly by your constituents.

Thank you.

Senator BUCKLEY. Thank you, Mr. Chairman.

Senator PELL. Our next witness is Mr. Antonin Scalia, Assistant Attorney General from the Office of Legal Counsel, Department of Justice.

In view of the time factors, I would hope that whatever portion of your testimony you would care to have inserted in the record, you would.

**STATEMENT OF ANTONIN SCALIA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY JACK GOLDKLANG AND ROBERT HICKEY**

Mr. SCALIA. Yes, sir, Mr. Chairman, I would ask that the entire testimony be printed, and I will try to skip over those portions that you have already been told about.

Senator PELL. Thank you very much. It will be inserted in the record.

[The written statement of Mr. Antonin Scalia follows:]



# Department of Justice

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STATEMENT

OF

ANTONIN SCALIA  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

BEFORE

THE

SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

OF THE

COMMITTEE ON RULES AND ADMINISTRATION

UNITED STATES SENATE

CONCERNING

LEGISLATION TO AMEND THE FEDERAL ELECTION CAMPAIGN  
ACT OF 1971 AS AMENDED, 1974

February 18, 1976

Mr. Chairman and Members of the Subcommittee:

On January 30, 1976 the decision of the Supreme Court in Buckley v. Valeo, No. 75-436, cut a gaping hole in the Federal Election Campaign Act of 1971 -- or, to be more faithful to the constitutional theory of what occurred, the decision found that a gaping hole already existed. The damage was so substantial that the Chief Justice, in his dissenting opinion, expressed the view that the entire Act should have been stricken down since, as altered by the Court's decision, it is "unworkable and inequitable." (Slip Opinion, Dissent, p. 18)/\* In the aftermath of the Valeo case there are two sets of decisions which must be taken by the Congress, one of which is extraordinarily difficult, and the other extraordinarily urgent. The extraordinarily difficult question can be taken verbatim from Chief Justice Burger's dissent: "when central segments, key operative provisions, of this Act, are stricken, can what remains function in anything like the way Congress intended?" (Dissent, pp. 20-21) The Congress will obviously have to address this issue eventually, to determine whether the elimination of certain features that were the quids or quos in a long debated and carefully crafted legislative package,

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\* All subsequent citations to Buckely v. Valeo will be to the Slip Opinion.

leaves a residue which is still an approximation of legislative will. I have no reason to believe -- and indeed, the press reports since the Valeo decision lead me to doubt -- that that process of reconsideration will be any less difficult or protracted than that which produced the 1974 Amendments.

There is, however, a second issue which must be resolved. It can, I think, be separated from the first, if not by logic, then at least by the genius for compromise and practicality which is the hallmark and the prerequisite of our democratic system. And approached with good will and with overriding concern for the national interest by all sides, it need not be as difficult an issue. I refer to the immediate, pressing necessity of making such minimal adjustments as are absolutely essential to prevent the enactment and subsequent partial invalidation of the 1974 Amendments from seriously distorting the 1976 election campaigns. Those campaigns are now well under way; they have at all levels -- but especially at the Presidential level -- been planned and conducted on the basis of certain assumptions which, unless the Constitution requires, it would be a public disservice to upset.

It is essentially the second of these issues which I wish to discuss today, in the context of the Administration

bill, S. 1987, designed to meet our immediate problems. I will also discuss, as you have requested, three other bills, S.2911, S.2912 and S.2918, which in my view -- though I hesitate to speak for their sponsors -- likewise offer no complete solution for the problems generated by the Valeo case but seek to minimize to the extent possible the distortion of the present election campaign.

Let me begin with a brief analysis of the principal effects of the Valeo decision. These may be divided into two categories, which roughly though perhaps not precisely parallel the two basic issues for your decision which I have discussed above. First, there are its effects upon what might be termed the substantive provisions of the election law. A large gap has been created in that portion of the law which previously limited campaign expenditures, both by candidates and by persons acting independently of candidates. 18 U.S.C. 608. That limitation has been held invalid except as applied to candidates who voluntarily accept Federal funding -- at the present time, only Presidential candidates. 26 U.S.C. 9004. Since there is no Federal funding for House and Senate races, no expenditure limitations are applicable to any candidates there; nor, even in the Presidential campaigns, is there any

limitation upon expenditures that are not "controlled by or coordinated with the candidate and his campaign."

(pp. 40-41)

The Court upheld limitations upon contributions to candidates, even those candidates who have not accepted Federal funding. Moreover, it made clear that "expenditures controlled by or coordinated with the candidate and his campaign" can be treated as contributions (pp. 40-41) though expenditures "made totally independently of the candidate and his campaign" cannot be restricted (pp. 41 ff).

The disclosure provisions of the law were upheld, with respect to all types of contributions and expenditures (pp. 69 ff).

Even in the brief time since the Valeo decision, much has been said and written concerning the likely effects of these substantive changes. By limiting contributions but not limiting expenditures on the part of candidates who have received no Federal funding, the post-Valeo law undoubtedly increases the importance of the candidate's personal wealth. By drawing a crucial line between expenditures "controlled by or coordinated with the candidate" (which can be limited) and those which are "independent"

(which cannot) the post-Valeo law creates a distinction that may be impossible to administer. Perhaps most important of all, by enabling contributions above the established limits to be funneled into campaigns only through organizations separate from the candidate himself, the post-Valeo law may sap the strength of our "political party" system, and foster elections whose major themes are selected by issue-oriented or narrowly factional groups, rather than by the candidate or even the candidate's political party.

These results may or may not be desirable; they may or may not be as severe as some predict. We will presumably know more about that after the present election campaign is completed. The point is, however, that they render a reconsideration of the Court-modified election laws essential. The total system which now exists is one which, in substantial and important respects, has been designed by no Congress and approved by no President. One of the purposes of the President's legislative proposal is to assure, insofar as possible, this needed reconsideration at a time when it can intelligently and dispassionately occur.

Turning now to the second category of effects of the Valeo decision, its effects upon the administration of the Federal Election Campaign Act: The clear holding

of the Supreme Court was that the Federal Election Commission's composition violates the Appointments Clause of the Constitution as to all but its investigatory and informative powers (p. 131). As you know, a majority of its members were appointed by congressional officers. 2 U.S.C. 437c. As long as the Commissioners are not appointed by the President with the advice and consent of the Senate, or by the President alone, in accordance with Article II, § 2, clause 2, the Commission cannot perform executive, i.e., enforcement functions. These include primary responsibility for bringing civil actions against violators, for making rules to carry out the Act, for making administrative determinations and for issuing advisory opinions (p. 131). The Court mitigated the effects of its opinion by staying its judgment "for a period not to exceed 30 days \* \* \* insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act" (pp. 136-37). The stay seems to mean that until 30 days from January 30, 1976, the Commission may continue to exercise all of the powers given to it by statute with respect to the substantive provisions which have been upheld, including the public financing of Federal elections (pp. 136-37). We understand from press accounts that this is in fact how the Commission has proceeded.

Beyond the 30-day period the legal situation, if Congress does not act, becomes more complicated. One safe statement is that there will be plenty of work for lawyers trying to figure out the application of Valeo to concrete situations. I will try to review some of the problem areas with you. First of all, to borrow from Mark Twain, the reports of the Commission's total demise are somewhat exaggerated. The Court said that the Commission could unquestionably continue to exercise those powers which are "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees" (p. 131). These powers were also described as "functions relating to the flow of necessary information -- receipt, dissemination, and investigation" (p. 131).

As to those substantive provisions of the Act which, as I have indicated above, are not invalidated by the Valeo decision, we are left in the following enforcement position. (Bear in mind that I am not trying to cover every contingency but am only sketching the general outlines that must be considered.) It is clear that the criminal provisions of the Act can still be enforced. Title 18 of the United States Code includes a number of criminal provisions of the election law which are under

the jurisdiction of the Fraud Section of the Criminal Division of the Department of Justice. Section 608, dealing with limitations on contributions and expenditures has, as mentioned, been truncated by the Court's decision; but the remainder of Section 608 and other provisions over which the Commission has had concurrent enforcement jurisdiction are left unaffected. These include Sections 610, 611, and 613-617 of Title 18 which deal with contributions by banks, corporations, labor unions, government contractors and foreign nationals, anonymous contributions, cash contributions and similar matters. Complaints can be filed directly with the Department of Justice or with the Commission. As the law stands now, if the Commission receives a complaint or has information concerning an apparent criminal violation it can report the matter to the Attorney General. 2 U.S.C. 437g(a)(2) and (a)(6). This collection and referral of information seems to be covered by the Supreme Court's permission for the Commission to engage in "functions relating to the flow of necessary information" (p. 131). To use another standard suggested by the Court, it is the kind of function that might be performed by a committee of the Congress (p. 131).

The Commission can, however, no longer bring civil actions to enforce the campaign financing restrictions.

The law had previously vested in the Commission "primary jurisdiction with respect to the civil enforcement" of the election laws, 2 U.S.C. 437c(b) and 437g(a) (5), including the power to obtain injunctive relief in certain circumstances, 26 U.S.C. 9011(b) (1) and 9040(c), and to sue for return of overpayments made by the Secretary of the Treasury, 26 U.S.C. 9010(b), 9040(b). As the Court read the applicable provisions, none of these powers required the concurrence or participation of the Attorney General (p. 105); they were all held unconstitutional.

If Congress does not act, we will be faced with the question whether the Attorney General can, without further legislation, assume the civil enforcement responsibilities which the Commission has been compelled to abandon. The law contains a provision whereby the Attorney General as well as the Commission can institute civil actions with respect to certain provisions -- but he cannot do so entirely on his own. The law states (2 U.S.C. 437g(a) (7)):

"Whenever in the judgment of the Commission, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of this Act or of Section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, United States Code, upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief \* \* \*."

The judgment required by the Commission -- to refer a matter to the Attorney General after notice and hearing -- would seem to involve the kind of administrative determination and hearing necessary to ensure compliance with the statute that the Court said the Commission could not perform (p. 131). To be sure, congressional committees can hold investigative hearings and refer violations, if they suspect them, to the Justice Department; but such referral is not, as this provision seeks to make it, a precondition to the Executive's enforcement of the law. We must conclude that the provision for Attorney General enforcement only upon Commission referral is invalid. This leaves open the question whether -- the referral provision having been stricken -- the remainder of the provision, giving the Attorney General enforcement authority, subsists. This is, in lawyer's terms, an issue of the "severability" of the invalidated provisions, a field of inquiry in which it is fair to say there are no clear answers. The most we can say is that if the Congress does not act, the Department of Justice will seek to use the enforcement mechanisms of 2 U.S.C. 437 g(a) (7) without prerequisite Commission referral. Whether such authority will be upheld is uncertain. I may note, moreover,

that this device, even if successful, would not apply to enforcement of Title 26 and the campaign financing features of the law.

It may be, however, that the Attorney General has independent, non-statutory, authority to bring civil actions. There is a line of cases holding that the Attorney General may sue without specific statutory authorization if the United States has an interest to protect or defend. E.g., Wyandotte v. United States, 389 U.S. 191, 201-202 (1967). See 28 U.S.C. 516-519. These cases deal with laws in which the Congress has been silent on the right to sue; it is not clear that they would be applicable where, as here, the power was vested elsewhere and held unconstitutional. Thus, the entire problem of civil suits after Valeo remains unclear.

Other issues involve certification of expenses, rulemaking and advisory opinions. Under Title 26 of the United States Code, the Commission was charged with the duty to receive and pass upon requests by eligible candidates for campaign money, and to certify such requests to the Secretary of the Treasury for the latter's disbursement. 26 U.S.C. 9005, 9036. The Commission was also given rulemaking authority, 2 U.S.C. 437d(a)(8), 438(a)(10);

26 U.S.C. 9009(b), 9039(b), and the power to issue advisory opinions upon which the requester was entitled to rely, 2 U.S.C. 437f. The Court held in Valeo that assignment of these powers to the Commission was inconsistent with fundamental notions of separation of powers (pp. 134-35):

All aspects of the Act are brought within the Commission's broad administrative powers: rule-making, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch, are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removal at will, \* \* \* none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States." (emphasis added.)

The result of this holding is a large gap in administration of the law. Unless the Congress acts, there will be no clear or easy method of handling certification of eligibility for funds. Treasury will of course be reluctant to disburse the significant amounts of money involved without

following the statutory certification procedure, even when the claim of the candidate seems clear. No one is specifically authorized to take over the prescribing of regulations. The Department of Justice could issue advisory opinions, or at least provide some guidance as to how we intend to enforce the particular provisions that fall within our jurisdiction. (Indeed, we did that prior to the creation of the Commission.) But that would not be an adequate substitute for the kind of advice on all aspects of the law that the Commission was authorized to provide.

Based on these broad conclusions, it seems clear to us that legislation is urgently needed, and that temporary inaction--at least with respect to these administrative provisions--is not a realistic option. As I have suggested above, however, it is possible to segregate these features from the more substantive provisions calling for congressional reconsideration; and thus to facilitate the prompt legislative action which is essential. The purposes of the President's proposal are two-fold: First, to assure the smooth operation of the campaign laws during the current elections by making the minimal administrative changes necessary for that purpose. Second, to provide assurance that there will occur at a later date congressional reconsideration of the entire election law

package, as substantively altered by the Supreme Court's decision. These two objectives are not unrelated. It is our hope that those in Congress who desire major substantive change can, in the interest of prompt action, be persuaded merely to defer that legislative battle, though not to abandon it entirely. As noted in his transmittal letter to the President of the Senate, in order to set an example for the suppression of those controversial issues which can be reserved for next year, the President has on his part even refrained from including in his proposal the revision of a clearly administrative feature to which he has strenuous objection, now that the Commission has been held to be performing executive functions--namely, the one-House congressional veto of Commission rules. It is hoped that all Members of Congress--who we know have strong feelings on many substantive features of this law--can likewise be induced to submerge those feelings, for the time being, in the national interest.

Let me now provide an outline of what the President's legislation would accomplish. Section 2(a) provides for the appointment of all Commission members by the President, by and with the advice and consent of the Senate. This is no more than the Constitution, as interpreted in Valeo, requires. Section 2(b) includes a number of technical conforming amendments

which eliminate language relevant to the system under which Commissioners were previously appointed.

I should mention that there is one feature of Section 2 which was not directly addressed by the Supreme Court. Section 2 would eliminate the Secretary of the Senate and the Clerk of the House as non-voting, ex officio members of the Commission. We believe that the spirit of the opinion, and even the letter of the Constitution, require this result. The connection of these two officers to the legislative branch is even closer than that of the present congressionally appointed members who have the right to vote. They are not only appointed by Congress, but paid by it and removable by it. We believe that the absence of voting power is not determinative for constitutional purposes. The power to be present and to participate in discussions is the power to influence. Normally, a judge, commissioner or juror, or even a corporate director, who is disqualified for conflict of interest, is expected to recuse himself not only from voting but from deliberations as well. In Wiener v. United States, 357 U.S. 349, 355-56 (1958), the Supreme Court stressed that an independent agency should decide matters on the merits "entirely free from the control or coercive influence, direct or indirect \* \* \* of either the Executive or the Congress." In Valeo the Court used similar words in describing the Commission's functions as "exercised

free from day-to-day supervision of either Congress or the Executive Branch" (p. 134). As long as two officers of the legislative branch sit on the Commission there is thus a danger that constitutional requirements will not be met and that, at the very least, the entire law will be subject to further litigation and challenge.

Section 3 includes a number of technical provisions designed to make the new appointment provision in Section 2 dovetail with the requirements of the present law. Thus, the terms of the present commissioners are ended upon the appointment and confirmation of the new appointees. The provision forbidding present officeholders from being appointed is made inapplicable to present Commission members, so that the President would not be barred from appointing incumbents. For the purpose of setting terms on a staggered basis the new appointees would be treated as those first appointed. In addition, certain references to the Secretary of the Senate and the Clerk of the House, made obsolete by our revisions in Section 2, would be eliminated.

Section 4 provides that all actions heretofore taken by the Commission shall remain in effect until modified, superseded or repealed according to law. This reenforces the statement of the Supreme Court that past acts of the Commission and interim acts until the end of the 30-day stay are accorded de

facto validity (pp. 136-37). We understand this to mean, for example, that money disbursed in good faith under the Act will be treated as legally disbursed even if the Commission that disbursed it was not appointed under the Constitution.

Section 5 provides that the laws relating to the Federal Election Commission (Title 2, Chapter 14), contribution limitations (18 U.S.C. 608) and primary and election financing (Title 26, Chapters 95 and 96) shall not apply to any election that occurs after this year except run-offs of elections held this year. The provisions of Title 18 which include basic measures dealing with such matters as contributions by corporations, unions, and government contractors, and with anonymous and cash contributions, would not be affected. In addition, the provisions for tax credits for contributions for candidates to public office (26 U.S.C. 41) and the \$1.00 tax check-off system (26 U.S.C. 6096) would be retained. Thus, potential methods of financing would be available even if there were a halt in the authority to disburse funds. In addition, this provision would not terminate the Commission. It could continue to work on matters relating to the 1976 elections as long after those elections as necessary, or on matters not related to a specific election.

We hope that this cut-off provision will facilitate passage of the bill we have presented. By providing for future

lapse of the now distorted 1974 substantive changes, it is intended to assure--and we believe will be successful in achieving--thorough reconsideration of these problems in 1977 when there will be time to act deliberately and on the basis of experience. There is no time to resolve fundamental differences now. Upon the expiration of the Court's 30-day stay, and until the Congress acts, we will have a legal jigsaw puzzle to contend with. We therefore urge you to pass S. 2987 as a concededly incomplete solution, a least common denominator, a prudent and temporary compromise.

I would like to comment briefly on the other bills that are before this Subcommittee. They are S. 2911, introduced by Senator Schweiker, and S. 2912 and S. 2918, introduced by Senator Kennedy.

We agree with most of the provisions of S. 2911, as far as they go. It is basically designed to provide for Presidential appointment and Senate confirmation of the Commissioners. As I indicated earlier, however, we believe that retaining the Secretary of the Senate and the Clerk of the House perpetuates a serious constitutional issue, and may produce litigation once again impeding administration of the Act. The two non-voting members, however influential, are hardly worth that cost. More importantly, however, we object to the absence

from S. 2911 of any mechanism which will assure reconsideration of the election financing "package" next year. We think it is unreasonable to ask the Congress to accept in haste a new status quo which, in the absence of future congressional action, will perpetuate a system, in an extraordinarily delicate area, which the Congress has never in reality approved.

The second bill, S. 2912 presents the same issue concerning non-voting, ex officio members. Otherwise Title I of S. 2912 differs only in drafting technique from Sections 2-4 of the Administration's bill. Section 102 deals with authorizations for funding of the Commission; we are not prepared to comment on what the proper level should be. Title II of S. 2912 would create a complete new title for the Federal Election Campaign Act of 1971, providing public financing of primary and general elections for the Senate. This is an idea which has had support previously, but not enough to pass both Houses. We are opposed to consideration of Title II of S. 2912 at this time. This opposition is not necessarily on the merits, but for the reasons of time that I have discussed previously.

The final bill, S. 2918, provides that the Comptroller General shall carry out the functions of the Federal Election Commission under subtitle H of the Internal Revenue Code of

1954. Subtitle H includes <sup>Chapters</sup> ~~titles~~ 95 and 96 of Title 26, which are the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act.

This bill would, by its terms, expire on April 30, 1976.

We oppose this bill for both practical and legal reasons. As we understand it, the bill would not terminate the Federal Election Commission. The Commission and other agencies would presumably continue to function as best as they can under Buckley v. Valeo in regard to the Commission's remaining powers under Title 2 and Title 18. Meanwhile, the duties of the Commission regarding matching funds for primaries would be completely shifted, in midstream, to different personnel in a different agency--with the further possibility that another shift would take place next April. (S. 2912 does not concern itself with what would happen after April 30, 1976.) The purpose of this provision is presumably to carry the funding system along while the Congress attempts to give fundamental reconsideration to the law produced by the Valeo decision. We doubt, to begin with, whether that period would be long enough--or, indeed, whether any period can produce intelligent and dispassionate reconsideration in the midst of an election year. Moreover, the temporary transfer does not make much practical sense. It is our understanding from press accounts that some of the early administrative

difficulties associated with the new law are now being overcome by the Commission, and that requests for certification of matching funds are now being processed more rapidly. It hardly seems that this would be an appropriate time to give the job to someone else.

Beyond these practical considerations, significant constitutional problems would arise from this proposal, paralleling the issues raised in Valeo. Both Title 95 and 96 include administrative and enforcement powers similar to those provided under Title 2, such as the power to initiate civil actions (26 U.S.C. 9010, 9011, 9040, 9041), in addition to the power to make administrative determinations as to certification of payments from the Treasury. Assuming a willingness to litigate, we would almost be guaranteed a new challenge as to whether, in light of Valeo, the Comptroller General can assume the functions of the Commission. At the least, we would have another period of uncertainty. In my view the Comptroller General cannot assume these functions of the Commission.

The Comptroller General is appointed by the President, by and with the advice and consent of the Senate. Unquestionably, therefore, S.2918 would assure compliance with the Appointments Clause. It mistakes the Valeo

decision, however, to assume that it is based exclusively upon failure to comply with that relative technicality. The Court was at pains to point out that the issue "touches upon the fundamental principles of the Government established by the Framers of the Constitution" (p. 113). The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3 (p. 132).

The Comptroller General is an officer of the legislative branch, removable only by the legislature (31 U.S.C. 41, 42, 43, 65(d)). See U.S. Government Manual 43 ff. (Revised May 1975). It is true that he had significant duties under the 1971 election law until it was amended in 1974 and the Commission was created. P.L. 92-225, § 308, 86 Stat. 3. These were not, however, as extensive as the powers later assigned to the Commission which would be retransferred to the Comptroller under S.2918. For example, under the 1971 Act the Comptroller could not bring civil

actions. See 2 U.S.C. 438(d)(1) (Supp. III, 1973). Moreover, the Supreme Court never had the opportunity to rule on even the limited powers which the Comptroller exercised under the 1971 law. In the Valeo litigation, the Commission relied for analogous support on the duties of the Comptroller General under the 1971 Act (p. 122, note 165). In response to this contention the Court stated that "irrespective of Congress' designation [of the Comptroller General as legislative], the Comptroller General is appointed by the President in conformity with the Appointments Clause" (p. 122, note 165). If read by itself, this footnote might be taken as a suggestion that conformity with the Appointments Clause is sufficient. However, as I have indicated earlier, the basis for the Court's opinion rests on more than the Appointments Clause, and it would be foolhardy to rely upon this rejoinder to a narrow argument as indicating a narrow scope for the opinion as a whole. To the contrary, the whole thrust of the case is that the doctrine of separation of powers precludes Congress or its officers from both enacting the laws and taking care that they be faithfully executed. Art. II, § 3; pp. 113-17. By assigning the Commission's functions to the Comptroller General, S.2918 would once again violate the doctrine of separation of powers and

"engraft executive duties upon a legislative office" (p. 133). We therefore oppose this bill on constitutional as well as practical grounds.

\* \* \* \* \*

In conclusion, may I again express the hope that this subcommittee will give prompt and favorable consideration to S. . I will be happy to respond, to the best of my ability, to any questions you may have concerning that bill or the other proposals I have briefly discussed.

(See text of S. 2987.)

Mr. SCALIA. I have with me, Mr. Chairman, Jack Goldklang a staff attorney at OLC, and Robert Hickey, Chief of the Elections Unit, Fraud Section, Criminal Division, of the Department of Justice, who will assist me in answering any questions you may have.

On January 30, 1976, the decision of the Supreme Court in *Buckley v. Valeo* cut a gaping hole in the Federal Election Campaign Act of 1971. The damage was so substantial that Chief Justice Burger, in his dissenting opinion, expressed the view that the entire act should have been stricken down, since, as altered by the Court's decision, it was in his view "unworkable and inequitable."

In the aftermath of the *Valeo* case, there are two sets of decisions which must be taken by the Congress, one of which is extraordinarily difficult and the other extraordinarily urgent. The extraordinarily difficult question can be taken verbatim from Chief Justice Burger's dissent—

When central segments, key operative provisions, of this act, are stricken, can what remains function in anything like the way Congress intended?

The Congress will obviously have to address this issue eventually, to determine whether the elimination of certain features that were the quids or quos in a long debated and carefully crafted legislative package leaves a residue which is still an approximation of legislative will. I have no reason to believe—and indeed, the press reports since the *Valeo* decision lead me to doubt—that that process of reconsideration will be any less difficult or protracted than that which produced the 1974 amendments. I may add that I am confirmed in that opinion by the widely divergent testimony I have heard here today. There is just a tremendous spectrum of opinion on what ought to be done with respect to the basic substantive provisions of the election campaign law.

There is, however, a second issue which must be resolved. It can, I think, be separated from the first, if not by logic, then at least by the genius for compromise and practicality which is the hallmark and the prerequisite of our democratic system. Approached with good will and with overriding concern for the national interest by all sides, it need not be as difficult as the first issue. I refer to the immediate, pressing necessity of making such minimal changes as are absolutely essential to prevent the enactment and subsequent partial invalidation of the 1974 amendments from seriously distorting the 1976 election campaigns. Those campaigns are now well underway; they have at all levels—but especially at the Presidential level—been planned and conducted on the basis of certain assumptions which, unless the Constitution requires, it would be a public disservice to upset.

It is essentially the second of these issues which I wish to discuss today, in the context of the administration bill, S. 2987, which Senator Griffin introduced this morning, designed to meet our immediate problems. I will also discuss, as you requested, three other bills—S. 2911, S. 2912, and S. 2918—which in my view, though I hesitate to speak for their sponsors, likewise offer no complete solution for the problems generated by the *Valeo* case but seek to minimize to the extent possible the distortion of the present election campaign.

I will skip, Mr. Chairman, that portion of my text which discusses principal effects of *Valeo*. Essentially they have been discussed already—the gap that has been created in expenditure limitations.

Even in the brief time since the *Valeo* decision, much has been said and written concerning the likely effects of the Court's opinion. By limiting contributions but not limiting expenditures on the part of candidates who have received no Federal funding, the post-*Valeo* law undoubtedly increases the importance of the candidate's personal wealth. By drawing a crucial line between expenditures "controlled by or coordinated with the candidates"—which can be limited—and those which are "independent"—which cannot be limited—the post-*Valeo* law creates a distinction that may be impossible to administer. Perhaps most important of all, by enabling contributions above the established limits to be funneled into campaigns through organizations separate from the candidate himself, the post-*Valeo* law may sap the strength of our political party system and foster elections whose major themes are selected by issue-oriented or narrowly factional groups, rather than by the candidate or even the candidate's political party.

These results may or may not be desirable; they may or may not be as severe as some predict. We will presumably know more about that after the present election campaign is completed. The point is, however, that they render a reconsideration of the Court-modified election laws essential. The total system which now exists is one which, in substantial and important respects, has been designed by no Congress and approved by no President. One of the purposes of the President's legislative proposal is to assure, insofar as possible, this needed reconsideration at a time when it can intelligently and dispassionately occur.

Turning now to the second category of effects of the *Valeo* decision, its effects upon the administration of the Federal Election Campaign Act: The clear holding of the Supreme Court was that the Federal Election Commission's composition violates the appointments clause of the Constitution as to all but its investigatory and informative powers. As you know, a majority of its members were appointed by congressional officers. As long as the Commissioners are not appointed by the President with the advice and consent of the Senate, or by the President alone, in accordance with article II, section 2, clause 2, the Commission cannot perform, the Court said, executive, that is, enforcement functions. These include primary responsibility for bringing civil actions against violators, for making rules to carry out the act, for making administrative determinations and for issuing advisory opinions. The Court mitigated the effects of its opinion by staying its judgment for 30 days. The stay seems to mean that until 30 days from January 30, 1976, the Commission may continue to exercise all of the powers given it with respect to the substantive provisions which have been upheld, including the public financing of Federal elections. We understand from press accounts that this is in fact how the Commission has proceeded.

Beyond the 30-day period, however, the legal situation, if Congress does not act, becomes much more complicated. One safe statement is that there will be plenty of work for lawyers trying to figure out the application of *Valeo* to concrete situations. I will try to review some of the problem areas with you. First of all, to borrow from Mark Twain, the reports of the Commission's total demise are some-

what exaggerated. The Court said that the Commission could unquestionably continue to exercise those powers which are "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees." These powers were also described as "functions relating to the flow of necessary information—receipt, dissemination, and investigation."

As to those substantive provisions of the act which, as I have indicated above, are not invalidated by the *Valeo* decision, we are left in the following enforcement position. Bear in mind that I am not trying to cover every contingency but am only sketching the general outline. It is clear that the criminal provisions of the act can still be enforced. Title 18 of the United States Code includes a number of criminal provisions of the election law which are under the jurisdiction of the Fraud Section of the Criminal Division of the Department of Justice. Section 608, dealing with limitations on contributions and expenditures, has, as I mentioned, been truncated by the Court's decision—but the remainder of section 608 and other provisions over which the Commission has had concurrent enforcement jurisdiction are left unaffected. These include sections 610, 611, and 613-617 of title 18 which deal with contributions by banks, corporations, labor unions, Government contractors and foreign nationals, anonymous contributions, cash contributions and similar matters. Complaints can be filed directly with the Department of Justice or with the Commission. As the law stands now, if the Commission receives a complaint or has information concerning an apparent criminal violation, it can report the matter to the Attorney General. This collection and referral of information seems to be covered by the Supreme Court's permission for the Commission to engage in "functions relating to the flow of necessary information." To use another standard suggested by the Court, it is the kind of function that might be performed by a committee of the Congress, so we think this referral function of the Commission with respect to violation of the criminal laws could continue to be performed.

The Commission, can, however, no longer bring civil actions to enforce the campaign financing restrictions. The law had previously vested in the Commission primary jurisdiction with respect to the civil enforcement of the election laws, including the power to obtain injunctive relief in certain circumstances, and to sue for return of overpayments made by the Secretary of the Treasury. As the Court read the applicable provisions, none of these powers required the concurrence or participation of the Attorney General; they were all held unconstitutional.

If Congress does not act, we will be faced with the question whether the Attorney General can, without further legislation, assume the civil enforcement responsibilities which the Commission has been compelled to abandon. The law contains a provision whereby the Attorney General as well as the Commission can institute civil actions with respect to certain provisions, but he cannot do so entirely on his own. The law requires that he be requested to do so by the Commission.

The judgment required by the Commission—to refer a matter to the Attorney General after notice and hearing—would seem to involve the kind of administrative determination and hearing necessary to insure compliance with the statute that the Court said the Commission could not perform. To be sure, congressional committees can hold investigative hearings and refer violations, if they suspect them, to the Justice Department; but such referral is not, as this provision seeks to make it, a precondition to the executive's enforcement of the law. We must conclude that the provision for Attorney General enforcement only upon Commission referral is invalid. This leaves open the question whether, the referral provision having been stricken, the remainder of the provision, giving the Attorney General enforcement authority, subsists. This is, in lawyer's terms, an issue of the severability of the invalidated provisions, a field of inquiry in which it is fair to say there are no clear answers. The most we can say is that if the Congress does not act, the Department of Justice will seek to use the enforcement mechanisms of 2 U.S.C. 437g(a)(7) without prerequisite Commission referral. Whether such authority will be upheld is uncertain. I may note, however, that this device even if successful, would not apply to enforcement of title 26 and the campaign financing features of the law.

There is some argument that can be made that the Attorney General, apart from any statutory, explicit statutory, authority, has general nonstatutory power to bring civil actions whenever the interests of the United States are involved, and there is some case law which supports such a theory. However, those cases generally deal with situations in which the Congress has been entirely silent on the right to sue. And it is not at all certain whether they could be used in this situation where the Congress has said it is the Commission which will sue, but that provision has been stricken down.

It is at least doubtful whether any general civil enforcement authority of the Attorney General could be used.

Other issues involve the certification of expenses, rulemaking and advisory opinions. Under title 26 of the United States Code, the Commission was charged with the duty to receive and pass upon requests by eligible candidates for campaign money, and to certify such requests to the Secretary of the Treasury for the latter's disbursement. The Commission was also given rulemaking authority and the power to issue advisory opinions upon which the requester was entitled to rely. The Court held in *Valeo* that assignment of these powers to the Commission was inconsistent with fundamental notions of the separation of powers.

The result of this holding is a large gap in administration of the law. Unless the Congress acts, there will be no clear or easy method of handling certification of eligibility for funds. Treasury will, of course, be reluctant to disburse the significant amounts of money involved without following the statutory certification procedure, even when the claim of the candidate seems clear. No one is specifically authorized to take over the prescribing of regulations. The Department of Justice could issue advisory opinions, or at least provide some guidance as to how we intend to enforce the particular provisions that fall within our jurisdiction, which is not all of them. (Indeed,

we did that prior to the creation of the Commission.) But that would not be an adequate substitute for the kind of advice on all aspects of the law that the Commission was authorized to provide.

Based on these broad conclusions, it seems clear to us that legislation is urgently needed, and that temporary inaction—at least with respect to these administrative provisions—is not a realistic option. As I have suggested above, however, it is possible to segregate these features from the more substantive provisions calling for congressional reconsideration; and thus to facilitate the prompt legislative action which is essential.

The purposes of the bill which the President has proposed are twofold. First, to assure the smooth operation of the campaign laws during the current elections by making the minimal administrative changes necessary for that purpose. And, second, to provide assurance that there will occur at a later date congressional reconsideration of the entire election law package, as substantively altered by the Supreme Court's decision. These two objectives are not unrelated. It is our hope that those in Congress who desire major substantive change can, in the interest of prompt action, be persuaded merely to defer that legislative battle, though not to abandon it entirely. As noted in his transmittal letter to the President of the Senate—and, incidentally, Mr. Chairman, I would ask that that be inserted in the record—in order to set an example for the suppression of those controversial issues which can be reserved for next year, the President has on his part refrained from including in his proposal the revision of a clearly administrative feature to which he has strenuous objection, now that the Commission has been held to be performing executive functions—namely, the one-House congressional veto of Commission rules. It is hoped that all Members of Congress—who we know have strong feelings on many substantive features of this law—can likewise be induced to submerge those feelings, for the time being, in the national interest.

Let me now provide an outline of S. 2987.

Senator PELL. Without objection, the letter from the President will be inserted in the record.

Mr. SCALIA. Thank you, Mr. Chairman.

[The message from the President follows:]

#### MESSAGE FROM THE PRESIDENT OF THE UNITED STATES

TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO ESTABLISH THE OFFICES OF MEMBERS OF THE FEDERAL ELECTION COMMISSION AS OFFICERS APPOINTED BY THE PRESIDENT, BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, AND FOR OTHER PURPOSES

*To the Congress of the United States:*

In only two weeks time, unless there is affirmative action by the Congress, the Federal Election Commission will be stripped of most of its powers.

We must not allow that to happen. The American people can and should expect that our elections in this Bicentennial year, as well as other years, will be free of abuse. And they know that the Federal Election Commission is the single most effective unit for meeting that challenge.

The Commission has become the chief instrument for achieving clean Federal elections in 1976. If it becomes an empty shell, public confidence in our political process will be further eroded and the door will be opened to possible abuses in the coming elections. There would be no one to interpret, advise or provide needed certainty to the candidates with regard to the complexities of the Federal

Election law. If we maintain the Commission, we can rebuild and restore the public faith that is essential for a democracy.

The fate of the Commission has been called into question, of course, by the decision of the Supreme Court on January 30. The Court ruled that the Commission was improperly constituted. The Congress gave the Commission executive powers but then, in violation of the Constitution, the Congress reserved to itself the authority to appoint four of the six members of the Commission. The Court said that this defect could be cured by having all members of the Commission nominated by the President upon the advice and consent of the Senate. Under the Court's ruling, the Commission was given a 30-day lease on life so that the defect might be corrected.

I fully recognize that other aspects of the Court's decision and that, indeed, the original law itself have created valid concerns among Members of Congress. I share many of those concerns, and I share in a desire to reform and improve upon the current law. For instance, one section of the law provides for a one-House veto of Commission regulations, a requirement that is unconstitutional as applied to regulations of an agency performing Executive functions. I am willing to defer legislative resolution of this problem, just as I hope the members of Congress will defer adjustment of other provisions in the interest of the prompt action which is now essential.

It is clear that the 30-day period provided by the Court to reconstitute the Commission is not sufficient to undertake a comprehensive review and reform of the campaign laws. And most assuredly, this 30-day period must not become a convenient excuse to make ineffective the campaign reforms that are already on the books and have been upheld by the Court. There is a growing danger that the opponents of campaign reform will exploit this opportunity for the wrong purposes. This cannot be tolerated; there must be no retreat from our commitment to clean elections.

Therefore, I am today submitting remedial legislation to the Congress for immediate action. This legislation incorporates two recommendations that I discussed with the bipartisan leaders of the Congress shortly after the Court issued its opinion.

*First*, I propose that the Federal Election Commission be reconstituted so that all of its six members are nominated by the President and confirmed by the Senate. This action must be taken before the February 29 deadline.

*Second*, to ensure that a full-scale review and reform of the election laws are ultimately undertaken, I propose that we limit through the 1976 elections the application of those laws administered by the Commission. When the elections have been completed and all of us have a better understanding of the problems in our current statutes, I will submit to the Congress a new, comprehensive election reform bill to apply to future elections. I also pledge that I will work with the Congress to enact a new law that will meet many of the objections of the current system.

I know there is widespread disagreement within the Congress on what reforms should be undertaken. That controversy is healthy; it bespeaks of a vigorous interest in our political system. But we must not allow our divergent views to disrupt the approaching elections. Our most important task now is to ensure the continued life of the Federal Election Commission, and I urge the Congress to work with me in achieving that goal.

GERALD R. FORD.

THE WHITE HOUSE, February 16, 1976.

[See text of S. 2987.]

Senator GRIFFIN. Could I ask, are you skipping over now some sections, portions?

Mr. SCALIA. I skipped some earlier.

Senator GRIFFIN. Where are you now?

Mr. SCALIA. I am on page 14, Senator, the bottom of page 14, coming to a summary of S. 2987, the President's proposed bill.

Senator GRIFFIN. I see you are going to discuss something that I commented on earlier—and I am glad to see you are going to discuss it—and that is the omission of the Secretary of the Senate and the Clerk of the House.

Mr. SCALIA. Yes, sir; we will discuss it.

Section 2(a) of the bill provides for the appointment of all Commission members by the President, by and with the advice and consent of the Senate. This is no more than the Constitution, as interpreted in *Valeo*, requires. Section 2(b) includes a number of technical conforming amendments which eliminate language relevant to the system under which Commissioners were previously appointed.

There is one feature of section 2 which was not directly addressed by the Supreme Court. Section 2 would eliminate the Secretary of the Senate and the Clerk of the House as nonvoting *ex officio* members of the Commission. We believe that the spirit of the *Valeo* opinion, and even the letter of the Constitution, require this result. The connection of these two officers to the legislative branch is even closer than that of the present congressionally appointed members who have the right to vote. They are not only appointed by Congress, but paid by it and removable by it. We believe that the absence of voting power is not determinative for constitutional purposes. The power to be present and to participate in discussions is the power to influence. Normally, a judge, commissioner, or juror, or even a corporate director, who is disqualified for conflict of interest, is expected to recuse himself not only from voting but from deliberations as well. In *Wiener v. United States*, the Supreme Court stressed that an independent agency should decide matters on the merits "entirely free from the control or coercive influence, direct or indirect \* \* \* of either the Executive or the Congress" 357 U.S. 349, 355-56. In *Valeo* the Court used similar words in describing the Commission's functions as "exercised free from day-to-day supervision of either Congress or the executive branch." As long as two officers of the legislative branch sit on the Commission, there is thus a danger that constitutional requirements will not be met and that, at the very least, the entire law will be subject to further litigation and challenge.

Senator GRIFFIN. I think that is very interesting and it does raise some questions that I frankly had not thought about. It may well be that it wouldn't be a good idea. I am certainly going to take a look at it anyway.

Mr. SCALIA. Senator, it seems to me a guide to your thinking might be to ask yourself whether you think that such a provision would be constitutional or even, that aside, would be desirable with respect to the Federal Communications Commission or any one of the independent regulatory agencies. Should the Congress have two, albeit nonvoting, members serving as members of this executive agency?

I think the answer is clearly no. I think the Supreme Court would say it is no as a matter of law. In any case, it doesn't seem to me to be worth the risk to get the entire administrative structure of the act kicked over once again.

Senator CANNON. If I may, Mr. Chairman, it seems to me that you have raised also another very interesting question on page 15, where you say "Normally, a judge, commissioner or juror, or even a corporate director, who is disqualified for conflict of interest, is expected to recuse himself not only from voting but from deliberations as well."

Now, that raises a question in my mind as to whether Members of Congress would be able to even enter into a discussion of this bill, if

we have the campaign financing provision in there—and, if so, would they be eligible to vote on it without recusing themselves.

Mr. SCALIA. Senator, I think those provisions do not apply to the legislative process, only to the executive and judicial process.

Senator CANNON. I see.

Mr. SCALIA. You have no worry on that score. Section 3 of the bill includes a number of technical provisions designed to make the new appointment provision in section 2 dovetail with the requirements of the present law. Thus, the terms of the present commissioners are ended upon the appointment and confirmation of the new appointees. The provision forbidding present officeholders from being appointed is made inapplicable to present Commission members, so that the President would not be barred from appointing incumbents. For the purpose of setting terms on a staggered basis the new appointees would be treated as those first appointed.

Section 4 provides that all actions heretofore taken by the Commission shall remain in effect until modified, superseded or repealed according to law. This reenforces the statement of the Supreme Court that past acts of the Commission and interim acts until the end of the 30-day stay are accorded de facto validity. We understand this to mean, for example, that money disbursed in good faith under the act will be treated as legally disbursed even if the Commission that disbursed it was not appointed under the Constitution.

Section 5 provides that the laws relating to the Federal Election Commission (title 2 of chapter 14), contribution limitations (18 U.S.C. 608) and primary and election financing (title 26, chapters 95 and 96) shall not apply to any election that occurs after this year except run-offs of elections held this year. The provisions of title 18 which include basic measures dealing with such matters as contributions by corporations, unions, and Government contractors, anonymous and cash contributions, would not be affected. In addition, the provisions for tax credits for contributions for candidates to public office and the \$1 tax checkoff system would be retained. Thus, potential methods of financing would be available next year even if there were a halt in the authority to disburse funds. In other words, if the Congress decided on reconsideration next year to set up the same kind of a system, the money would be there.

In addition, this provision would not terminate the Federal Election Commission. It would continue to work on matters relating to the 1976 elections as long after those elections are necessary, or on matters not related to a specific election.

We hope that this cut-off provision will facilitate passage of the bill we have presented. By providing for future lapse of the now distorted 1974 substantive changes, it is intended to assure—and we believe will be successful in assuring—thorough reconsideration of these problems in 1977 when there will be time to act deliberately and on the basis of experience. There is no time to resolve fundamental differences now. Upon the expiration of the Court's 30-day stay, and until the Congress acts, we will have a legal jigsaw puzzle to contend with. We therefore urge you to pass S. 2987 as a concededly incomplete solution, a least common denominator, a prudent and temporary compromise.

I would like, if you wish, Mr. Chairman, to comment briefly on the other bills that are before this subcommittee—S. 2911, first of all. We agree with most of the provisions of that legislation, as far as they go. It is basically designed to provide for Presidential appointment and Senate confirmation of the Commissioners. As I indicated earlier, however, we believe that retaining the Secretary of the Senate and the Clerk of the House perpetuates a serious constitutional issue and may produce litigation once again impeding administration of the act. The two nonvoting members, however influential, are hardly worth that cost. More importantly, however, we object to the absence from S. 2911 of any mechanism which will assure reconsideration of the election financing package next year. We think it is unreasonable to ask the Congress to accept in haste a new status quo which, in the absence of future congressional action, will perpetuate a system, in an extraordinarily delicate area, which the Congress has never in reality approved.

I might note that Senator Schweiker in his testimony indicated that he would favor the addition of a cut-off provision to his bill, so perhaps we are not in substantive disagreement on that point.

Senator GRIFFIN. I might just interject here a thought that the presence of the Secretary of the Senate and the Clerk of the House, in part, indicates a desire on the part of the Members of Congress to take advantage of an expertise that has been developed there in the past. It would seem that maybe that could still be done in some way that wouldn't make those people members of the Commission, or not actually participate in the deliberations—but perhaps in an advisory role, or something of that kind.

Mr. SCALIA. I think there would certainly be no problem about that. I think the only obstacle is actually making them members of what has now been found to be an executive agency.

The second bill before you, S. 2912, presents the same issue concerning the two nonvoting ex officio members. Otherwise, title I of S. 2912 differs only in drafting technique from sections 2 to 4 of the administration's bill. Section 102 deals with authorizations for funding of the Commission; we are not prepared to comment on what the proper level should be. Title II of S. 2912 would create a completely new title for the Federal Election Campaign Act of 1971, providing public financing of primary and general elections for the Senate. This is an idea which has had support previously, but not enough to pass both Houses. We are opposed to consideration of title II of S. 2912 at this time. This opposition is not necessarily on the merits, but for the reasons of time that I have discussed previously.

The final bill, S. 2918, provides that the Comptroller General shall carry out the functions of the Federal Election Commission under subtitle H of the Internal Revenue Code of 1954. Subtitle H includes chapters 95 and 96 of title 26, which are the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act. This bill would, by its terms, expire on April 30, 1976.

We oppose this bill for both practical and legal reasons. As we understand it, the bill would not terminate the Federal Election Commission. The Commission and other agencies would presumably continue to function as best as they can under *Buckley v. Valeo* in regard to the

Commission's remaining powers under title 2 and title 18. Meanwhile, the duties of the Commission regarding matching funds for primaries would be completely shifted, in midstream, to different personnel in a different agency—with the further possibility that another shift would take place next April. S. 2912 does not concern itself with what would happen after April 30, 1976. The purpose of this provision is, I suppose, to carry the funding system along while the Congress attempts to give fundamental reconsideration to the law produced by the *Valeo* decision. We doubt, to begin with, whether that period would be long enough—or, indeed, whether any period can produce intelligent and dispassionate reconsideration in the midst of an election year. Moreover, the temporary transfer does not make much practical sense. It is our understanding from press accounts that some of the early administrative difficulties associated with the new law are now being overcome by the Commission, and that requests for certification for matching funds are now being processed more rapidly. It hardly seems that this would be an appropriate time to give the job to someone else.

Beyond these practical considerations, significant constitutional problems would arise from this proposal, paralleling the issues raised in *Valeo*. Both chapter 95 and chapter 96 include administrative and enforcement powers similar to those provided under title 2, such as the power to initiate civil actions, in addition to the power to make administrative determinations as to certification of payments from the Treasury. Assuming a willingness to litigate, we would almost be guaranteed a new challenge as to whether, in light of *Valeo*, the Comptroller General can assume the functions of the Commission. At the least, we would have another period of uncertainty. In my view, the Comptroller General cannot assume these functions of the Commission.

The Comptroller General is appointed by the President, by and with the advice and consent of the Senate. Unquestionably, therefore, S. 2918 would assure compliance with the appointments clause. It mistakes the *Valeo* decision, however, to assume that it is based exclusively upon failure to comply with that relative technicality. The Court was at pains to point out that the issue "touches upon the fundamental principles of the Government established by the Framers of the Constitution." The Commission's enforcement powers, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the laws be faithfully executed," article II, section 3.

The Comptroller General is an officer of the legislative branch, removable only by the legislature. It is true that he had significant duties under the 1971 election law until it was amended. These were not, however, as extensive as the powers later assigned to the Commission which would be retransferred to the Comptroller under S. 2918. For example, under the 1971 act the Comptroller could not bring civil actions. Moreover, the Supreme Court never had the opportunity to rule on even the limited powers which the Comptroller exercised under the 1971 law. In the *Valeo* litigation, the Commission relied for analogous support on the duties of the Comptroller General under

the 1971 act. In response to this contention the Court stated that "irrespective of Congress' designation—of the Comptroller General as legislative—the Comptroller General is appointed by the President in conformity with the appointments clause." If read by itself, this footnote might be taken as a suggestion that conformity with the appointments clause is sufficient. However, as I have indicated earlier, and as a number of excerpts from the Court's opinion indicate, the basis for the Court's opinion rests on more than the appointments clause. It would be foolhardy to rely upon this rejoinder to a narrow argument as indicating a narrow scope for the opinion as a whole. To the contrary, the whole thrust of the case is that the doctrine of separation of powers precludes Congress or its officers from both enacting the laws and taking care that they be faithfully executed. By assigning the Commission's functions to the Comptroller General, S. 2918 would once again violate the doctrine of separation of powers and "engraft executive duties upon a legislative office." We therefore oppose this bill on constitutional as well as practical grounds.

In conclusion, may I again express the hope that this subcommittee will give prompt and favorable consideration to S. 2987. I will be happy to respond, to the best of my ability, to any questions you may have concerning that bill or the other proposals I have briefly discussed.

Thank you.

Senator PELL. Thank you very much. A general question—do you believe it important that our Nation have an independent body, like the Federal Election Commission, to administer and enforce the Federal election laws, or do you believe that this is unnecessary?

Mr. SCALIA. Well, as the President's statement indicated, Mr. Chairman, we do feel that an independent commission is an important feature of the election campaign laws, and we would like to see that feature retained.

The administration bill does not abolish the Commission; although the cutoff applies to the substantive provisions of the act, the cutoff would not apply to the Commission. That demonstrates something of a bias, I suppose, that when the Congress comes to reconsider it, we hope that they will continue the Commission.

Senator PELL. There are a couple of questions, as you know, the Supreme Court left unanswered—more than a couple, I guess. But, first, do you have any views as to the standards which would be proper to employ in determining the difference between a controlled or coordinated expenditure, which the Supreme Court held would be considered a contribution subject to limitation, and an independent expenditure to expressly advocate the election or defeat of a clearly identified candidate, which may be made without limit?

Mr. SCALIA. I guess an honest answer is "No," and probably nobody does. I read it to require that control be something more than what one might call passive simultaneous action on the part of another group. I would not think that the requirement of control would be met if a group assessing a particular candidate's campaign figures out on its own what would help him the most and designs a package that will fit very nicely into that campaign. I would think that as long as it is not

actively coordinated with the candidate himself or his managers, the constitutional right to engage in such activity would continue to exist.

Senator PELL. What are your views with regard to the constitutionality of the law—section 608(F), title 18—setting expenditure limitations on national and State committees of a political party?

Mr. SCALIA. I frankly have not considered the point, Senator.

Senator PELL. Because this touches on the same question that was raised by the Supreme Court decision.

Mr. SCALIA. Yes, sir.

Senator PELL. What are your views on the constitutionality of recommending the public financing of Senate elections without providing for public financing of House elections?

Mr. SCALIA. I see no reason why that would not be constitutional, any less than providing for financing of Presidential elections but not Senate elections.

Senator PELL. Thank you. Senator Griffin?

Senator GRIFFIN. I don't have any questions. I think this is a very excellent statement, and certainly indicates that the administration didn't quickly or lightly put forth the legislation which was introduced today.

I am certainly impressed—and newly interested in that one question about whether or not the Secretary of the Senate and the Clerk of the House should be members.

One suggestion that was made by Senators Kennedy and Scott in their bill, was that instead of having the Commission members—a new member appointed every year, it seems to me they were proposing that to be appointed every 2 years in the off year. And this looks beyond really, I guess, the expiration—and really looks to what we would do next year under the legislation that you are suggesting.

But I just want to indicate, I think that has some merit. It would mean that the appointment of two would be made not in the heat of the campaign year, but in an off year—and presumably the President would appoint one Democrat and one Republican at the same time. That has a little bit of appeal to me—I just want to indicate that.

Thank you, Mr. Chairman.

Senator PELL. Senator Cannon?

Senator CANNON. Thank you, Mr. Chairman. The suggestion was made earlier that the House might possibly act before the Senate and might pass a provision for congressional financing. And my question to you is—you indicated in your statement that one of the reasons you were opposed to that consideration was because of the difficulty of getting it through.

If that should happen in the House, would you be opposed to the addition of that type of a provision in this act?

Mr. SCALIA. I really cannot speak as to the administration's position on the point, Senator. I have no idea.

Senator CANNON. Of course, that might conflict with your theory about this being enacted only until next year and then expiring.

Mr. SCALIA. Well, it seems to me that if you go that way, what you are saying is, we want to have fundamental reconsiderations this year. That is a fundamental change in the law. It seems to me that if you do go that way you are essentially rejecting the approach that the

administration's bill proposes, which is to set aside controversy as much as we can in the interests of getting through this 1976 election with as little disruption as possible.

There is another factor, too, I suppose. One might want to see how the financing scheme works in one election at the Presidential level before one extends it still further. I mentioned at several points in my testimony the value of having some experience to go on when the Congress comes to reconsider the election law next year.

But should such a provision come here from the House, which seems to me an unlikely event, I don't know what the administration's position would be.

Senator CANNON. In light of the Supreme Court's position on the unlimited expenditure possibility of persons not associated with the candidate, either in support of or in opposition to, the suggestion has been made that it might be well to amend title 18 to provide that mass media communications would clearly and conspicuously state whether the communication was authorized by a candidate and, if not authorized the name of the person or organization who financed the expenditure.

Would you care to comment on that?

Mr. SCALIA. Just off the top of my head, without having given it any consideration, the principle seems to me a good one. Obviously one of the dangers created by the Supreme Court's decision is that a candidate's campaign can be run by somebody other than the candidate. That risk could at least be minimized if all campaign advertising that was not formally sponsored by the candidate himself or herself stated specifically who it was that was sponsoring it. It seems to me like a sensible provision.

I am told that section 612 of title 18 already has a provision that, to some extent, meets this need.

Senator CANNON. What I was suggesting was an amendment to section 612—to title 18, section 612—to make it a little more clear as to what would have to take place in that instance.

Mr. SCALIA. Maybe a specific caption that says "Not approved by the candidate" would help.

Senator CANNON. Thank you, Mr. Chairman.

Senator PELL. Thank you.

Senator WILLIAMS?

Senator WILLIAMS. Just two questions, Mr. Scalia. Yours was a very helpful statement.

I wondered—and this might touch on something that Senator Cannon just asked—this separating the independent campaign effort from the candidate's requirement to comply with the ceiling and reporting requirements leaves us where with respect to that independent effort in terms of disclosure and limits?

Mr. SCALIA. Well, disclosure is covered. The Supreme Court did nothing with disclosure requirements as to everyone, so even if you are talking about noncandidates and people totally independent of candidates, the disclosure requirements continue to apply.

Senator WILLIAMS. Are they identical in demand on who discloses and the triggering amounts?

Mr. SCALIA. Yes, sir, I think there is no distinction as to whether one is formally a candidate or not. I think that is correct, Senator—there is no distinction—but I will check it.

[Mr. Scalia subsequently supplied the subcommittee with the following information:]

Under Title 2, section 434(e), every person (other than a political committee or candidate) who makes contributions or expenditures, other than by a contribution to a political committee or candidate in an aggregate amount in excess of \$100 within a calendar year, shall file the information required by § 434 with the Commission.

The Supreme Court construed this provision so that it “imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate.” Slip op. p. 74.

Speaking generally, under section 434 the reporting requirements for committees and candidates apply to amounts over \$1000.

Senator WILLIAMS. How do you deal with this in your bill?

Mr. SCALIA. We try not to deal with it, Senator. That is one of the problems created by the Supreme Court decision as to which there is a multitude of opinions. The whole purpose of our bill is to submerge those issues that are controversial and to do the minimal amount necessary to enable the 1976 elections to proceed.

I am not sure too much can be done with the basic problem you are concerned about. I think the major obstacle is the Constitution. I think the Supreme Court has pretty clearly said that you cannot prohibit the making of these expenditures or the spending of his own money by the candidate himself, so long as he hasn't agreed to accept Federal funds.

That also is a problem, I suppose, with any House or Senate funding bill that you consider. A candidate who does not accept the Federal funding is now, by reason of the *Valeo* decision, free to spend as much as he wants of his own funds. So your funding is going to have to be high enough to make it worthwhile for a candidate of substantial means to accept the funding rather than to spend his own money beyond the funding limit.

Senator WILLIAMS. Well, I am still worried about the opportunity for an independent campaign and how that is going to be accommodated in the whole effort here to purify the electoral process through disclosure and limits. I don't know what the limits are for those independent activities, what the disclosure requirements are. And just on the question of independents, it would seem to me that the Commission, if we continue it according to the Court's opinion, should have authority to appoint hearing examiners, because this is going to have unlimited questions.

Is there any authority in the Commission to appoint hearing examiners or will every case take 8 months?

Mr. SCALIA. I do not believe they have authority to appoint—certainly not administrative law judges. I am not sure whether they would have general authority to hire lawyers called hearing examiners without the necessity for a specific provision to that effect.

Senator WILLIAMS. Well, I think we ought to get into this later on, because one case in the House took how many months?

Mr. SCALIA. Well, I think you are quite right. The issue of whether a particular organization is coordinated with a candidate, or independent from a candidate, which is now a crucial distinction, is a factual determination that is going to be very difficult to make in a lot of cases, I would think.

Senator WILLIAMS. They can be related by osmosis, not by conference and meeting. You see a poor candidate hasn't got a billboard—all you know is that guy needs a billboard.

Mr. SCALIA. He needs a billboard. And I would think there is no way you could stop that. In judging what are independent expenses, I read the Supreme Court's opinion as allowing you to exercise your own judgment about what will help the candidate. All it prohibits is actual active coordination with the candidate himself or with his campaign committee.

Senator WILLIAMS. Well, I don't want to continue any longer—just one further question. As I look at our schedule here in the next 11 days, it doesn't seem to me there is any overriding measure that is before us that would occupy our time to the exclusion of this—I don't know anything about the House.

But if there are problems, has the Department thought in terms of asking for a further stay?

Mr. SCALIA. Yes, we have considered the point, and when the time comes we will take what action is available to us. I hope the Congress won't count on that, because even if we ask for it, there is no certitude that it will be granted. As I have indicated, I think it would really be disastrous if the extension should expire. Things are in a very chaotic state at that point concerning rulemaking and advice-giving, civil enforcement and many other features of the law.

Senator WILLIAMS. Nothing further. Thank you.

Mr. PELL. Following up that thought, you said that if the Congress does not act, the Department of Justice will seek to use the enforcement mechanisms of the present law without prerequisite Commission referral.

In such an event, would Justice be able and willing to commit the necessary resources to the enforcement of those portions of the act not ruled unconstitutional, including issuing the necessary guidelines that would be requested—this is if we do not act in time?

Mr. SCALIA. Senator, we will do our best with the available funds and manpower that we have and within the limits that the courts impose upon us. As I indicated, it is not entirely clear that we will be authorized to do it in any case.

But we think there is a solid argument to be made that we can do it—and we will try.

Senator PELL. Very well. We will do our best to get it through in time, but I think as a practical matter you had better be braced for this eventuality.

Mr. SCALIA. Yes, sir, we are braced.

Senator GRIFFIN. Mr. Chairman, may I?

Senator PELL. Yes.

Senator GRIFFIN. I want to go back to one comment that you made, that even though the lid is off in terms of expenditures by third persons and so forth, the disclosure reporting requirements are still in place.

As I understand it, the provision, section 437(a), provides any person who expends any funds or who commits any act and so forth, supporting a candidate or working for the defeat of a candidate, is required to file a report with the Commission as if such person were a political committee. I understand from counsel that provision was stricken down as unconstitutional by the Court of Appeals of the District of Columbia and was not changed upon appeal to the Supreme Court.

And if that is the case, it seems to me that your earlier statement would have to be modified a little bit.

Mr. SCALIA. No, sir, it is my understanding of the Supreme Court's opinion, my clear understanding of the Supreme Court's opinion, that all disclosure requirements remain binding. Those are not affected at all.

Senator GRIFFIN. Right behind you, Mr. Harris, who I know to be a pretty good lawyer, is shaking his head, so I just want you to know there is a question here which my counsel also—

Mr. HARRIS. Thank you, Senator. Section 437(a) was held invalid by the Court of Appeals. There was no appeal, so it was never before the Supreme Court.

Senator GRIFFIN. That is what I am told by counsel.

Mr. HARRIS. It has been treated as a nullity since the court of appeals decision. The reporting provision for independent expenditures is found on page 17, if you use this yellow book—it is 434(e)—and this provides that every person, other than a political committee or candidate, who makes contributions or expenditures other than by contribution to a political committee or a candidate in an aggregate amount in excess of \$100 within a calendar year, shall file reports with the Commission as if he were a political committee.

So that actually the reporting ceiling on these independent expenditures is lower than for a committee—it is \$100 instead of \$1,000.

But it would require full reporting of all disbursements over \$100.

Senator GRIFFIN. I see.

Mr. SCALIA. Well, I agree that the relevant provision is section 434(e) of title II and not section 437(a), which was held unconstitutional below.

Senator GRIFFIN. I don't know that we have to decide it right now. I am just pointing up that Congress has another reason why they have got to take a real good look at the situation.

Mr. SCALIA. I think that the reporting and disclosure one is not a problem if you take the Supreme Court's opinion on its face, at least. The syllabus says the following:

The act's disclosure and recordkeeping provisions are constitutional. The provision for disclosure by those who make independent contributions and expenditures, as narrowly construed to apply only (1) when they make contributions earmarked for political purposes, or authorized or requested by a candidate or his agent to some person other than a candidate or political committee, and (2) when they make an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate, is not unconstitutionally

vague and does not constitute a prior restraint, but is a reasonable and minimally restrictive method of furthering first amendment values by public exposure of the Federal election system.

I think the Supreme Court, in its opinion anyway, went rather out of its way to—

Senator GRIFFIN. To rule on the question.

Mr. SCALIA. Yes. You could speak to the question whether to call it a holding or not; that is another point.

Senator GRIFFIN. Thank you.

Senator PELL. The subcommittee will recess and will reconvene at 2 o'clock.

#### AFTERNOON SESSION

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

Our next witness is Mr. Philip S. Hughes, Assistant Comptroller General and an individual who has helped this committee many times in the past.

#### STATEMENT OF PHILIP S. HUGHES, ASSISTANT COMPTROLLER GENERAL OF THE UNITED STATES

Mr. HUGHES. Thank you, Mr. Chairman.

I have a very short statement which I would appreciate being able to read, if I might.

Senator PELL. Fine.

Mr. HUGHES. It is on target as well as brief.

Senator PELL. Right.

Mr. HUGHES. We do appreciate the opportunity to appear before you on this very important subject, Mr. Chairman.

You have asked that oral presentations be brief, and mine certainly is. In addition to the statement, however, I would appreciate the subcommittee including in the record our letter of February 5, 1976, to Senator Cannon as chairman of the Senate Committee on Rules and Administration.

Senator PELL. Without objection, it will be included in the hearing record.

Mr. HUGHES. Thank you.

I see no need to reiterate points made in that letter except to emphasize that it will not be possible for the Comptroller General to immediately perform the required authorizations without satisfying himself as to the validity of the audit and investigative procedures followed by the Commission.

In that regard, Mr. Chairman, I might simply mention that one of the reasons that I am here as a witness was that I was the Director of the Office of Federal Elections in the era when General Accounting had some responsibility under the 1971 act. That Office was completely abolished in May of last year, and for a period of several months before that it really was simply existing in a pro forma status, pending the arrival on the scene of the new Commission.

The staff for that function and activity has been dispersed, some of them within the General Accounting Office, to their former duties and

responsibilities. Some, indeed, have gone to assist the new Commission and I am happy that one or two are serving as staff to this particular committee.

My point is that whatever our capacity at one point to perform this sort of function, we are completely out of business and would have to reconstitute some sort of an active organization to do the job.

I would like to add, moreover, that proposals to provide a temporary or interim solution for 30, 60, or 90 days to enable the Congress to deal with more fundamental legislation on the subject of campaign financing do not seem to us to offer a very practical solution to the problem. Experience with this type of legislation in the past suggests that the time for congressional action is more likely to be measured in years rather than either weeks or months.

Furthermore, whatever interim solution the Congress might provide would inevitably further weaken the position of the Commission and extend the interval during which the Commission and its staff would be handicapped in their struggle with the difficult and controversial problems confronting them.

If I could emphasize here, Mr. Chairman, also, and in light of Mr. Scalia's comments just before lunch, that our concern here is a practical and administrative concern, and we do not necessarily subscribe to the legal or constitutional theories that Mr. Scalia mentioned with regard to the propriety legally and constitutionally of the Comptroller General performing these functions.

We simply are dealing with the practical problems of assembling a staff and satisfying ourselves in administrative terms about these things.

Nothing that has occurred since our letter of February 5 has changed our view that the best and most practical course of action would be for the Congress to pass simple legislation along the lines of S. 2911, or title I of S. 2912, or, conceivably, appropriate portions of Senator Buckley's legislation. We have not examined that. We are making the general point of the desirability of reconstituting the Commission by constitutional means.

The Commission would then be able to proceed to administer the law in the manner originally contemplated by the Congress. Any alternative would inevitably disrupt the program which the Congress so recently established. If, after the experience with the 1976 elections, Congress sees the need for a major change in the Federal Election Campaign Act, this could be accomplished in an atmosphere that is not constrained by a severe time limitation within which it is required to act.

That is the end of my statement, Mr. Chairman; and I would be pleased to respond to your questions as best I can.

Senator PELL. Thank you.

I read your letter and I recall the gist was "Please do not give this to us," was it?

Mr. HUGHES. That is the essence, Mr. Chairman.

Senator PELL. What you are emphasizing here.

As you know, S. 2918 proposes to transfer the Commission's functions to the Comptroller General this year. In your own opinion, would

this be a constitutional grant of power? Would you be able to constitutionally exercise the powers?

Mr. HUGHES. I am not in a position to respond definitively, Mr. Chairman, on the constitutional question, though I would think the range of authorities we had and exercised in the 1971 act, and the fact that we successfully performed those tasks, would suggest that the delegation of those authorities to the GAO would be constitutional. Our objection is, again, the practical one of reassembling a staff and satisfying ourselves on the basis for certification, coupled with the hiatus that this interim solution would create and, again, adding the fact that we think the Congress as a whole, not just the Senate, but the Congress as a whole is going to find it very difficult to deal with the many questions that are wrapped up in this legislation within necessary time limits.

Senator PELL. If you were given this responsibility, how long would it take you to insure yourself of the questions that you want?

Mr. HUGHES. I really cannot answer that, Mr. Chairman. We have designedly, I might say, stayed away from the Federal Elections Commission. That was partly on our own initiative.

It was also suggested to us rather firmly that we should get ourselves out of the business as soon as possible, and we have tried to stay away from the Commission. We are not familiar with their procedures, with the amount of work that is being done, and it would be necessary to start anew to review the situation and estimate the time; but I would think it would inevitably be a period of several months to satisfactorily satisfy ourselves as to the propriety of certifying.

Senator PELL. What in your view would be the effect if we went ahead and enacted S. 2918? Give us a sketch or view of the scenario.

Mr. HUGHES. It would seem to me if that legislation were enacted, we would need to immediately pull together, either from within GAO or outside a staff to perform the necessary functions.

We would need to establish some sort of liaison with the Commission to find out what it had done and undertake to either follow through the processes that they have undergone or supplement them if in the judgment of the Comptroller General that was necessary.

Thereupon, we would certify or attempt to certify the propriety of disbursements here and would need to maintain a rather close liaison with the Commission in order that we perform our respective functions in some sort of synchronization. It seems to me that would be a very difficult thing to do within a short span of time, given the nature of the Commission itself, the fact that there are a number of members, each of whom in a sense is equal to all other members. The difficulty of resolving problems and achieving coordination would be considerable.

Senator PELL. Thank you very much.

Senator Allen?

Senator ALLEN. Nothing.

Senator PELL. Thank you very much indeed, Mr. Hughes. You always come to us with succinct testimony—pretty clear views.

Mr. HUGHES. Thank you, Mr. Chairman.

[The letter addressed to Chairman Cannon by Comptroller General Staats follows:]

COMPTROLLER GENERAL OF THE UNITED STATES,  
Washington, D.C., February 5, 1976.

Hon. HOWARD W. CANNON,  
Chairman, Committee on Rules and Administration,  
U.S. Senate.

DEAR MR. CHAIRMAN: During the past several days there have been a number of references in the Congressional Record and in the press relating to the possibility that the Congress might ask the General Accounting Office to undertake responsibility for certifying eligibility for campaign finance funds for candidates for the Presidency of the United States pending legislative action to remedy the constitutional problem set forth in the recent Supreme Court decision with respect to the Federal Election Commission.

I am much concerned about the workload impact of this possible additional responsibility on this Office burdened as we are with ever-increasing responsibilities placed upon us by the Congress. As you undoubtedly know, we have no budget to undertake this assignment. Moreover, we are not familiar with procedures of the Commission as to how it has carried out its auditing and investigations preparatory to certification. As you can well appreciate, I would not want to certify payments without first-hand knowledge on my part to assure eligibility of candidates for the funds requested.

It will of course be necessary for the Congress to enact and the President to sign legislation authorizing the performance of this function by the GAO. I note that one such bill has been introduced in the Senate but it would seem highly unlikely that legislation of this type could be enacted in time to make it possible for this Office to make adequate preparation to assume the responsibility as of the date the Supreme Court has specified.

Under the circumstances, I believe it important that the Congress act within the thirty-day period to pass simple legislation authorizing the appointment of the Commission by constitutional means. The Commission could then proceed with the administration of the law in the manner originally contemplated by the Congress. In the interim, transfer of the responsibility to this Office would be disruptive to the program to say the least and would place upon this Office a responsibility that it is inadequately prepared to take.

Sincerely,

ELMER B. STAATS,  
Comptroller General of the United States.

Senator PELL. Our next witnesses will be representatives of the Federal Election Commission, Commissioners Joan Aikens and Thomas Harris.

**STATEMENT OF THOMAS HARRIS AND JOAN AIKENS, COMMISSIONERS, FEDERAL ELECTIONS COMMISSION; ACCOMPANIED BY ORLANDO POTTER, STAFF DIRECTOR, AND JACK MURPHY, GENERAL COUNSEL**

Mr. HARRIS. Mr. Chairman and members of the subcommittee, my name is Thomas Harris. I am a member of the Federal Elections Commission. Accompanying me is Joan Aikens, who is also a commissioner; and on my right is Orlando Potter, our staff director. On the left is Jack Murphy, our general counsel. On truly difficult questions I will refer to them for answers.

I have a prepared statement with two appendices, and I ask that this be made a part of the record.

Senator PELL. Without objection, the written statement will be included in the hearing record in its entirety.

[The written statement with appendices thereto of the Federal Election Commissioners follows:]

## STATEMENT OF THE FEDERAL ELECTION COMMISSION, FEBRUARY 18, 1976

Mr. Chairman and Members of the Subcommittee, my name is Thomas Harris, and I am a member of the Federal Election Commission. Accompanying me today is Commissioner Joan Aikens. We are pleased to have this opportunity to appear before your Committee on behalf of the Federal Election Commission to offer testimony with respect to S. 2911, S. 2912 and S. 2913.

These bills are addressed to problems which arise, of course, out of the Supreme Court's January 30, 1976 decision in *Buckley v. Valeo*. In that case the Supreme Court upheld certain provisions of the Federal Election Campaign Act and struck down others as unconstitutional. Attached to our statement today is a short summary of the Court's decision which we would like to make part of the record.

The key issue before this Committee today arises from the Court's holding that some of the Federal Election Commission's powers may only be exercised by Officers of the United States appointed in conformity with Article II, Section 2, Clause 2 of the Constitution, and that the present membership of the Commission was not so appointed.

The Court did uphold the disclosure and reporting requirements of Title 2 of the Act and stated that the Commission retained such powers as were necessary to implement those requirements. The Court accorded "de facto validity" to all past acts of the Commission, and further ordered a 30-day stay of judgment in order to give Congress the opportunity, if it were so inclined, to reconstitute the Commission in accordance with the Appointments Clause of Article II of the Constitution, or to provide such other remedy as is deemed appropriate. In granting the 30-day stay, the Court was clearly mindful of the drastic disruption of the political process which would occur with an abrupt termination of the Commission's functions. As the Court stated:

This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act. (Slip Op. p. 136.)

The powers of the Commission which will lapse if the Commission is not re-established include the responsibilities for:

1. Certifying matching funds for presidential elections and convention financing,
2. Writing regulations subject to Congressional review,
3. Giving Advisory Opinions,
4. Investigating Complaints, and
5. Initiating civil suits in appropriate cases.

While it is the Commission's authority to certify presidential matching funds which has received widest notice in the press, we submit that the Commission's interpretative, informational and other functions are of equal, if not greater importance. Thousands of persons throughout the Nation rely upon the Commission's regulations and Advisory Opinions for guidance with respect to complying with this complicated election law. We are daily in communication with national, state and local parties, hundreds of multi-candidate committees, and thousands of candidates and their authorized committees. But the Court said that these important responsibilities—"Functions with respect to the Commission's task of fleshing out the Statute—Rulemaking and Advisory Opinions; and functions necessary to insure compliance with the Statute and rules—informal procedures, administrative determinations and hearings, and civil suits" (Slip Op. p. 131) are improperly reposed with the Commission as presently constituted.

The Commission's activities to date illustrate why the Congress saw the need for such an agency. The Commission has received almost 300 Advisory Opinion requests and thousands of additional requests for clarification of the law. Approximately 200 formal opinions have been issued by the Commission thus far and they have been widely disseminated through a variety of outlets. Further, the Commission has transmitted to Congress for approval six separate sets of regulations to clarify the responsibilities of those subject to the Act. In the area of reporting and disclosure, the Commission has attempted, wherever possible, to ease the reporting burdens of the candidates and committees without compro-

missing public interest in the fullest possible disclosure of relevant campaign financing data.

To date, the Commission has certified for disbursement to the national parties \$1.2 million in convention financing funds. Under an audit and review procedure painstakingly established over the last eight months, the Commission has certified 12 presidential candidates as eligible for presidential matching funds. One additional presidential candidate may be certified today and another in the near future. Since January 1, the FEC has certified Treasury disbursement of over \$7 million in matching funds to these candidates. An appendix describing in more detail the Commission's presidential primary matching procedures and activities is attached for inclusion in the record.

The Commission is continuing to review and certify requests for matching funds during the month of February on an expedited basis. We are continuing to respond to the many requests for clarification of the meaning of the law and for guidance as how best to comply with it. We are reviewing all previously issued opinions in light of the Supreme Court decision and are in the process of notifying persons who received these opinions of any revisions occasioned by the Court's conclusions. Similarly, we are redrafting our proposed regulations in order to bring them into conformity with the Supreme Court's determination.

Two of the three bills presently being considered by this Committee, namely S. 2911 and S. 2912, would provide for a Presidentially appointed Commission to fulfill the responsibilities which Congress originally conferred upon this Commission. These two bills would re-establish the Commission with six voting members appointed by the President, with the advice and consent of the Senate. No more than three members could be appointed from any one party. The Secretary of the Senate and Clerk of the House would serve as ex officio members, as they do now.

If the Congress wishes to preserve the reforms embodied in the 1971 and 1974 Campaign Acts, an independent agency is necessary for their proper implementation. These two bills would achieve this end. We note the particular importance of provisions contained in S. 2912 which would assure an orderly transition should the Commission be re-established.

In addition, S. 2912 provides for both primary and general election public financing for Senatorial candidates. The Commission takes no position on the merits of this public financing proposal. We would note, however, that this proposed expansion of the public financing function would require substantial increases in the Commission's staff and budget.

The third bill before your Committee is S. 2918. It amends Subchapter H of Title 26, United States Code, to transfer the administration of public financing from the Federal Election Commission to the General Accounting Office until April 30, 1976. We respectfully submit that this bill is not a viable alternative to the two bills we have already discussed. The suggested transfer of authority would create numerous special problems which we should like to mention briefly. If this bill is enacted, the General Accounting Office would be immediately responsible for:

1. Verifying the eligibility of candidates attempting to qualify for matching funds by establishing that the candidates have met the initial 20 state \$5,000 matchable contribution requirement as specified under the Act;

2. Creating a mechanism for reviewing all of the submissions which the candidates would make for matching fund certification. To give you an idea of what this entails, one of the presidential aspirants has submitted a request for certification of 150,682 contributions based on 95,390 contributor record entries and a computer print-out which is 11,925 pages long. The contributions and contributor record entries must be cross-checked against one another and against the computer print-out in order to make sure that the candidate has not received "bogus" or "illegal" contributions, or contributions which otherwise may not be matched;

3. Establishing a procedure for reviewing and auditing the monthly reports of candidates;

4. Establishing a continuing audit function to effectively ensure that the repayment provisions of the Act are promptly and accurately carried out; and

5. In addition to all of the above, the GAO would have to establish procedures for certifying major party convention financing.

We respectfully suggest that in the time it might take the GAO to establish these procedures, its authority to administer them would expire under this bill. Also, S. 2918, confined as it is to a transfer of public financing functions, does not address the numerous additional needs of the political process which the Commission is presently meeting and can continue to meet if re-established.

We hope that these comments will prove useful to the Committee in its deliberations. We thank the Committee for this opportunity to appear.

#### APPENDIX A

##### SUMMARY OF SUPREME COURT DECISION IN BUCKLEY V. VALEO

The following provisions of the Federal Election Campaign Act of 1971, as amended (the Act), were found to be constitutional (reference to the slip opinion is by page number only):

1. The limitations on contributions to candidates for Federal office (6-2 vote; Burger, Blackmun, dissenting; pp. 7-33). Specifically, the Court upheld:

(a) the \$1,000 limit on contributions by any person to a Federal candidate in any election [18 U.S.C. § 608(b)(1)] (pp. 17-29);

(b) the \$5,000 limit on contributions by a multicandidate political committee to a Federal candidate in any election [18 U.S.C. § 608(b)(2)] (pp. 29-31);

(c) the \$25,000 limitation on total individual contributions during any calendar year [18 U.S.C. § 608(b)(3)] (pp. 32-33).

2. The disclosure and recordkeeping provisions requiring reporting by candidates, political committees, and individuals or groups which receive contributions and make certain kinds of expenditures (6-2 vote; Burger, Blackmun, dissenting; pp. 54-79). Specifically, the Court upheld:

(a) the \$10 and \$100 thresholds for disclosure and recordkeeping requirements in 2 U.S.C. §§ 432, 434 (pp. 76-79);

(b) the reporting requirement of 2 U.S.C. § 434(e) for any person (other than a political committee or candidate) who makes (1) contributions to influence a Federal election or (2) expenditures for communications which expressly advocate the election or defeat of a clearly identified Federal candidate, other than to a political committee or candidate, in an amount greater than \$100 in a calendar year.

3. Public financing of presidential elections through (a) the presidential primary matching fund, (b) the presidential general election campaign fund, (c) the national nominating convention fund (7-1 vote; Burger, dissenting; pp. 79-103).

Where a presidential candidate has accepted public funding of campaign efforts in an election, the candidate and his/her campaign committees are subject to the national and state expenditure limits applicable to that election [18 U.S.C. § 608(c)(1)(A)] (pp. 102-103).

The following provisions of the Act were found to be unconstitutional:

1. The limitations on expenditures (pp. 7-17, 35-52). Specifically, the Court invalidated:

(a) the limitations in 18 U.S.C. § 608(a) on expenditures by candidates from personal or family funds [5-3 vote; White, Marshall, Rheinquist, dissenting] (pp. 45-48);

(b) the overall limitations in 18 U.S.C. § 608(c) on campaign expenditures by Federal candidates in any election [7-1 vote; White, dissenting] (pp. 48-52). Note the exception above for presidential candidates who accept public funding in any election.

(c) The \$1,000 limitation of 18 U.S.C. § 608(e) on independent expenditures [7-1 vote; White dissenting] (pp. 33-45).

2. The composition of the Federal Election Commission as to all but its informational and certain investigatory powers [8-0 vote] (pp. 103-107).

The Court accorded "de facto validity" to past acts of the Commission, and provided for a 30 day stay of judgment, during which the Commission may validly exercise all the duties and powers which it previously possessed, in order to permit Congress to reconstitute the Commission in conformity with the Appointments Clause of Article II of the Constitution (pp. 136-137).

#### APPENDIX B

##### PRESIDENTIAL PRIMARY MATCHING FUND ACTIVITY

###### I. INTRODUCTION

To date the Federal Election Commission has certified that 12 presidential candidates have met the threshold requirements which qualify them to receive matching funds under the provisions of Chapter 95 of the Internal Revenue Code.

In addition, it appears that two more candidates have met or will soon meet the threshold requirements.

Since August, 1975, the FEC has conducted 14 field audits and reviewed over 300,000 transactions. More than \$7 million in contributions received by the candidates has been certified to be matched by Federal funds. In addition, \$1.2 million has been paid to national committees who will hold presidential nominating conventions.

#### II. THE CERTIFICATION PROCESS—INITIAL FIELD AUDIT

When it is apparent from disclosure reports submitted by a presidential candidate, or other direct communication with the candidate, that the candidate has received contributions necessary to qualify for matching funds, audit teams are dispatched by the Commission to review his or her campaign committee's records. The purpose of these audits is threefold:

1. To determine whether the candidate has received eligible contributions of \$5,000 in each of twenty states.
2. To acquaint campaign committee officials with the provisions of the Act and regulations applicable to matching fund procedures.
3. To assist committee officials in maintaining their bookkeeping and accounting systems in the correct manner to make orderly submissions for matching funds.

Field audit teams have consisted of three auditors who spend approximately two weeks at each audit site. To date, this has required a total of approximately 420 man-days of field work.

#### III. THE CERTIFICATION PROCESS—REVIEW

Considerable care must be taken at all times to ensure that all matching payment requests are carefully examined and certified. Since August 21, 1975, presidential candidates' committees have been required to retain photocopies of contributor checks which serve as documentation of the date, amount of contribution and identity of the contributor. The Commission has determined that this is the most efficient and least expensive way to obtain independent confirmation that the contributions had in fact been made by the individuals recorded in committee records.

The Commission developed Interim Guidelines for federal matching and provided all presidential candidates and committees detailed description of suggested methods of preparing their requests for matching funds.

##### *1. Manpower needs*

The initial submissions and many subsequent submissions have required 100 percent item-by-item review. Between December 3, 1975 and February 12, 1976, a staff of 28 was fully occupied in the certification process. This involved 1,120 man-days of staff time during normal working hours and 1,650 hours of night and weekend work to meet the 15-day certification deadline adopted by the Commission. With one exception, all deadlines have been met. The exception involved a submission of some 100,000 entries and 40,000 photocopied documents, which, because of its considerable deficiencies, had to be subjected to an item-by-item review.

##### *2. Use of other personnel*

In the certification process, the Commission has relied on its auditing staff, other agency personnel, 6 employees of the General Accounting Office detailed to the FEC by the Comptroller General, and an average of 8 temporary employees. A total of approximately 1,700 man-days have been devoted to the certification process.

#### IV. PRESENT PROCEDURES

With the evolution of final FEC certification review procedures, and with developing ability of campaign committees to prepare orderly matching requests, certification now involves three steps:

##### *1. FEC review of supporting documentation*

Every photocopied check or signed contributor card is reviewed to ensure that it is matchable. Contributions are excluded if they are:

A. Nonmatchable items:

- (1) Submitted by corporate check;
- (2) Submitted by labor union treasury check;
- (3) Represent a contribution of another political committee;
- (4) Are not contributions of money (i.e., in-kind contributions).

In these cases, the photocopies are returned to the committee with a notification that they are not matchable. In the case of corporate and union checks, of course, the committee will have to present sufficient documentation and information to establish that unlawful contributions have not been made.

B. Supported by insufficient documentation:

- (1) Lack of documentation for listed item (no photocopy, etc.);
- (2) Contributor's name omitted;
- (3) Mailing address omitted;
- (4) Contributor's signature omitted;
- (5) Cash contribution of \$100 or less not supported by signed contributor card;
- (6) Need for additional documentation to prove contribution was made with personal funds.

Since these are possibly otherwise matchable contributions, such items are returned to the committee with a request for further information.

2. *Review of candidate's master list*

A complete review is also made of the alphabetical list submitted by the candidate's committee. The same criteria are applied to the master list as are applied to the supporting documentation. In addition, the list is examined to insure that the computer program permits the proper aggregation of multiple contributions made by an individual.

3. *Correlation*

A. Use of sampling

Sampling procedures have been used to assure that each item on the master list is backed up by an appropriate document verifying the information on the alphabetical list. Any presentation which shows an excessive error rate (over 3%) is returned to the committee for further preparation.

B. Reductions in payment

If the error rate is found not to be excessive, a calculation of the dollar range of probable error in the candidate's total request is made. That amount is then deducted from the final amount payable to the committee. The committee is given the choice of accepting the reduced amount without recourse, or withdrawing the entire presentation for later resubmission. (This percentage reduction takes place after any non-matchable payments have been deducted.)

V. PRESENT STATUS

The Commission believes that it has developed and implemented certification processing techniques which provide a practical method of making an accurate calculation of the amounts of matching funds due presidential candidates. These techniques, developed during a six-month dialogue between the candidates, their committees, and the Commission, represent a body of new knowledge in this first application of federal matching fund payments to federal candidates.

Mr. HARRIS. I think in my oral presentation, I can skip a good deal of it inasmuch as the ground was covered this morning.

Picking up my statement on the bottom of page 2, I state:

The powers of the Commission which will lapse if the Commission is not reestablished include the responsibilities for (1) certifying matching funds for Presidential elections and convention financing; (2) writing regulations subject to congressional review; (3) giving advisory opinions; (4) investigating complaints—and I would like to stop there and make a correction.

That investigative responsibility would not lapse entirely. Mr. Scalia was correct. I think that the Commission would continue to have the investigative function of the sort that the prior supervisory officials had, plus perhaps the power of subpoena, but at some point

the investigation would have to culminate either in our closing a file or referring it to Justice. I think we could not take any action ourselves unless reestablished as a consequence of the investigation.

The present statute puts considerable emphasis on voluntary compliance even in the case of compliance actions and on some conciliation and the Commission is to refer the matter to Justice or bring a civil suit only if it is able to obtain satisfactory voluntary compliance or conciliation. That role would terminate, I think, if the decision—if the Commission is not reconstituted.

And certainly, item 5, initiating civil suits in appropriate cases.

While it is the Commission's authority to certify Presidential matching funds which have received widest notice in the press, we submit that the Commission's interpretive informational and other functions, are of equal if not greater importance.

Thousands of persons throughout the Nation rely upon the Commission's regulations and advisory opinions for guidance with respect to complying with the complicated election law.

We are daily in communication with national, State and local parties, hundreds of multi-candidate committees, and thousands of candidates and their authorized committees. But the Court said that these important responsibilities—it said:

Functions with respect to the Commission's task of fleshing out the statute—rulemaking and advisory opinions; and functions necessary to insure compliance with the statute and rules—informal procedures, administrative determinations and hearings and civil suits,

All of these the Court said are:

Improperly reposed with the Commission as presently constituted.

The Commission's activities to date illustrate why the Congress saw the need for such an agency. The Commission has received almost 300 advisory opinion requests and thousands of additional requests for clarification of the law. Approximately 200 formal opinions have been issued by the Commission thus far and they have been widely disseminated through a variety of outlets.

Further, the Commission has transmitted to Congress for approval six separate sets of regulations to clarify the responsibilities of those subject to the act. In the area of reporting and disclosure, the Commission has attempted, wherever possible, to ease the reporting burdens of the candidates and committees without compromising public interest in the fullest possible disclosure of relevant campaign financing data.

To date, the Commission has certified for disbursement to the national parties \$1,200,000 in convention financing funds. Under an audit and review procedure painstakingly established over the last 8 months, the Commission has certified 12 Presidential candidates as eligible for Presidential matching funds.

One additional Presidential candidate may be certified today and another in the near future.

Senator PELL. Who would be the one tomorrow? Who will be the one tomorrow?

Mr. HARRIS. Mrs. McCormack is before the Commission tomorrow I believe.

Senator PELL. Thank you.

Mr. HARRIS. I think Senator Clark is the one down the road—Church, not Clark but Church.

Since January 1, the Commission has certified Treasury disbursement of over \$7 million in matching funds to these candidates. The second of the two appendixes attached to the statement sets out in detail the functions the Commission has to discharge and in discharging this matching procedure and establishing the initial eligibility and thereafter the check—the funds for eligibility for matching. That appendix was put in of course to give the committee a basis for judging the feasibility of transferring that operation elsewhere on a temporary basis.

We agree with Mr. Hughes that that is not at all a viable alternative. It would of course be possible to put it in some other agency permanently but I think examination of the procedures and volume of work involved will convince you that it really is not feasible to transfer it elsewhere just as a temporary emergency measure.

The Commission is continuing to review and certify requests for matching funds during the month of February on an expedited basis. We are continuing to respond to many requests for clarification of the meaning of the law and guidance as how best to comply with it. We are reviewing all previously issued opinions in light of the Supreme Court decision and are in the process of notifying persons who received these opinions of any revisions occasioned by the Court's conclusions.

Similarly, we are redrafting our proposed regulations in order to bring them in conformity with the Supreme Court's determination.

If the Commission is reestablished it would be the disposition of its present Commissioners to resubmit these regulations in revised form. We also had in process a regulation dealing with compliance procedures and we contemplate overhauling that very completely and conducting public hearings on the whole subject before going forward with it.

Two of the three bills presently being considered by this committee; namely, S. 2911 and S. 2912 would provide for a Presidentially appointed Commission to fulfill the responsibilities which Congress originally conferred upon this Commission.

These two bills would reestablish the Commission with six voting members appointed by the President, with the advice and consent of the Senate. No more than three members could be appointed from any one party. The Secretary of the Senate and Clerk of the House would serve as ex officio members, as they do now.

This morning strong exception to this appointment as ex officio members was taken by Mr. Scalia. I would like to comment on the validity of his legal objections. The court did not really deal with them at all. I will say though that I think that we have found the representation of the Senate and the House with respect to the Secretary and the Clerk to be helpful. They have served in consultative functions, a liaison function and I am sure that all of the Commissioners would agree with me that we have found their service helpful rather than otherwise.

If the Congress wishes to preserve the reforms embodied in the 1974 Campaign Act we believe an independent agency is necessary for their proper implementation. Both of these two bills would achieve this end. We note the particular importance of provisions contained

in S. 2912 which would assure an orderly transition should the Commission be reestablished.

In addition to that bill, S. 2912 provides for both primary and general election public financing for senatorial candidates. The Commission takes no position on the merits of the public financing proposal. We would note, however, that this proposed expansion of the public financing function would require substantial increases in the Commission's staff and budget. And, of course, if it were extended to cover the House races I would think that a general appropriation would be necessary to meet that additional expense.

The third bill before your committee is S. 2918. It amends subchapter (h) of title 26, United States Code to transfer the administration of public financing from the Federal Election Commission to the General Accounting Office until April 30, 1976.

In our prepared statement we have spelled out a number of reasons why we think that this is not a viable alternative. Since that information is detailed there and in the appendix and since that grant has been covered by Mr. Hughes I would—we will skip that unless the committee has some questions about it.

Apart from the problems and the length of time it might take the Accounting Office to establish matching fund procedures, we would also call attention to the fact that that bill would not take care of the numerous additional needs of the political process which the Commission is now hopefully discharging, the problem of having a Commission so deeply immersed in the process available on a day-to-day basis to give advice to the many people who ask for it. We hope these comments will prove useful to the committee.

We thank you for this opportunity to appear and we will be glad to undertake any questions.

Senator PELL. Thank you.

We will get started with the questioning and then we have to recess and go over and vote and come back, but a critical matter before Congress is the need to provide for the ongoing certification of public matching funds for Presidential primaries occurring today, and I was wondering if you would give us a short explanation of how your certification process will work between now and February 29.

Mr. HARRIS. We are going ahead to certify on an expedited basis and the staff has been working day and night to check the submissions and to prepare the documents for submission to the Commission. We have been certifying weekly since the court decision instead of the former two weekly basis. We will try to clear as much out of the pipeline as we could before the 29th. We have in fact been contemplating meeting on the 28th and 29th which is Saturday or Sunday. We do not know how that would sit with the Treasury but we do intend to try to clear up as much backlog as possible. We have some \$2.5 million pending submissions and how much of that we can clear before the end of the month I do not know but we will do our best.

Senator PELL. If most of the matching funds were certified by February 29 would there be any great disruption if Congress were not able to act until the middle of March?

Mr. HARRIS. Well, I think you are probably as well able to answer that Senator, as I am. Some of the candidates apparently are pretty

short and they are proceeding on a day-to-day basis. Some of them in particular apparently have regarded it even a few days delay as presenting them with some problems.

Senator PELL. But the Commission in any case would not be sent out by the Treasury until later in March, is that correct?

Mr. HARRIS. Perhaps—Mr. Potter, how long does it take them?

Mr. POTTER. Checks are sent out in a matter of 24 hours, I believe, from our certification.

I think the point should be made that the submissions now before us—\$2.5 million are but one small increment in the process. Some of the candidates are in the process of making their fifth submission to us. Others are only on their second. They keep coming in and they collect money for matching and they keep presenting it to us, so we have no way of knowing that they are in fact going ahead. We surmise there is a good deal left to come.

Senator PELL. In other words, all of the funds you have certified as of February 29 would probably be distributed within a couple of days—mailed within a couple of days?

Mr. POTTER. Yes.

Senator PELL. Can you see the Commission making a request to the court for an extended stay of its order?

Mr. HARRIS. Mr. Scalia was asked that this morning and he indicated that they probably would do so if it appeared the Congress was moving and that there was a reasonable basis for applying to the court. The Commission would certainly be disposed to do so but we would enjoy being joined by the Attorney General. I have no doubt it would be more persuasive.

Senator PELL. The subcommittee will recess for a few minutes while the Members go over and vote and be back in about 10 minutes.

[Brief recess.]

Senator PELL. The subcommittee will come to order.

Mr. HARRIS and Ms. Aikens, if the Commission were not reconstituted what would be the extent of its power after February 29? In other words, could you make audits, field investigations—

Mr. HARRIS. Well, that question is addressed by the Supreme Court on page 131 of its opinion. It divided the functions of the Commission into three parts and specified which could be exercised and which could not. The three categories, the first function is relating to the flow of necessary information, receipt of, dissemination and investigation. That is the filing and disclosure and publicity function which they say the Commission could continue to carry on. Functions with respect to the Commission's task fleshing out the statute, rule-making and advisory opinions. Those as they say the Commission could not carry on. The function necessary to insure compliance with the statute and rules, informal procedures, administration determination and hearings on civil suits. Those they say cannot be carried on unless the Commission were reconstituted.

In addition to those functions there is one—the clearinghouse function established in 438(a) of the act to which the Court does not refer but which seems clearly constitutional, that is 438(b). That is the function of serving as a national clearinghouse for information in respect to the administration of elections, letting out contracts, and

conducting studies and research on various matters relating to the elections. That was formerly done by the General Accounting Office and I guess—

Senator PELL. In other words, could your General Counsel continue to issue informal opinions?

Mr. HARRIS. Well, I think we could carry on what they call our informational functions, that is we could answer inquiries of a non-technical nature that do not really involve any complicated construction of the statute but I take it that our advisory opinion function would be out and the opinion of the counsel function would be out. Anything beyond informational, I think we could not do after the 29th.

Senator PELL. How many requests for advisory opinions have you received, roughly?

Mr. HARRIS. Jack, could you—

Mr. MURPHY. Approximately 300.

Senator PELL. How many have you answered?

Mr. MURPHY. We have answered approximately 100 advisory opinion forms. Many of those advisory opinion requests however have been changed in designation to either opinion of counsel or to a simple request to which an informational response can be given by another section of the Commission.

The total output of the Commission in terms of opinions in which we look at some of the tougher issues arising under the act is approaching 200 and we are, in my judgment, rapidly eliminating the backlog of inquiries requiring very careful analysis, and, of course, as you well know, this act left many questions unanswered and we sought to supply those answers where we could.

With the advent of the election year, of course the questions continue to come in at an accelerated rate but our opinion production has also accelerated and I am confident we can meet the needs of the inquiring parties.

Senator PELL. I would mention here in a personal vein I asked for an advisory opinion in connection with charitable gifts on October 22, 1975, and have yet to receive an opinion or reaction on it.

Mr. MURPHY. I will check on that.

Senator PELL. Presumably this is not unique but that is October, November, December, January, February—about 4 months and with the staff of lawyers and the regulations that have been interpreted I would think that greater attention should have been given so that we could get our advisory opinions more quickly. The staff, as you know, as has been pointed out to the Congress, is substantial and I think a 4-month delay for an individual Senator to get a reply back is too long.

Mr. MURPHY. I will assure the Senator that I will check on that the first thing when I return to my office this afternoon.

If the question had to do with the tax issue, it is highly possible that that matter was referred to IRS.

Senator PELL. Nothing to do with taxes. It had to do with charitable gifts and whether they should be included in the amount of funds that will be counted against your total.

Mr. MURPHY. We have a number of questions which are even more senior than that one and I think I speak for the Commission when I say we regret the delays but the Senator will understand that some of these issues are extraordinarily sensitive and the Commission has cautioned me to proceed with great care lest we issue views that prove to be ill-advised. I will certainly check on this inquiry personally but, in general, delays have been occasioned by the vast work effort we have been under and I regret to note a number of inquiries have gone unanswered for protracted periods and, as I say, we are eliminating that backlog but it is a backlog which we have to live with.

Senator PELL. What would you think is the average delay? Mine is 4 months. What would be the average?

Mr. MURPHY. It is very difficult to say because we had so many when we started. There were approximately 100 inquiries when I was appointed on May 1 and we have answered many of those; and, of course, although there are a few that may go back as early as June which pose questions of such difficulty or involve such policy determinations that the Commission has been unable to resolve them to this date and there is no way of averaging because we are looking at a startup period during which we faced a backlog—at the outset of which we faced a backlog.

We expect, I should tell you, to have an average turnaround time on opinions of 4 to 5 weeks and I hope that process will be in place within the next 6 weeks.

Senator PELL. Provided you are in place.

Mr. MURPHY. Yes, sir.

Senator PELL. Does the Commission provide legal advice to those people who do not have legal standing to request advisory opinions?

Mr. MURPHY. Yes, sir, we have. We have supplied opinions of counsel to persons other than the candidates, committees or incumbents who are given standing for advisory opinions under 437(f) of the title.

The opinion of counsel has been a handy vehicle for supplying persons with information that they might not otherwise receive. We also have of course an even more informal information function through the circulation of brochures and through seminars and a lot of telephonic communication.

Mr. HARRIS. The statute provides for advisory opinion only by an individual holding Federal office, a candidate for a Federal office or a political committee. It seemed to us that anyone who was covered by this statute might be in violation should have the same standing. The statute does not read that way so all we can do is give them an opinion of counsel.

Senator PELL. What forms of advice does the Commission offer—what other forms of written opinions, verbal opinions, or informal opinions?

Mr. HARRIS. We will not give a verbal opinion except on something very simple and clearcut like—what form do we fill out or when is the next filing date or something like that. Apart from that the most formal would be an advisory opinion, then an opinion of counsel, then we have a lot of routine letters that simply go out of the information section.

We also put out a good many publications. We have a simplified version of the statute. We put out a weekly publication. We have a lot of general informational stuff, thus far.

Senator PELL. Do you believe that it is important that we have a separate Federal Election Commission this way? Do you believe that the function could be carried on by the Department of Justice and General Accounting Office?

Mr. HARRIS. Well, I think we reason that the Commission was created at the time it was dissatisfaction with enforcement by the Department of Justice over the years. The Department was probably faced with the problem that it would have to proceed with indictments, criminal prosecution, or else do nothing. I think that some kind of civil enforcement, particularly in the case of the innumerable inadvertent filing violations is desirable. There needs to be some agency that can oversee compliance with the filing requirements and with the complexities of the law and bring some corrective to bear short of a criminal prosecution.

If you look at the annotation to the United States Code under the provisions of the Election Act which the Department of Justice has been administering, it is evident that they have been very few and far between and since there was no civil enforcement agency this means not much enforcement.

I do think that is a sound idea, to have an independent Commission that would be on this civil enforcement function.

Senator PELL. Has the Commission determined which of its advisory opinions are no longer valid because of the Supreme Court's opinion? Have you been able to go through the opinions you have made to determine which ones of them have been invalidated by the Supreme Court decision?

Mr. HARRIS. Yes.

Mr. MURPHY. That was done immediately, Mr. Chairman, and we have communicated or are in the process of communicating with all persons who have received those opinions to indicate where modification of the Commission's views is occasioned by the Court's holding. Once that is done we plan to publish in the Federal Register and otherwise distribute a general statement reviewing the modifications of all of the opinions issued heretofore so that in one place any person who has been reading the opinions will have the amendments set forth and can read the previous opinions in light of those amendments.

Senator PELL. Will this be done in the next week or so?

Mr. MURPHY. I am not certain it will be done in the next week, but it will be done by the end of the month.

Senator PELL. So then a list of the opinions that have been invalidated will be made available to the public at one place?

Mr. MURPHY. That is correct.

Senator PELL. Thank you.

Senator Griffin?

Senator GRIFFIN. If you had a request for an advisory opinion that started out: "We request you provide us with an opinion of whether or not the contributions hereafter described will be charged to campaign limitation" in light of the Supreme Court decision, that would be pretty easy to answer now, would it not?

Mr. MURPHY. The question involved contribution limitations which will remain in force.

Senator GRIFFIN. I see, but isn't this an expenditure?

Mr. MURPHY. Yes.

Senator GRIFFIN. The question does relate actually to charged to campaign expenditure limitations. That is whether or not certain charitable contributions would be charged against the expenditure limitation of the candidate. I understand in the Supreme Court decision there would not be any question about that.

Mr. MURPHY. Except for publicly financed campaigns. Of course, there is no expenditure limitation.

Senator GRIFFIN. That would be a Presidential campaign?

Mr. MURPHY. That would be correct.

We have identified—we immediately identified six pending advisory opinion requests which were utterly obviated by the Supreme Court opinion; but the typical request involved several issues, not just one, and will have to be therefore partially answered by analysis by the Commission and partially answered by a statement that the Court's opinion—

Senator GRIFFIN. Are you continuing to issue advisory opinions even though the Supreme Court says you are not constitutionally able to do that?

Mr. MURPHY. The Commission decided to suspend its advisory opinion function pending a determination by Congress as to what its status should be. I am, however, continuing to issue opinions of counsel.

Senator GRIFFIN. Thank you, Mr. Chairman.

Senator PELL. Senator Cannon.

Senator CANNON. Thank you, Mr. Chairman.

Have you had the opportunity to analyze the proposal that was made by Congressman Hayes today?

Mr. HARRIS. I read it about 2 minutes ago, Senator.

Senator CANNON. I note you have a press release there. I will skim through some of it briefly.

Among other things he, of course, proposes the continuance of the Commission to provide for Presidential appointments, and that all matters arising out of or relating to the regulation of political campaigns shall be within the exclusive jurisdiction of the Commission.

I presume that you would not argue with that.

Another one would prohibit the Commission from making investigations on the basis of anonymous complaints, and would require the Commission to attempt to reach a conciliation agreement before civil or criminal proceeding may be initiated.

He has also suggested that the Commission propose advisory opinions of general applicability as rules; and a majority vote of all members before authorizing investigations, civil proceedings, or referrals to the Justice Department.

He would propose putting a yearly limit of \$1,000 on individual contributions to a political committee; and limiting contributions by political committees to contributions of \$5,000 annually to other political committees.

He suggests full reports and disclosure of independent expenditures, including clear statements on communication of the name of the person who made or financed such an expenditure.

He also has proposed that corporations and political committees be prohibited from soliciting employees who are union members, and that an employee be permitted to make a voluntary checkoff in favor of a union political committee, if a corporation provides such a system for its political committee. That is sort of a rough sketch of what Congressman Hayes has proposed, and a number of these items are items that I know have been under discussion at the Commission and in the Senate.

I wonder if therefore you would want to comment or feel you are able to comment on any of these at the present time.

Mr. HARRIS. What we have here is simply a press release. I would think that it would be inappropriate for the Commission or the individual Commissioners to comment in the substantive proposal, in any event. It would, of course, be proper for us to comment, I think, on those that go to the administration of the act, but the Commission obviously has not seen those or taken any position on them.

I could give you a personal reaction to some of them and perhaps Commissioner Aikens could, too.

For example, the provision that a major vote of the entire Commission would be necessary to authorize investigations. That prevails now under the procedures which we have adopted. That is our internal rules—rules of internal procedure which are required before starting an investigation.

Senator CANNON. Has that been in effect for some time?

Mr. HARRIS. Yes; it has been in effect at all times—since August, at least. The anonymous complaints, I know, is a touchy issue. It is my personal feeling that an agency which has investigative authority must be able at least to look at anonymous complaints and, if they seem detailed with circumstances and something that can be easily checked out that they ought to take a look.

Certainly they better find something before going very far with such an investigation; but it is my personal view that they should not be ruled out entirely as a basis of proceeding. Maybe some of the other Commissioners do not agree with that.

I think an awful lot of wrongdoing has been encouraged where the investigation started simply on the basis of an anonymous complaint and the distinction should be drawn between starting an investigation and how far you go with it on that basis.

Senator CANNON. Well, you are, of course, aware of the case that this comes out of? Let me ask, what was the outcome? Did the Commission get its fingers burnt on that?

Mr. HARRIS. I do not think that the investigation has ever been finally concluded. I think very likely that it will turn out that there was nothing to the charge but it was exceedingly specific, naming people that this item or that could be checked with, banks that this item or that could be checked with. It was not just some kind of general shotgun allegation.

Senator CANNON. I missed your opening testimony and I do not know whether you commented on the issue.

Mr. HARRIS. Senator, if I might, could I hand you a letter which Chairman Curtis sent to Mr. Hayes which in effect dealt with the matter about which you were just inquiring?

Senator CANNON. Thank you.

In your testimony you discuss the question of the possibility of financing congressional races.

Mr. HARRIS. No. I simply state that the Commission took no position on public financing. Obviously, we would need some more staff if we had to get into a particular matching fund operation which is very—which does take a lot of staff.

Senator CANNON. Incidentally, what is the situation now with respect to all of the Presidential candidates? Have all the known candidates qualified so far?

Mr. HARRIS. Mr. Potter, do you want to address that? I think we have two candidates who generally are considered to be in the field but not yet qualified, Mrs. McCormack and Senator Church. I think we are expecting a submission with regard to Mrs. McCormack tomorrow. I do not know where Senator Church stands.

Mr. POTTER. We have qualified 12 candidates already and funds totaling \$7.7 million have been certified to those 12 candidates.

Senator CANNON. What is the current status of the fund? How much money is there now pending?

Mr. MURPHY. There was \$62 million back in December. That is my recollection, Senator. They anticipate another \$1 million in January, \$2 million in February, \$7 million in March and \$20 or \$22 million in April. That was a conservative estimate from the Department of the Treasury.

We hear this morning that the early returns suggest that the percentage of people checking off has increased by 2 percent over the last year, which would suggest the amount in the Treasury would far exceed the estimate that I have just given you.

At this time, we do not anticipate any problem with the adequacy of the funds available for primary matching. There is a question of which you may be aware as to whether or not, if the primary funds which come out of one of the three funds were exhausted, whether Treasury could dip into the general election fund or into the congressional financing convention fund to borrow money pending the arrival of the April returns to assure there was adequate money for continued primary financing.

There was a division of opinion within Treasury about this.

We have argued that they should consider borrowing if that becomes a necessity but we do not think the reality will arise. Our assessment of the financial situation is that sufficient money is available to meet the needs of the candidates on an ongoing basis without any fiddling with funds within the Department of the Treasury.

Senator CANNON. Do you have any estimate now as to the total amount of the funds that will be used in the primary and matching formula, and also, the total amount of the general fund?

Mr. MURPHY. No, sir.

Of course, with 12 candidates qualified, the potential there for disbursements of \$60 million, since each candidate would have theoretically a right of up to \$5 million, and to date we have disbursed \$7.7 million or whatever, something in that range; two candidates have dropped out as the Commissioner has pointed out. There simply is no way of projecting what the demand will be because obviously with

the primary process, there will be some candidacies rising and some falling, and that, of course, will have an effect on their contributions and the amount of money they can put in for matching.

Senator GRIFFIN. What happens when a candidate drops out as far as the money is concerned that has already been provided to him?

Mr. MURPHY. We have provided in the regulations, pursuant to title 26, that the money which is given to candidates on a matching basis may be used only for what are called qualified campaign expenses. That is a phrase of art which appears in the statute.

It is my view that money expended to date for such expenditures was properly expended, and the candidate who drops, for whatever reason would be under no obligation to repay. He has under the statute a right to retain an unexpended disbursement for a period of up to 6 months after the election to wind up his costs. We have not reached any analysis as to whether or not an early termination date should apply where a candidate has dropped out far ahead of the terminal point of the primary process, but in any event, the act provides for repayment provisions by an equitable formula.

You take the amount of funds contributed on a private basis and the amount of moneys disbursed by the Treasury and see what ratio they bear to one another.

You will see then what, at the end of the campaign and windup stage, the candidate has in his account at that time; and you apply the ratio to that balance, and repayment is occasioned pursuant to the ratio. That is an awkward way of putting what the act puts more elegantly.

Senator GRIFFIN. Is there a requirement for repayment?

Mr. MURPHY. Yes, sir.

Senator GRIFFIN. Do you suggest any need for revision or change in that as long as we are now looking at the act again?

Mr. MURPHY. I am unprepared—

Senator GRIFFIN. It might be something that you would want to give some thought to, to make a submission.

Mr. MURPHY. Yes, sir.

Senator GRIFFIN. Thank you. I am sorry.

Senator CANNON. So that in any event, then, there is no possibility of a candidate not being liable for repayment of all unused funds that he got through the Government source as a matching source.

Mr. MURPHY. I think that is a proper statement, Senator. Repayment of all of the moneys left over. I think that is a correct way of characterizing it.

Senator CANNON. I wish you would check that and see, because if there is not that obligation, I think we would want to make absolutely sure that it does exist—a candidate could not retain matching funds that he received from the Government, and simply because he had not used all of that amount.

Mr. MURPHY. Yes, sir. That was the clear thrust of the statutory language.

Senator CANNON. That was our intent, I know, when we drafted it; but if there is any loophole in it, I think we ought to know so we can correct it; and if you feel from the legal standpoint that under any circumstances that a candidate could conceivably not be required to

repay some of that money that he did not use, then we would like to know about it at this time and do something.

Mr. MURPHY. I want to make sure that the record is clear that that is not my view. I hesitated in responding to you because I thought you might be suggesting repayment of all moneys therefore paid out and not repayment of just the moneys left over. Obviously there is a repayment necessitated with respect to moneys left over.

Senator CANNON. Thank you.

Mr. HARRIS. I think both of the candidates who have gone on inactive status so far have leaned over backward to avoid any problem of that sort. In neither case did they totally withdraw; but I know that Governor Sanford called up and asked us to stop payment immediately; and I believe that Senator Bentsen did the same.

Senator PELL. Senator Clark has an amendment on the floor and asked me to ask you these questions in his behalf.

There being some controversy over FEC actions undertaken on the basis of unassigned complaints, does the FEC now have the authority, and should it have the authority, if it does not, to undertake investigation under its own initiative? And would not any enforcement agency that did not have this authority be hopelessly handicapped?

Mr. HARRIS. To some extent I have answered that already. The statute is certainly clear that the Commission is to proceed on any of three bases:

One, upon receiving a complaint. Now, there our procedures do require a notarized written complaint. Second, on the basis of any referral from the Clerk of the House to the Secretary of the Senate; or, third, if it has reason to believe.

Now, under that last category, I would think we would justify instituting an inquiry even upon the basis of a newspaper story if we read in the newspaper that someone has confessed to a criminal violation within the last 3 years. I would think that under that alone, it would be enough for us to take a look, and we have proceeded on that basis.

Senator PELL. Based upon your experience, what kind of shape would the various Senate or House campaigns be in if you lose your authority on February 29; and more importantly, what would be the condition of those campaigns next April or May if there is no one around to issue regulations or advisory opinions?

Mr. HARRIS. I think the candidates and their committees have openly welcomed the opportunity to get a day-by-day advisory on the meaning of the act, on how to comply with the filing requirements. There has been a very steady flow of requests for information. I think they would be seriously inconvenienced and perhaps even put in jeopardy without that.

The candidates and their committees, I may say, have been very cooperative and anxious to avoid a violation insofar as our experience has gone. We have found that all of the Presidential candidates are extremely cooperative and meticulous as to how their books should be kept; as to what kind of reports should be filed; that sort of thing.

Senator PELL. Thank you. Any other questions?

[No response.]

Senator PELL. Thank you very much indeed for being with us and for your presentation, and we hope to get legislation out in time to be of help to you, and we will do our best.

Ms. AIKENS. Thank you, sir.

Senator PELL. Our next witness is Mr. Fred Wertheimer of Common Cause.

**STATEMENT OF FRED WERTHEIMER, VICE PRESIDENT OF OPERATIONS, COMMON CAUSE, ACCOMPANIED BY JACK MOSKOWITZ, LOBBYIST**

Mr. WERTHEIMER. Thank you, Mr. Chairman.

I am accompanied by Mr. Jack Moskowitz, a lobbyist with Common Cause.

I have a prepared statement that I would like to submit for the record and deliver a brief portion of it now.

Senator PELL. Without objection, your statement will be inserted in the record. You may proceed.

[The written statement of Mr. Wertheimer follows:]

**STATEMENT OF FRED WERTHEIMER, VICE PRESIDENT OF OPERATIONS, COMMON CAUSE**

Mr. Chairman, I want to thank you and the other members of this committee for the opportunity to testify today. Common Cause believes that Congress must act promptly to reconstitute the Federal Election Commission. We believe that any temporary half measures are unnecessary and unacceptable to the goal of effective administration and enforcement of campaign finance laws. We strongly oppose any efforts to put a short term limit on the life of the Commission, which has only been in operation since April 1975.

We also strongly oppose the President's recommendation to Congress on Monday that all of the federal campaign finance laws in this country be terminated following the 1976 elections, to ensure their full scale review. We do not believe this represents a constructive proposal designed to assure meaningful review of campaign finance laws in the next Congress. Rather we believe it sets the stage for killing vital legislation which in many respects has not yet even had the opportunity to be tested in one national election. Termination is totally unnecessary. Congress always has the right to modify and review this legislation.

The Supreme Court's opinion in *Buckley v. Valeo* made it clear that there is no constitutional problem with a Federal Election Commission whose members are appointed by the President and confirmed by the Senate in accord with the Appointments clause of the Constitution. The Supreme Court practically invited Congress to enact a statute to re-create the FEC in this manner. In granting a 30-day stay of its judgment with regard to the FEC, the Supreme Court explained: "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains (slip opinion at 136).

As suggested by the Court, the constitutional deficiencies of the Federal Election Commission are easily rectified. Common Cause urges Congress to enact a bill to provide for appointment of the six members of the FEC by the President subject to Senate confirmation. The President has said that he supports such a legislative approach.

This concept is not new. In both 1973 and 1974, the Senate passed campaign reform bills that established independent election commissions with all of their members appointed by the President.

The Supreme Court has made it clear that there is no need to return to the old, corrupt system of campaign financing that was dominated by abuses of big money and excessive secrecy. The Court upheld the essentials of campaign finance reform—disclosure, contribution limits, and public financing—and estab-

lished a foundation on which to build a constitutional Federal Election Commission. But the FEC is essential. This country's previous experience with campaign financing legislation demonstrates that without enforcement these laws become meaningless shells.

Much of what has been done to clean up our election process will ultimately be undone if the Federal Election Commission is not re-created. Failure to re-create the FEC will be an invitation to return to the corruption of the Watergate days and before.

An overwhelming number of members of Congress voted for the Federal Election Commission in 1974. If Congress fails to re-create the FEC, the public will have to read its failure to act in only one way—that Congress is not serious about ridding our electoral system of corruption. The crisis of confidence in government sparked by Vietnam and Watergate has continued to grow in the post-Watergate years. Our system of representative government should not be asked to bear the burden of another demonstration of unwillingness or inability to act on the nation's problems. Millions of citizens have demonstrated their commitment to a new way of financing elections in America by providing \$1 each for the Presidential Election Campaign Fund. It would be inexcusable to fail to establish a mechanism adequate to oversee the first Presidential election paid for by their tax dollars.

Prompt re-creation of the Federal Election Commission will serve three important national interests:

(1) It will demonstrate that Congress recognizes that public confidence and meaningful enforcement depend on independent enforcement of campaign finance laws.

(2) It will prevent any interruption in disbursement of public matching funds to Presidential candidates.

(3) It will insure a continuity in the enforcement of the law and guard against arbitrary and selective enforcement.

#### *The Need for Independent Enforcement*

Common Cause has repeatedly stated that an independent federal election commission is absolutely essential to any effective system of campaign financing legislation. The long history of almost total non-enforcement of campaign financing laws in this country is well known and well documented. This abysmal record of non-enforcement was a major underlying cause of the Watergate and other campaign financing scandals that have shaken this nation in recent years. It is hardly surprising to find candidates and their agents ignoring or circumventing the law when history would give them every assurance that their violations would go unpunished. It is hardly surprising to find that citizens have become gravely disillusioned by such a process.

The highlights of the record on non-enforcement are as powerful today as they were in 1974 when Congress first created the Federal Election Commission. The first campaign financing legislation enacted in this country was the Tillman Act of 1907, which prohibited national banks and corporations from making any expenditure in connection with any election to public office (34 Stat. 814). In 1911, the Tillman Act was amended to require Senators and Representatives and political committees to file reports of receipts and expenditures before and after elections (37 Stat. 25). The first prosecution was not brought until nine years after passage of the original Act.

The Federal Corrupt Practices Act of 1925 required candidates for federal office and political committees to file contribution and expenditure reports with the Secretary of the Senate and the Clerk of the House (43 Stat. 1070). A person who failed to comply was subject to criminal sanctions. In its 47 years of existence, almost no prosecutions were brought under the 1925 Act. Responsible officials shirked their duties. In 1954, Attorney General Herbert Brownell issued an order addressed to U.S. Attorneys that took the position that the Department of Justice would not act in the absence of a request from the Clerk of the House or the Secretary of the Senate. During this period, the Clerk took the position that his duty was to receive the reports but not to make referrals to the Department of Justice.

In *Buckley v. Valeo*, the U.S. District Court found, "The Secretary of the Senate, the Clerk of the House and the Department of Justice have largely failed to enforce prior campaign financing practices legislation." *Buckley v. Valeo*, Jt. Appendix (Vol. II—part A), Dist. Court Finding 139.

No one seriously questions the fact that the history of campaign finance laws in this country is a history of non-enforcement. It is equally clear that absent effective oversight and enforcement, campaign finance laws will not work.

The Federal Election Commission was created to fill a 70-year vacuum. Its reconstitution with strong enforcement powers is essential to making our new campaign financing laws a reality and not an illusion. Any retreat from independent enforcement can only serve to further erode public confidence.

#### *The Need for Disbursal of Public Funds to Presidential Candidates*

In upholding the public financing provisions of the Federal Election Campaign Act of 1971 as amended in 1974, the Supreme Court found: "Congress was legislating for the 'General welfare'—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising (slip opinion, at 85)."

The Federal Election Commission has established and implemented a system of certification of Presidential candidates and disbursement of public matching funds. These candidates have based their campaigns on the availability of public financing. Their ability to communicate with the voters and the other values noted by the Court is at stake.

It is essential that the system of disbursement that is now in place not be replaced or interrupted. By the same token, the need for action on the certification powers cannot be allowed to serve as a convenient excuse for gutting the Federal Election Commission. Common Cause strongly opposes any effort—whether temporary or permanent—to replace the existing certification mechanism. The "take-the-money-and-run" proposal to give the General Accounting Office "temporary" responsibility is unworkable and unacceptable. It would also set the stage for a refusal to deal with the issue of reconstituting the Commission with enforcement powers. The Comptroller General has opposed this shortsighted scheme in a letter to the Democratic and Republican leadership in both Houses.

The Comptroller General has pointed out: ". . . we have no budget to undertake this assignment. Moreover, we are not familiar with the procedures of the Commission as to how it has carried out its auditing and investigations preparatory to certification. As you can well appreciate, I would not want to certify payments without firsthand knowledge on my part to assure eligibility of candidates for the funds requested . . . transfer of the responsibility to this Office would be disruptive to the program to say the least and would place upon this Office a responsibility that it is inadequately prepared to take (emphasis added)."

There is no conceivable justification for Congress to make a sudden shift of this \$100 million program from an agency that is prepared to handle it to one that is not.

#### *The Need to Insure a Continuity of Enforcement*

Holding the 1976 federal elections without the Federal Election Commission is like playing baseball without an umpire or football without a referee. It is an invitation for chaos. The interests of all participants in the upcoming federal elections are best served by uniform, rather than ad hoc administration. The Supreme Court granted its 30-day stay of its judgment with regard to the FEC because of the obvious public interest in not interrupting the continuity of enforcement.

The Commission to date furthermore has been forced to operate on inadequate interim funding. Its initial authorization expired in June 1975 and has never been renewed. Despite the fact that both the House and Senate passed 18-month authorization bills in June, 1975, no conference has ever been held during the last eight months to work out the differences between the two bills and enact the Commission's authorization into law.

The Commission has recently stated that based on its operating experience it would need approximately \$9 million for the 18-month period ending on December 31, 1976. This is a small price to pay for honest national elections.

We urge that in reconstituting the Commission, Congress also provide an adequate authorization to assure that the Commission has the funds needed to carry out its responsibilities.

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It is time for Congress to do what the Senate has already done on several occasions—to pass a bill creating a properly constituted Federal Election Com-

mission. Nothing less will solve the problem. Attempts to delay or switch authority temporarily will invite chaos, confusion, and corruption. We do not believe that the public will accept this. Nor will they fail to understand how easily it could have been avoided.

Mr. WERTHEIMER. Mr. Chairman, we want to thank you and the other members of this committee for the opportunity to testify today. We believe that Congress must act promptly to reconstitute the Federal Election Commission. We believe that any temporary half measures are unnecessary and unacceptable to the goals of effective administration and enforcement of campaign finance laws.

We strongly oppose any efforts to put a short-term limit on the life of the Commission, which has only been in operation since April 1975.

We also strongly oppose the President's recommendation to Congress on Monday that all of the Federal campaign finance laws in this country be terminated following the 1976 elections, to insure their full-scale review.

We do not believe this approach is necessary or appropriate here. We think that review should take place without such a provision.

The Supreme Court's opinion in *Buckley v. Valeo* made it clear in our view that there is no constitutional problem with a Federal Election Commission whose members are appointed by the President and confirmed by the Senate in accord with the appointments clause of the Constitution.

We believe the Supreme Court practically invited Congress to enact a statute to re-create the FEC in this manner.

In granting a 30-day stay of its judgment, the court explained, and I quote, "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the court sustains."

As suggested by the Court, the constitutional deficiencies of the Commission are easily rectified.

Now, we urge Congress to enact a bill to provide for appointment of the six members of the Federal Election Commission by the President, subject to Senate confirmation. This concept is not new, particularly not new to the Senate and in both 1973 and 1974, the Senate passed campaign reform bills that established independent election commissions with all of their members appointed by the President.

Much of what has been done to clean up our election process will ultimately be undone if the Federal Election Commission is not re-created. Failure to re-create the FEC will be an invitation to return to the corruption of the Watergate days and before.

Prompt re-creation of the Federal Election Commission will serve three important national interests.

It will demonstrate that Congress recognizes that public confidence and meaningful enforcement depend on independent enforcement of campaign finance laws.

It will prevent any interruption in dispersal of public matching funds to Presidential candidates.

It will insure a continuity in the enforcement of the law and guard against arbitrary and selective enforcement.

We have repeatedly urged that an independent Federal Election Commission is essential to any effective system of campaign finance

legislation. A long history of almost total non-enforcement of campaign financing laws in this country is well known and well documented.

In *Buckley v. Valeo*, U.S. District Court found, "The Secretary of the Senate, the Clerk of the House, and the Department of Justice have largely failed to enforce prior campaign financing practices legislation."

I do not think anyone seriously questions the fact that the history of campaign finance laws in this country is a history of nonenforcement. And it is equally clear that, absent effective oversight and enforcement, campaign finance laws simply will not work.

We are also opposed and think it would be a serious error to replace the existing certification mechanism for public financing on an either temporary or permanent basis. That has been discussed here by the Comptroller General's representative and others. We do not think it would work. We do not think it would be effective, and it certainly could become a basis for failing to act to reconstitute the Commission.

I would just like one last point, Mr. Chairman.

The Commission to date has been forced to operate on inadequate interim funding. Its initial authorization expired in June 1975 and has never been renewed. Despite the fact both the House and Senate passed 18-month authorization bills in June 1975, no conference has ever been held during the last 8 months to work out the differences between the two bills and enact the Commission's authorization into law.

The Commission has recently stated that based on its operating expense, it would need approximately \$9 million for the 18-month period ending on December 31, 1976. We think that is a small price to pay, and we urge that in reconstituting the Commission Congress also provide an adequate authorization to insure that the Commission has the funds it needs to carry out its job.

Thank you very much, Mr. Chairman. We would be happy to answer any questions.

Senator PELL. Basically, the legislation before us you would support is S. 2912; correct?

M. WERTHEIMER. We would support that or any other bill which moves to reconstitute the Commission with enforcement powers.

Senator PELL. And also which includes public financing.

What, in your view, would be the cost of public financing for the Senate and House elections if they were added in a Presidential year?

Mr. WERTHEIMER. I think that really depends on what kind of provision the Congress passes. If it passes a full grant system, the cost would be substantially higher than if it passes a matching system. I think any proposal, any specific proposal, could be costed out if you assumed you were going to limit the amount of public funds that can be made available; and I would imagine that any proposal that does would have to come forward with and should come forward with the figures.

Senator PELL. Senator Griffin.

Senator GRIFFIN. I am not sure I understand. You favor what Senator Kennedy and Senator Scott are proposing, and that is to include in legislation that we are going to pass within the next 11 days, presumably, provision for public financing of Senate-House campaigns?

Mr. WERTHEIMER. Senator Griffin, we have always been on record in favor of congressional financing, and we continue to be in favor of such legislation.

Senator GRIFFIN. Do you think we should do that at this time for this election?

Mr. WERTHEIMER. We think if the Congress is capable of acting in this period of time that it should be done.

Senator GRIFFIN. For the 1976 elections?

Mr. WERTHEIMER. We think that could be done. I would think that there are clear cost limitations that apply if you are going to take the funding out of the dollar checkoff which might limit the amount of money one made available to congressional elections in this year, and that might be one form of limitation that would apply. We do not think that congressional financing should be enacted with respect to the primary elections in 1976.

Senator GRIFFIN. Does it not concern you that public financing in 1976 could be a windfall for those who have filed within the filing dates and that others who may have run on their own, had they known there was public financing available, did not so file?

Mr. WERTHEIMER. Well, I think a large part of that problem is dealt with really if you are just focusing on the general election. I would add that one of the reasons we have overwhelmingly supported congressional public financing is that we feel that it would be very helpful in increasing competition in the political system and I think that would certainly be the case in the congressional public financing passed here.

Senator GRIFFIN. I do not think you addressed yourself to one of the major concerns that has been expressed here about the Supreme Court decision. That is, the lifting of any limit whatsoever of what individuals or special-interest organizations or associations, like Common Cause, could spend in a campaign.

Do you want to comment on that?

Mr. WERTHEIMER. Yes; we are very concerned about that. We do not spend money in support of or in opposition to candidates. That question has been raised by a U.S. Senator.

Senator GRIFFIN. You do distribute educational information, though, about people, do you not?

Mr. WERTHEIMER. Yes. That question was raised when Chairman Hayes directed the GAO to do an investigation and audit of us in 1972, which they did over a 3-month period and issued a report and reached the conclusion that in fact we were not spending money in support of or in opposition to candidates. We think there are a variety of ways of attempting to deal with this problem of independent expenditures. It is a problem.

Senator GRIFFIN. Are you willing to put that over until next year? You did not address yourself to that.

Mr. WERTHEIMER. No. In my testimony, Senator, I addressed myself to the election commission only.

Senator GRIFFIN. That is what I thought.

Mr. WERTHEIMER. No; I think that Senator Cannon, for example, mentioned some provision that Chairman Hayes might have had that dealt with the truth in advertisement to make clear that where independent expenditures were coming from, whether they were authorized

or not, whether on their face they explained that they were unauthorized and whether or not they were made in consultation with the candidate in conjunction with the standards set forth by the Supreme Court, and we think that kind of activity should be looked at and be acted upon and we would be happy to look at any language on any provision like that.

We do think it is a problem that should be dealt with.

Senator PELL. Senator Cannon.

Senator CANNON. Thank you.

You stated that you do not take positions in support of or in opposition to candidates. But how do you arrive at positions on legislation? Is your membership consulted about positions on legislation?

Mr. WERTHEIMER. Yes. We poll our membership annually. We have a 60-member elected board of directors, which is elected by the membership at large. All policy decisions, the major policy decisions of the organization are voted upon and under the ultimate control of the board of directors.

Senator CANNON. So that if you poll your membership annually you do not necessarily include a poll on all of the matters?

Mr. WERTHEIMER. Not every detail, Senator; no.

Senator CANNON. As a matter of fact, this issue here, when it arose a short time ago, was that decided by the board of directors, or was that decided by you, or by who?

Mr. WERTHEIMER. That was decided by our staff with information going to the board of directors.

The position we have taken here is simply the position we have taken for some time now; that there should be an independent Federal Election Commission and we have testified on that on numerous occasions in the past and we have also testified on numerous occasions in support of congressional public finance.

Senator CANNON. I am aware of that.

What I was trying to get at was the point here of the precise problem before us and the time frame. I am wondering how you make those decisions and who makes them, which has the priority.

Is it principally the extension of the Federal Election Commission, or should that be tied together with the congressional financing?

Mr. WERTHEIMER. To us the first priority is the Federal Election Commission. That is the first priority.

Senator CANNON. Has that been determined by your board of directors?

Mr. WERTHEIMER. That has been determined by the chairman of our board, the president of our organization, in conjunction with the staff.

Senator CANNON. With the staff? Not with the board of directors?

Mr. WERTHEIMER. Not that specific one.

The board of directors, every member of the board of directors, was notified about this policy.

Senator CANNON. How many staff do you maintain?

Mr. WERTHEIMER. I think we have approximately—I could get you the exact figures—I think we have about 80 or 85 paid staff and then we have a couple of hundred volunteers who come in the Washington area on a weekly basis; and then we have many, many volunteer citi-

zens around the country who are not paid, but volunteer at the local level.

Senator CANNON. Is the organization itself registered as a lobbyist?

Mr. WERTHEIMER. We are registered as a lobbyist and our lobbyists are registered as lobbyists.

Senator CANNON. How many registered lobbyists do you have?

Mr. WERTHEIMER. We have—again I would like to get to the exact figures—I think we probably have about 14 or 15 people registered as lobbyists. Sir, I would have to get you the exact figures on that, Senator.

Senator CANNON. Incidentally, on page 7 of your statement you refer to the money the Commission would need. You said they need approximately \$19 million here.

Mr. WERTHEIMER. No.

Senator CANNON. That was your testimony, but your printed statement says \$9 million. Which is it?

Mr. WERTHEIMER. It is \$9 million. I am sorry, \$9 million was the figure they used. I think they have submitted it to this committee.

Senator CANNON. In the event that the House should act first, should vote and include congressional elections, then you would see no problem with us taking that up and making it an issue on the floor here?

Mr. WERTHEIMER. No, Senator.

Senator CANNON. Did you hear my reasoning before?

Mr. WERTHEIMER. I was in the back, but I heard general reasoning.

Senator CANNON. Do you find any problem with any of that?

Mr. WERTHEIMER. I think our view on those would really depend on what the specific provision said; that is, of course, what we would do immediately after the chairman, at whatever point he introduced the bill, we would intend to review the bill. We would be willing to comment at that point.

Senator CANNON. Thank you, Mr. Chairman.

Senator PELL. Thank you.

Thank you, very much.

Mr. WERTHEIMER. Thank you.

Senator PELL. Our next witness is Mr. George Agree, director, Committee for Democratic Process.

#### STATEMENT OF GEORGE AGREE, DIRECTOR, COMMITTEE FOR DEMOCRATIC PROCESS

Mr. AGREE. Thank you, Mr. Chairman. I have a short statement.

This is an awkward moment for everyone interested in this subject. The action of the Supreme Court on January 30 confronts us with a completely new situation.

On the one hand, the Court radically undermined the entire conceptual framework of the reforms that had been developed over the past several years.

It would seem to me, in listening to some of the testimony here today, that either this point is not understood or is not agreed to; but it looks to me, Mr. Chairman, as though in many respects we are in the situation of crazy cats still running after we have left the cliff. We do not yet know that some of the ground is out from under us.

This suggests to me a need for long and careful deliberation about the future structure of American campaign finance legislation.

On the other hand, by depriving the Federal Election Commission of its power to disburse public subsidies as of February 29, the Court has created a need for swift and effective action.

It seems to me that we must do immediately what needs to be done to continue the certification and disbursement of Federal campaign funds, and that we should do a little more than that as possible until there has been much more time to think.

I do not like the idea of a Presidential Commission. I fear it. Apparently, in 1974, the Congress feared it. The danger of its membership and staff being stacked by a two-term President, especially one with a Senate controlled by his own party, is very real. And a Chief Executive could use the powers this would give him to discipline members of his own party as well as to harass the opposition.

But an independent agency of some kind has long been needed merely to provide effective administration and enforcement of disclosure laws. And one is now also needed for the 1976 elections to go forward.

On balance, I favor reconstitution of the Commission with Presidential appointments. Also on balance, because I think again the question has to be looked at in the long-range perspective somewhere along the line, I think the life of the Commission should be limited to the purposes of this election. And I would feel safer if its powers could also be limited to the minimum necessary for the distribution of subsidies and the implementation of the disclosure provisions.

Specifically, I think it would be useful to deprive such a temporary commission of any powers relating to the remaining expenditure ceilings—those that a candidate must accept as a condition of receiving Federal funds, first, because I think these ceilings are now meaningless because they will be vitiated by the formation of independent, unauthorized committees.

I would interject that requiring such committees to identify their statements would likely have no effect at all on public reception of their messages.

Second, because the enforcement of expenditure ceilings is a swamp from which, once entered, there is no way out. It requires investigation of everything—and beyond. The mere need to define what fell within the limits was the source of most of the Commission's troubles with the Congress, and its dogged pursuit of precise categories in the swirling waters of American politics impaired its credibility elsewhere as well.

Mr. Chairman, since the Court's decision will have effects beyond the immediate problem of the Commission, I ask your indulgence to mention a few items the committee might wish to consider in its future deliberations.

First, we are thrown off balance by the fact that efforts to achieve public financing in our country were promoted as a means of replacing, rather than supplementing, private funding; and of putting a lid on, rather than helping to meet, the rising costs of political communication.

Now, the invalidation of individual, group, and candidate expenditure limits shatters these pretensions. Every precedent in the history of campaign finance regulation supports the expectation that unchecked streams of big money will flow again, albeit somewhat indirectly through the independent committees.

And I expect that the transparency of any evasion that may be involved will be no more barred through its prompt acceptance as political convention than the earlier \$3 million limit on Presidential committees prevented the spending of 10 and ultimately 20 times that amount. Whatever the law permits will be done.

Those familiar with foreign experience with public financing and with American literature on the subject will be neither surprised nor dismayed by this new situation. In all democracies other than ours, the principal reason for introduction of political subsidies was to supplement, not curb, the existing supply of private money because of the latter being insufficient to meet the rising costs of legitimate campaigning, and I stress the word "legitimate." This is, and has been, the case in the United States also; and we should be grateful to the Court for compelling us to face up to it.

Hopefully, renewed perception of these realities will incline us to think again of Government funding as a way to erect financial floors under candidates, rather than of lowering ceilings over them.

Next, Mr. Chairman, I want to make a few observations about the possibility of matching grants for Senate and House campaigns. I believe that they would be preferable to flat grants precisely because of the vitiation of even voluntarily accepted expenditure limits.

If independent commissions are going to be able to operate on behalf of candidates, then the flat grants, with no ceilings, do not make much sense.

But they may create a problem which I suspect the Congress will wish to avoid; under the \$25,000 limit on aggregate contributions, it could be possible to give each of 100 candidates a \$250 contribution and to have them, all of them, matched. This would mean \$25,000 in taxpayer subsidies for the electoral choices of a single donor, and it would represent an automatic doubling of the cloud of any lobbyist seeking to assure his ability to get past the receptionists in offices on Capitol Hill.

The problem could be avoided by providing that contributions would be matched only when received from persons residing in the district or State of the candidate. This would not permit interdistrict or interstate flow of contributions—nor should it, but it would confine the power to double one's influence to the candidate's own constituents.

Finally, Mr. Chairman, all public financing systems pose problems of fiscal control. When public funds are given to private persons or organizations for their own use, safeguards are necessary to insure that they confine the use of this money to the purposes for which it was given—that they not line their own pockets or floors with it, and that the manner of its deployment in the political wars is not inimical to the public interest.

The possibility of effective safeguards has a direct relationship to whether there is full or partial public funding of candidates. It would

be difficult in the extreme for any agency to monitor and evaluate every expenditure made in the course of a single campaign, and impossible in a national election involving hundreds of campaigns.

Even to make the effort could have disasterously chilling effects on political behavior. Yet such an effort would be required in a system of full public funding, in which not to make it would open a wide door to misappropriation and abuse—and finally to scandals that would undermine the system itself.

On the other hand, partial public funding makes it possible to segregate subsidies from other moneys, and to require that they be used only for easily verifiable kinds of expenses such as metered postage, broadcasting time, billboards, and telephone charges.

At the same time, salaries, personal expenses, petty cash, and other difficult to trace disbursements could be excluded from payment with tax money. In such a system, it would even be feasible not to give candidates the subsidy funds at all, but to have them submit certified bills for approved expenses which the Government then would pay directly, as is now done in Puerto Rico.

At issue is whether the administering agency will be compelled to give detailed scrutiny to every action taken in a campaign, or only to those involving use of taxpayer funds—whether, in effect, it will have an impossible assignment involving serious danger of stifling the political process, or will work toward the attainable objective of underwriting robust competition and enhancing the openness of our democracy.

Thank you, Mr. Chairman.

I would be happy to answer any questions.

Senator PELL. Thank you, Mr. Agree; an old friend of this committee and the chairman. I am very grateful for your thoughts. You certainly are very informed and qualified to speak on this subject.

The legislation in front of us, the bills, which one would you favor; the simple extension?

Mr. AGREE. The simple extension would be one clear limit. I believe Senator Schweiker accepted such an amendment.

Senator PELL. Do you agree that the one offered by Senators Scott and Kennedy would be a little too complicated?

Mr. AGREE. I would suggest that the Senate and the Congress do the least necessary at this time until there has been time to think through all of the implications of the Court's decision.

Senator PELL. Senator Cannon?

Senator CANNON. Thank you, Mr. Chairman.

You raised some certainly very interesting and very serious questions, I am wondering do you have any possible solution to the very big loophole that you pointed out, and that is the independent expenditure?

Mr. AGREE. Senator, I am not a lawyer, but as I have read the Court's decision—and I have read it several times—I do not think that loophole can be closed. My own impression is that we are just going to have to adjust to the fact. It seems to me that what the Court has said, in effect, because it based its opposing of contribution limits on the corruption element, it seems to me what the Court has said, in effect, is that if the Members of Congress feel that politicians may be corrected

by contributions, they may limit what contributions candidates can receive, but they may not limit anything else that other people may do.

What this does, it seems to me, is set up a situation in which other people will do things. I could go out tomorrow and organize a national committee for independent action and I believe raise unlimited sums which could then be spent in Nevada campaigns or Rhode Island campaigns or anywhere, just so they were not coordinated with the candidate. I do not think that this can be limited and I think it may be unwise to try. It might just provoke other litigation.

Now, if I may, I will make one more point on that.

This puts candidates in a very difficult position with respect to the contribution limits. Many candidates over past years have been worried about millionaires coming in and blitzing them, spending a lot of money on media. In the past it has been possible for a candidate to go to his millionaire friends and say, I am in trouble, help me. After this decision, it seems to me that he has to wait for them to perceive that he is in trouble and to decide to help him out. It is not a very good situation.

Senator CANNON. I must say that I agree with you there. I think it poses a very difficult problem.

You, for example, could only contribute to me \$1,000 per election, and yet you could go out on your own and spend \$100,000 on my behalf if you wanted to do it. That is kind of a distinction without a difference, it seems to me.

Mr. AGREE. Senator, the question to me seems to be are you going to somehow try to find loopholes in the Court's decision and try to plug up this business, despite the rather emphatic statements the Court has made and the overwhelming vote in favor of that part of the decision, or are you going to say, well, okay, big money is in, but let us see to it that there is a lot of other money so that big money would not have such a deleterious effect.

I would much prefer that second approach. It is the approach the politicians have followed in other countries. It is the approach that most American political scientists who have written on the subject suggest.

If you are asking me do I see any way to stop that big money, my answer is, I do not. Maybe there is, but I suspect there is not, and I think it is hardly worth the effort.

Senator CANNON. Of course, under the Court's decision if we went to the public financing aspect, then we could get back to the limitation on expenditures, but it would go only by the candidate itself and still would not apply to the independent person or to the committee.

Mr. AGREE. Senator, I have an opinion on what I am about to put to you, but I would be interested in yours.

Suppose this law had been in effect in 1972, this Court decision, in effect in 1972. President Nixon had accepted the \$20 million and the limit.

Would that have barred Governor Connally or others from going out and raising millions in addition for the Democrats for Nixon or some other committee and spending it?

I do not believe it would have.

Senator CANNON. As long as it was not in collusion with the campaign committee.

Mr. AGREE. And it would not have to be.

Senator CANNON. Well, I think it poses a very serious problem, but I do not know whether I go along with you on the idea that we ought to stop and think about it because it seems to me that there is not too much thinking left to be done. The choices are relatively clear: you are either going to have to go down this road as the Supreme Court has outlined or we are going to have to go to the public financing where we can limit the amount that an individual can spend; and if we go that route, then I do favor your suggestion.

It ought to be on a matching basis rather than an outright grant.

Mr. AGREE. Actually, I would prefer the vouchers, but I think it is a little premature to consider it.

Senator CANNON. Thank you, Mr. Chairman.

Senator PELL. Thank you very much, Mr. Agree. You have been very helpful to us.

Mr. AGREE. Thank you.

Senator PELL. Our next witness is Mr. Herbert E. Alexander, director, Citizens' Research Foundation.

#### STATEMENT OF HERBERT E. ALEXANDER, DIRECTOR, CITIZENS' RESEARCH FOUNDATION

Mr. ALEXANDER. Thank you, Mr. Chairman.

If my full statement could go into the record, I would just skip through here.

Senator PELL. Thank you very much.

The full statement will be inserted into the record as if read.

Mr. ALEXANDER. Thank you.

[The written statement of Mr. Alexander follows:]

#### STATEMENT OF HERBERT E. ALEXANDER, DIRECTOR, CITIZENS' RESEARCH FOUNDATION

I am happy to respond to the invitation of Senator Pell dated February 11, 1976, to testify. My statement is my own and does not necessarily reflect the views of members of the Board of Trustees of the Citizens' Research Foundation, which as an organization does not take positions on public policy.

In its decision in *Buckley et al. v. Valeo et al.* the Supreme Court has done much to relax some of the rigidities that the Federal Election Campaign Act Amendments of 1974 imposed upon the electoral process. The decision preserved the most desirable features of the law—public disclosure of campaigns for Federal office and public funding of Presidential campaigns—while saving the political system from its most questionable features—the limitations on candidates' campaign expenditures and the ceilings on spending by individuals and by groups independent of the candidate. The decision followed closely the recommendations of the American Bar Association, and adhered to the findings expressed in the political science literature over the years, that expenditure limits would have serious consequences for the political system in terms of their impact upon the relationships between all the actors and institutions—candidates, campaign committees, political parties, interest groups, and volunteers—active in elections.

The decision reopens some lingering questions about how far election reform should go, and what its effects are upon the political process. The 1974 law attempted to do too much, affecting every aspect of political campaigns, their organizational and financial structure. The law was so complex that the Federal Election Commission was inundated with requests for advisory opinions, questions asked by numerous Members of Congress among others, who for fear of

violating the law, asked for an interpretation before taking action. This fear threatened to reduce some spontaneity in the political system and in filtering down to state and local party and other committees would have lessened the enthusiasm of citizens to volunteer their services.

In part, the FEC was not at fault; it was implementing a badly-drawn law which left too much unclear and too much open to interpretation. On the other hand, too many FEC advisory opinions were too narrow and too legalistic, without consideration of their impact on the system. In retrospect, the FEC would have done better to defer so many ad hoc AO's which did not cohere to any controlling goals, and to have spent its first months writing the essential regulations that still do not exist after nine months of operation. What both the 1974 Amendments and the FEC lacked was a philosophy about regulation that was both constitutional and designed to keep the process open and flexible rather than rigid and exclusionary. I hope the Supreme Court decision revitalizes our perceptions about what democracy and pluralism are all about. I hope it leads us to understand that floors, not ceilings, are what are needed; that not too much but possibly too little money is spent to achieve a competitive politics in this country; that there is no value more important than citizen participation, including financial participation, in politics; and that citizen participation is often achieved most effectively through group activity—whether groups represent corporations, labor unions, trade or professional associations, or issues—that should be encouraged, not discouraged, from participating in the politics of our democracy.

Because money has always been a scarce resource in politics, parties and campaigns are dependent upon volunteers to provide free services. A harsh price must be paid for regulation in an activity such as politics, because politics so depends upon citizen volunteers. Candidates and parties cannot as readily pay salaries to workers to ensure compliance, as can corporations and labor unions and others regulated by government. Thus, government regulation of politics, while essential, must be calibrated to achieve the fine balance between keeping politics fair and law-abiding, and overburdening or stifling it. This subtlety was never understood by many advocates of reform, and the Court decision should lead to more balanced perspectives on the potentially serious side-effects of over-regulation. The government's role should be to regulate, not to dominate the electoral processes as the FEC came to do by building an administrative law the average citizen could not cope with. The goals in a democracy should be to encourage political dialogue and citizen participation; at times it is unavoidable that this gives certain advantages to wealthy individuals or special interests. Only those with too little faith fear the full play of ideas and of competition. Unfortunately, many of the far-reaching reforms that were enacted in 1974 tried to restrict and limit certain forms of electoral participation rather than to enlarge it. Some of the reforms became part of a politics of exclusion that should not be acceptable to a democratic society. To help overcome the advantages of wealth, the Supreme Court properly saw that limited government funding of politics should be available to assist candidates and political parties to meet the costs necessary in a system of free elections.

The findings that both the structure and enforcement powers of the FEC are unconstitutional gives Congress the opportunity not only to reconstitute the Commission but also to modify remaining sections of the law. Clearly there is continuing need for a government agency with statutory authority to regulate disclosure and public funding, and to initiate enforcement by referring cases to the Justice Department.

I assume that an independent FEC appointed wholly by the President, making rules affecting campaigns for Congress, would not be acceptable to many. Hence I would suggest a return to something like the 1971 FECA permitted, but with a reconstituted FEC, reduced in staff size and authority, as the single unified agency receiving disclosure reports for campaigns for the President, for Senate and House. I would not return to the tripartite arrangement in which the Secretary of the Senate and the Clerk of the House also have some responsibilities. Not a single state among the 49 with disclosure laws requires legislative agents to receive disclosure reports. Neither would I permit Congressional veto of regulations and opinions, nor require Congressional approval of them. Rather, I would write a law with clear Congressional intent and less discretionary power for the FEC.

It is true that the Constitution requires that each House be the judge of its own members. A FEC need not 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.

The architects of the 1974 law based their arguments for government funding of political campaigns on two interrelated theories. One was that government funds should be provided within the framework of campaign expenditure limits, so that tax dollars were simply not being added to whatever private funds could be raised, thus enabling candidates to spend unlimited amounts and escalating campaign costs uncontrollably. The second theory was that government funds should be enacted to provide a necessary alternative source of funds to make up for the reduction in funding caused by the imposing of contribution limits. By declaring expenditure limits unconstitutional, the Court knocked away the first prop, sustaining the argument for government funds, but by retaining the contribution limits, the Court added a strong prop to the second theory.

The Supreme Court tempered its findings by holding that candidates who accept government funds still will be bound by limits. The matching grants plan, currently operative in Presidential campaigns, whereby the government matches contributions up to a maximum of \$250, fortunately was accepted by the Court decision. This should encourage candidates to continue to seek to broaden their financial base of support by attracting smaller contributors.

Those who do not accept government funds can spend as much as they can raise, perhaps more if they are permitted to go into debt. A Presidential candidate who chooses government funding in the general election next fall will be limited to about \$22 million in spending, all of it received from the tax checkoff funds, whereas a candidate going the private route could spend \$30 or \$40 million or more. This built-in disparity makes the private route more attractive but only for candidates with high confidence in their fund-raising appeal, or for wealthy candidates spending their own funds. The private option would be risky for candidates without a proven track-record in raising big money in small sums. Once nominated in 1972, George McGovern raised about \$16 million in small contributions, but at a cost of \$3.5 million in mail costs, \$1 million in newspaper ads, and more in appeals for funds tagged on at the end of paid broadcasts. A candidate would need to expect even better gross and net returns than McGovern achieved to risk taking the private route—unless he felt he could get advantage from claiming that his campaign was funded by popular support, whereas his opponents were funded from the public trough.

Serious consideration should be given to raising the Presidential election spending limit for the general election period, extending the matching fund formula now in use, so that no extra tax dollars, private citizens will be able to contribute to the Presidential nominees. I deem the right of citizens to give some money to Presidential candidates in the general election period so important that I would change the law to permit it. Moreover, some \$30 million were spent in Senator McGovern's 1972 campaign after he was nominated, not to mention more than that spent for President Nixon's campaign. Given the inflation factor since 1972, I think the \$22 million permitted is insufficient to mount a national campaign, and the continuance of that limit will invite substantial spending by individuals and groups independent of the candidates. To head that off, I would frame the law to channel most spending within the candidates' control. To achieve that, I would suggest a \$40 million limit with a matching formula for contributions of up to \$250 each with an upper matching amount of \$20 million—money that will be available in the Presidential Election Campaign Fund. The eligibility requirements might be somewhat different than the 20-state formula used in Presidential pre-nomination campaigns, in order to deal fairly with minor parties. This change might preclude litigation during the Presidential election if a serious third-party movement is mounted. The provisions in the law now for minor party Presidential candidates are still unfair—despite the Court decision—and are further litigable if damage can be shown. Such litigation in the midst of a Presidential campaign should be avoided if possible, and this is a desirable way to do so.

If free speech in politics means the right to speak effectively as the Supreme Court said, the decision is further justification for the use of tax dollars for campaign purposes, to help enable candidates and political parties to reach the electorate effectively. This strengthens the argument consistently suggested in

the literature, that floors, not ceilings, should be enacted. Floors mean the provision of government funds to ensure minimal access of the candidate to the electorate. Beyond that level, candidates can spend as much private money as they can raise. This concept also is accepted in mature democracies around the world, from the Scandinavian countries to Israel, although in these countries money is provided to political parties and not to candidates as it is in our candidate-centered culture characterized by weak political parties.

This concept should help to disengage us permanently from the illusory notion that too much money is spent in politics. The United States devotes a miniscule portion of its resources to politics. In 1972, we spent \$425 million on our elective and party politics at all levels, Federal, state, and local, which is less than the advertising budgets of our two largest corporate advertisers. The goal of achieving more competition in elections means we may have to spend more, not less, on politics.

The remaining problem in seeking bigger money in smaller sums is the cost of raising it. For this purpose, provision for seed money is necessary. In this connection, the Supreme Court decision left one major inequity. By declaring unconstitutional the limitation on candidates' spending on their own behalf, the decision opened the way for the return of millionaire candidates who at once provide the funding for their own campaigns and raise the ante for their opponents. Candidates without personal wealth will be disadvantaged unless Congress increases the amounts individuals can contribute to their campaigns.

While the Supreme Court sanctioned the current \$1,000 limit on contributions, for purposes of equity this should be raised by Congress to \$3,000 or \$5,000, or eliminated entirely. And the overall limit a person can contribute to Federal candidates in a calendar year, now \$25,000 should be raised to at least \$100,000. Raising these limits also would help provide seed-money for candidates who are not well known, who represent unpopular viewpoints, who come from a poor constituency, or who need substantial funds to initiate their direct mail drives for funds in smaller amounts.

While the thrust of the 1974 Amendments was in the direction of restricting large contributions and special interests, the Supreme Court's thrust was to reopen channels for significant big money to reenter politics. It is desirable to channel such money into the candidate's campaign rather than for it to be spent independently in ways that may be wasteful and counter-productive.

Mr. ALEXANDER. I am happy to respond to your invitation to testify. My statement is my own and does not necessarily reflect the views of members of the board of trustees of the Citizens' Research Foundation, which as an organization does not take positions on public policy.

In its decision in *Buckley et al. v. Valeo*, the Supreme Court has done much to relax some of the rigidities that the Federal Election Act Amendments of 1974 imposed upon the electoral process.

The decision reopens some lingering questions about how far election reform should go, and what its effects are upon the political process.

The 1974 law attempted to do too much, affecting every aspect of political campaigns, their organizational and financial procedures. The law was so complex that the Federal Election Commission was inundated with requests for advisory opinions, questions asked by numerous Members of Congress, among others, who for fear of violating the law, asked for an interpretation before taking action.

This fear threatened to reduce some spontaneity in the political system and in filtering down to State and local party and other committees would have lessened the enthusiasm of citizens to volunteer their services.

In part, the Federal Election Commission was not at fault; it was implementing a badly drawn law which left too much unclear and too much open to interpretation. On the other hand, too many Federal Election Commission advisory opinions were too narrow and too legalistic, without consideration of their impact on the system.

In retrospect, the FEC would have done better to defer so many ad hoc AO's which did not cohere to any controlling goals, and to have spent its first months writing the essential regulations that still do not exist after 9 months of operation.

What both the 1974 amendments and the FEC lack was a philosophy about regulation that was both constitutional and designed to keep the process open and flexible rather than rigid and exclusionary. I hope it leads us to understand that floors, not ceilings, are what are needed; that not too much but possibly too little money is spent to achieve a competitive politics in this country; that there is no value more important than citizen participation, including financial participation, in politics; and that citizen participation is often achieved most effectively through group activity—whether groups represent corporations, labor unions, trade or professional associations, or issues—that should be encouraged, not discouraged, from participating in the politics of our democracy.

Because money has always been a scarce resource in politics, parties and campaigns are dependent upon volunteers to provide free service. A harsh price must be paid for regulation in an activity such as politics, because politics so depends upon citizen volunteers.

Candidates and parties cannot as readily pay salaries to workers to assure compliance, as can corporations and labor unions and others regulated by Government.

Thus, Government regulation of politics, while essential, must be calibrated to achieve the fine balance between keeping politics fair and law abiding, and overburdening or stifling it.

This subtlety was never understood by many advocates of reform, and the Court decision should lead to more balanced perspectives on the potentially serious side effects of overregulation.

The Government's role should be to regulate, not to dominate the electoral processes as the FEC came to do by building an administrative law the average citizen could not cope with.

The findings that both the structure and enforcement powers of the FEC are unconstitutional gives Congress the opportunity not only to reconstitute the Commission but also to modify remaining sections of the law. Clearly, there is continuing need for a Government agency with statutory authority to regulate disclosure and public funding, and to initiate enforcement by referring cases to the Justice Department.

I am going to skip the whole next page and move on to page 4, the first paragraph.

Serious consideration should be given to raising the Presidential election spending limit for the general election period, extending the matching fund formula now in use, so at no extra tax dollars, private citizens will be able to contribute to the Presidential nominees.

I deem the right of the citizens to give some money to Presidential candidates in the general election period so important that I would change the law to permit it.

Moreover, some \$30 million were spent in Senator McGovern's 1972 campaign after he was nominated, not to mention more than that spent for President Nixon's campaign.

Given the inflation factor since 1972, I think the \$22 million permitted is insufficient to mount a national campaign, and the continuance of that limit will invite substantial spending by individuals and groups independent of the candidates.

To head that off, I would frame the law to channel most spending within the candidates' control. To achieve that, I would suggest a \$40 million limit with a matching formula for contributions of up to \$250 each with an upper matching amount of \$20 million per candidate.

The eligibility requirements might be somewhat different than the 20-State formula used in Presidential prenomination campaigns, in order to deal fairly with minor parties. This change might preclude litigation during the Presidential election if a serious third-party movement is mounted.

The provisions in the law now for minor party Presidential candidates are still unfair—despite the Court decision—and are further litigatable if damage can be shown. Such litigation in the midst of a Presidential campaign should be avoided if possible, and this is a desirable way to do so.

Now, on page 5.

Hopefully, some of the concepts in the Supreme Court decision should help to disengage us permanently from the illusory notion that too much money is spent in politics. The United States devotes a minuscule portion of its resources to politics. In 1972, we spent \$425 million on our elective and party politics at all levels, Federal, State, and local, which is less than the advertising budgets of our two largest corporate advertisers.

Senator PELL. I would like to point out though that comes out to be about \$2 a head for every man, woman, and child.

Mr. ALEXANDER. Right. That is right, Senator.

The remaining problem in seeking bigger money in smaller sums is the cost of raising it. For this purpose, provision for seed money is necessary and that was discussed some this morning.

In this connection, the Supreme Court decision left one major inequity.

By declaring unconstitutional the limitation on candidates' spending on their own behalf, the decision opened the funding for their own campaigns and raised the ante for their opponents. Candidates without personal wealth will be disadvantaged unless Congress increases the amounts individuals can contribute to their campaigns.

While the Supreme Court sanctioned the current \$1,000 limit on contributions, for purposes of equity this should be raised by Congress to \$3,000 or \$5,000, or eliminated entirely.

And the overall limit a person can contribute to Federal candidates in a calendar year, now \$25,000, should be raised to at least \$100,000.

Raising these limits also would help provide seed money for candidates who are less well known, or who represent unpopular viewpoints, who come from a poor constituency, or who need substantial funds to initiate their direct mail drives for funds in smaller sums.

While the thrust of the 1974 amendments was in the direction of restricting large contributions and special interests, the Supreme Court's thrust was to reopen channels for significant big money to re-

enter politics. It is desirable to channel such money into the candidate's campaign rather than for it to be sent independently in ways that may be wasteful and counterproductive.

Thank you.

Senator PELL. Thank you very much.

Senator Cannon, do you have any questions?

Senator CANNON. Thank you.

You certainly point out some very interesting problems here in connection with this.

I note that you have some support among some of the earlier witnesses today with respect to the limits, the contribution limits.

I have listened to you with a great deal of interest. I want to thank you for being here.

Mr. ALEXANDER. Thank you.

Senator PELL. Thank you very much, Mr. Alexander.

Our next witness is Ms. Ruth Clusen, president of the League of Women Voters.

Welcome, Ms. Clusen. I have a tremendous regard for the good work of your membership, and I know our own Rhode Island League of Women Voters are seemingly well informed and I think always are in the right direction.

#### STATEMENT OF MS. RUTH CLUSEN, PRESIDENT, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

Ms. CLUSEN. Thank you, Senator.

I appreciate the opportunity to appear today.

As you know, I represent the constituency and I do know what they think because we have asked them about campaign financing from the time in 1973 when we first embarked on a broad study of it. So I assure you that the views I speak to today do represent our 1,350 leagues, with some 140,000 members.

We are limiting our comments today to what we consider the basic issue at hand, which is the state of the Federal Election Commission, although we do have positions on a great many things in regard to campaign funding.

Essentially I am here today to urge you and indeed the entire Congress to act speedily to pass legislation that would reconstitute an independent Federal Election Commission, a Commission appointed by the President with the advice and consent of the Senate.

I would like to say in some respects I share the opinions expressed by Fred Wertheimer of Common Cause, who urged adequate funding. I cannot speak to the exact level, but I do think that operating on the basis of interim funding is not really a viable basis and while you are at reconstituting it, perhaps we can do something about more permanent funding as well.

The campaign finance issue, and particularly this now concerned with the constituency of the Commission seems to us to be filled with rhetoric and emotionalism and we hope that the congressional debate on this will not take on this kind of pitch; that it will focus on the necessities of the situation within the next 11 days; and that the Con-

gress will put aside any emotion or self-interest which they feel about it as a result of any of the activities of the Commission during the time it has been in operation.

We have felt from the very beginning that an independent Commission with broad enforcement powers is keyed to a viable law in this field.

We think the most important contribution we can make right now is to try to steer discussion back to what seems to us to be the real issue involved, which is the vigorous enforcement of the campaign law in an effort to restore public confidence in Government.

In our own study of campaign financing we had overwhelming agreement that an independent body was essential to campaign reform and indeed from the very beginning we saw some deficiencies in the law in regard to the way it set up the Commission.

In fact, we said in the beginning that an independent body, as we saw it, referred to an elections commission which would centralize reporting, oversee campaign receipts and expenditures, and enforce the campaign financing laws and that the Commission must be adequately funded instead with the powers to investigate, to subpoena, to initiate court action against violators and to have strong penalties against violators.

Throughout the debate on the passage of the 1974 amendments, we repeatedly stressed the need for this; and I think this is even more apparent in the year that has passed since that time. In fact, because of our strong commitment to this we intervened, along with the Center for the Public Finance of Elections and Common Cause to defend the law in the case of *Buckley v. Valeo*.

As you know, the Supreme Court upheld the major provisions, but we think this would be a hollow victory, if indeed it was one, if the law which we defended were not enforced.

I urge you to consider the kind of situation which would exist if Congress does not reconstitute an independent commission.

Without it, there will be no place for the hundreds of candidates and politically active persons to turn for authoritative answers and interpretations of the complex law. Certainly candidates are already confused enough and, I might say that we are ourselves in somewhat of that bind because we are doing a series of Presidential candidates and our baseline are those that qualify for public financing.

We are awaiting our decision right now two that are pending. We think the vast majority of candidates really want to comply. They do not want to obscure or avoid the law, but they will have no one to turn to for guidance if Congress does not act in the next few days.

I heard the testimony of the Commission that they have received around 300 requests, as we understand it, including requests for opinions of counsel. Actually, there are some 500 advisory opinions requested and pending. It seems to us that neither the Justice Department nor the General Accounting Office nor the Clerk of the House and the Secretary of the Senate are really a feasible alternative to an independent commission and that to go that route would put us back where we were in 1972.

The chief problem, of course, with the previous law was enforcement. Its penalties were too low. Its apparatus was inefficient. Its en-

forcement authority was fragmented. It amounted to a slap on the wrist. There has been a lack of uniformity in handling and reporting complaints, a lack of central control.

So essentially what we are saying is, let us not turn back the clock. The most important drawback in the past was the monitoring bodies lacked the power of subpoena. They had to look to the Justice Department for full enforcement.

Of the thousands of reported violations transmitted to Justice, action was taken in only a few cases. If campaign reform is to have real meaning, effective enforcement is a must.

We think the need for the mechanism is not confined to the issue of campaign financing. In fact, the current call for lobby registration reform is again a response to the recognition that laws in the books are meaningless without enforcement.

The one thing we seem to have to learn over and over again is the passage of law is not enough; it has no effect without the power of enforcement. In this case, we see an independent commission with full regulatory powers is essential.

We urge the Senate and indeed every Member of Congress to put aside any of the hostilities which have arisen in the past year and to make clear the issue, which is that of an independent commission.

Without an independent commission, the campaign finance laws will be meaningless. We think the people will not be satisfied with less than reconstitution of an independent commission; and we think it might indeed interpret the failure of Congress to act as an attempt to renege on its promises to the public.

The mood of the public in this election year is not easy to guess, but if we had to guess, we would say that the public will not easily forget nor will it forgive either the lack of action on the part of the Congress or reluctance or lip service on this issue as a result of the traumatic times we have all been through.

I would be glad to answer any questions.

Senator PELL. Thank you very much indeed, Ms. Clusen. I appreciate your testimony.

Senator Cannon?

Senator CANNON. You do not take any position on this, on the question of public financing?

Ms. CLUSEN. We have, and, as I said, we have positions throughout this whole field. I think I would have to say honestly that our fear is that it could get so tied up in this that what we think is most essential to accomplish would not happen.

We do support a combination of public and private financing. We do support extension of public financing to candidates for Congress. Certainly we would be glad to see these things happen, but pragmatically speaking, I guess given the passage of legislation in the Congress, we do not think it can take place in 11 days, and this is more important to us.

Senator CANNON. Thank you very much.

Senator PELL. Thank you very much.

Our next witness is Mr. Ira Glasser, president of the New York Civil Liberties Union.

STATEMENT OF IRA GLASSER, DIRECTOR, NEW YORK CIVIL LIBERTIES UNION, ACCOMPANIED BY PROF. RALPH WINTER, YALE LAW SCHOOL

Mr. GLASSER. Thank you.

I am Ira Glasser, director of the New York Civil Liberties Union. With me today is Prof. Ralph Winter of Yale Law School.

As you probably know, the New York Civil Liberties Union was a plaintiff in *Buckley v. Valeo*, and Professor Winter was counsel in that case for plaintiff Senator Buckley.

We appear here today jointly on behalf of the American Civil Liberties Union. We would like the opportunity to submit written testimony to you within a couple of days.

We thought now we would simply like to comment informally and briefly on a variety of the issues that face you.

It is our view that taken as a whole the Congress enacted with insufficient scrutiny the first time the Federal Election Campaign Act Amendments of 1974, and its predecessor act of 1971, as well.

We believe that in addressing yourselves to the constitutional questions involved in achieving the ends of the bill, you listened to the wrong advice, and paid insufficient attention to the constitutional limits. As a result we and others started that litigation which ended in the Supreme Court decision last January, and as a result we now all have to function within the first amendment limits that the Court set down.

What is left of the bill can fairly be called a wreckage, I think, and I think it would be a mistake to automatically defend that wreckage as if it were an original bill.

I think it is fair to say that if what is left now of the law were submitted initially as a proposed bill nobody would have supported it. It would be much better, I think, to begin from scratch, to take the court decision as a signal to go back and do it right this time, and to separately address each of the problems which the legislation sought to address the first time, but this time within the limits set by the Court.

Professor Winter will comment first on our view on the Federal Election Commission, and also on limits on contributions, and I will comment afterward on disclosure of public financing and the voluntary funds that are available to corporations and unions.

Mr. WINTER. Thank you.

We favor the reconstituting of the Federal Election Commission with only the power to administer the reporting and disclosure provisions, and the power to supply candidates for Federal funding in Presidential elections.

We would leave enforcement and the rest of the statute to the ordinary law enforcement agencies. We think that a commission with broad law enforcement powers carries with it many dangers, some of a philosophical nature, some more of a pragmatic nature. The existence of the commission really calls for law enforcement, and really calls for the constant monitoring of political activities, much of the same kind that was criticized in the case of the FBI.

Whereas it may have been unauthorized there, nevertheless the danger is the same.

Secondly, we feel that a commission will constantly expand its powers and be constantly rewriting the law without regard to the intent of Congress.

We think to some extent the Commission has publicized intervention in the *Morton* case, which was an instance of its undertaking without extended hearings and interpretation of the law that was hardly clear.

Finally, as a practical matter, I would like to disagree with some of the people who testified earlier as to what a great thing it is to have a commission that hands out advisory opinions.

No candidate can, without risking loss at an election, disobey, or go against an opinion issued by this Commission. Yet there is also no time to have a full hearing on the merits, or a full hearing before courts.

We very often have an ad hoc decision by a commission that does not even have the lifetime status of an article 3 court, and we find that to be very dangerous.

In the case of *Rogers Morton*, for example, the chairman of the Commission apparently just went to the newspapers and declared his view that something illegal had gone on. This itself is politically damaging.

The White House, although they continue to say they thought they were right on the law, felt compelled nevertheless to accede to this exercise of power by the Commission, which, so far as I know, did not follow any notice right to a hearing, or any other due process procedure.

Mr. Glasser can testify to an example in New York where the State election commission did a similar thing, and the opponent candidate immediately began to print leaflets stating that the State election commission stated that someone had violated the law.

I think if the Senators would take into account what happened to them with the Commission really, not subject to judicial review handing down ad hoc decisions in public during a campaign, they might be less anxious to reconstitute such a power.

As to contributions, I would raise only two points, going to the unfairness that has now worked as a result of the Supreme Court decision.

The first is that candidates will have lost control of a large part of their campaign.

Mr. Agree has stated it better than I think I can. It is just as to how money will flow into campaigns, and candidates will see their positions perhaps stated wrongly, perhaps either opponents attacked in ways that would create sympathy for their opponents, and the other things that happen that, in effect, they are unable to control.

That seems to me to be unfortunate, and it seems to me to be unfair to candidates.

The second point is a point about wealthy candidates. I really am amazed. I have been following the passage of the 1974 act, and that act was rarely mentioned without the statement that it will drive the wealthy from politics, and we will no longer have a situation where the wealthy have an advantage of gaining public office.

I am amazed to sit here today and hear advocates of the statute say, gee, the major provisions were upheld, that everything we wanted we got. There have not been that many changes. All we need now is a new Federal Election Commission.

Well, of course, the truth is otherwise. There has been a lot of speculation as to the effect of the statute, but we do not have to speculate very hard as to one effect of this court decision if Congress does not list the contribution limits.

More wealthy people will run for office, and more wealthy people will win office, and there really cannot be just any doubt about that.

Mr. GLASSER. As to the disclosure provisions, I think it is important to read the Court's decision very carefully. We have no quarrel with the Court's criteria, which sets down after a long recitation of the line of cases, beginning with NAACP against Alabama, in protecting the parties who may say harassment.

We think Congress need go no further than trying to paraphrase that in statutory language.

We are happy with the Court's criteria, and think it adequately protects the interest of associations in that respect. We do think that it must be listed according to the criteria the Court sets down.

The Court, after all, said that the only thing that one had to balance on the other side was the possibility of corruption, or the appearance of corruption, the possibility, put colloquially, of buying a candidate.

We submit that the present threshold levels which require candidates and parties to keep records of \$10 contributions subject to audit by the Commission, and require automatic disclosure of \$100 or more is far too low to be even reasonably expected for any candidate.

The Court agreed with us quite explicitly, but referred it to Congress in setting that limit higher, and we think Congress should accept that deferral, and go ahead and raise the threshold.

We would recommend that the recordkeeping threshold be limited to \$100 contributions, and that there be a sliding scale upward for disclosure for office. The exact figure, obviously, is open to debate, but we would suggest something like \$250 for Congress, \$500 for the Senate, and \$1,000 for the Presidency.

We think that it is patently absurd to suggest that contributions smaller than those for those offices could be set to buy a candidate, and, if they cannot buy a candidate, we think that the right of association privacy should win out.

We would also suggest that the burden of keeping those records is substantial, particularly on small, underfinanced campaigns. The burden of just keeping the records so that they will have it if the Federal Election Commission decides to audit, is a tremendous burden, and should not be undertaken when you are dealing with a level under \$10.

We would also suggest that parties and candidates which expend a small amount of money in pursuit of an office be entirely exempt from disclosure, no matter what the size contribution is.

We believe that that is important for this reason: If the candidate or party is so small as not to be serious, one might set that level at different amounts, depending on how you decided what was serious and what was not, but it would seem to me that they ought to be exempt from the burden entirely, a burden which is substantial in terms of small parties.

It will be argued that disclosure is important, even for trivial candidacies, in order to prevent stalking horses. My response would be that a stalking horse cannot stalk very far if it is not spending too much money.

I would not presume to suggest what level that ought to be. I do think the Congress ought to do now what it did not do before, and that is pay attention to the level that is really important for the people to know. That is a clear mandate of the court.

Apart from that, we are happy with the disclosure remedy. We think, of course, it is the preferred remedy.

We think limits on contributions and expenditures, and having the public know who was beholden to who is the ultimate sanction.

After all, remember, we have never functioned in this country with a full disclosure provision before. Whatever ills may have existed prior to this act, they did not exist in an atmosphere in which full disclosure of admittedly large contributions to major party candidates was mandated.

The evil that was involved when people set out to cast their ballot was not that large amounts of money was going to candidates, but more that nobody knew about, and not knowing about it, the voters were not able to apply their sanction.

The ultimate sanction on large contributors is the vote, not a regulatory system, not a system of criminal laws, not a system of prohibitions or certifications and monitoring political activity, but the sanction is the vote, and the reason why that sanction never was before was because the voters never knew before.

We think at the very least that a less drastic alternative ought to be tried before you start monkeying around with the first amendment.

As to segregated funds, this act continued to permit, in some ways expand, and the Court decision expands still further, the power of special interest by corporations and unions.

We think if you are interested in equity, if you are interested in putting candidates on a more equal financial footing, if you are interested in opening up elections to the small people, that the small contributors, that the most significant thing you can do is not focus upon the few rich maverick individuals, but rather upon the real exercise of financial power involved in politics in this country, and that is the enormous concentrations of money and wealth that is implicit, namely, in corporations and unions.

This bill allowed them more power than they had ever been allowed before. It created the situation where they could proliferate their commissioners, and where they can raise virtually an unlimited amount of money, spend an unlimited amount of money, and now the act makes it worse by placing an individual limit on contributions, by allowing that to stand while it allows unions and corporations to go their merry way.

I think it is not an exaggeration to say that to a large extent these special interests now have the capacity to capture the dominant influence in both major parties, and insofar as the public financing provisions, the major effect is to fund the two major parties, and taken together you have a kind of political religion in this country.

There are two political links, to be exact, Democrats and Republicans, each with its own special interest, and it is fair to say that most

political funding has to go through each of those special interests, and each of those political links in order to be accepted. Everything else is relegated to the wayside.

We think that the present prohibitions on direct contributions of money by corporations and unions, two candidates ought not to have the present exemptions.

To facilitate voluntary funds is not construed as contribution, and hence is permitted. We think that you ought to construe it as a prohibition, and we think you ought to prohibit it.

We think if you do that, what will happen is that you will eliminate the major source of institutional financial inequity in this country.

As to public financing, we would agree with a good deal of what has been said before about the present scheme, and also the inherent discretion.

Tomorrow Ellen McCormack is going before the Federal Election Commission to get her fund certified. I understand that a rival group is also going to file a complaint saying that she is not bonafide, that she had misrepresented her position, she has misrepresented her candidacy, and she should not be certified, for example, she should not get the funds.

The first amendment does not include that kind of adjudication by a Government agency. We do not want to see a situation where somebody runs for office, and somebody else is opposed to their substantive position, and goes in and makes complaints, and the Government gets involved in adjudicating who is right and who is wrong, and who is misrepresenting, and who gets the money.

We say this even though our position on the question of abortion could not be further removed from Ellen McCormack's.

We would also suggest one small revision which we think is directed by fairness in your current scheme. We think that the entire Federal Election Campaign Act and its amendments, with the possible exception of the discharge provisions, ought not to apply at all to any candidates or parties who are not eligible for public funding.

We say this for one reason, if they are not eligible for public funding, it is because you have made your judgment that their candidacy is sufficiently small as to not be paid attention to.

The probability of success is so low that you do not have to give it public funding.

If its probability of success is so low, then it seems to me, the appearance of a corporation, the quid pro quo, the buying of a candidate, is equally low.

If a candidate or a party cannot be strong enough to qualify for public funding, it cannot be strong enough to qualify for limits on contributions.

So at the very least I think the public financing ought to be amended in that fashion.

I think we will now be prepared to submit to any questions you might have.

I would also like to submit a small booklet that we have prepared, which sets forth more fully our positions on all these matters for the record.

Senator PELL. It will be kept in the subcommittee files.

Then, in essence, with the various legislation and bills, you would support the Kennedy-Scott bill, title 1 of the Kennedy-Scott; is that correct?

Mr. WINTER. We have not seen those bills, Mr. Chairman.

From the description I have heard, I suspect the bill we would be most likely to support, the one that would come the closest, but we do not think goes far enough, is the one introduced by Senator Buckley.

We do not want law enforcement policy in the Commission.

Senator PELL. Thank you.

Mr. GLASSER. I would say that like other speakers it is kind of difficult to deal with the exact provisions of language of a bill that you have not seen or just recently seen. The only bill I have seen at all, the only bill I have touched at all, is the Buckley bill and that not more than 10 minutes ago when someone handed it to me. I think we will be prepared to say more explicitly later, but I think at this point we should set forth the criteria and have you evaluate the rules by our criteria.

Senator PELL. Thank you. Senator Cannon.

Senator CANNON. Is there any question about the constitutionality of Congress giving the enforcement power to the Federal Election Commission?

Mr. WINTER. I think there still is a question of constitutionality left in that there are many decisions of the Supreme Court saying you cannot delegate excessive discretion in the first amendment area to an administrative body. These are all cases with State legislation, but we made the argument in the Supreme Court.

Senator CANNON. I am glad to know that we are in accord on the recordkeeping of the \$10 contribution. It seems to me that serves no useful purpose, and certainly until you get to the point that it has to be disclosed, unless you are going to assume that the Commission might want to come back and audit all of your less than \$100 contributions, I do not think it serves any useful purpose.

You suggested that we ought to go to a higher limit on the disclosure.

What do you have in mind there?

Mr. GLASSER. Well, I think that the actual numbers could bear some discussion, but I would suggest to begin with that the following criteria be developed:

The Court made it clear, and I think you would agree that if there is a purpose to disclose contributions it is to disclose those contributions where the people contributing might be expected to have more influence than your average \$20, \$30, \$40 contribution. I think that is something that the public has a right to know about before it casts its ballot.

The question is what level would that be before one can reasonably expect to exercise that kind of influence. I think immediately it becomes apparent that that is different in different offices. Whatever the size contribution will get you in the front office to a Congressman's office, it would not get you into the front door of the White House, and I would expect the Senate is somewhere in between.

We would suggest a sliding scale and for purposes of suggestion we would like to begin with about \$250 for the House, \$500 for the Senate, and \$1,000 for the Presidency in terms of automatic disclosure

with recordkeeping being mandated down to \$100 so if there is any reason to believe that there is a manipulation going on by busting up large contributions into small contributions, they could still be audited with some kind of recordkeeping mandated at \$100 or above and we think the automatic disclosure can be moved up by small amounts.

You pointed out some of the problems in connection with the advisory opinion subject and were critical of them.

Do you not think it is better to have someone giving guidelines in the nature of an advisory opinion or in some form on which a candidate can rely rather than have the candidate in a position that he just has to go ahead and take a chance? Here at least he has a prima facie compliance with the law if he abides by the decision.

Mr. WINTER. Well, he may not.

I forget the exact statutory language, but you are not totally protected against criminal prosecution. The problem is the criminal prosecution is in the Justice Department whereas the advisory opinion is in the Commission.

Senator CANNON. You would admit there would be a strong presumption in his favor if he followed the opinion?

Mr. WINTER. Probably. The problem is there will also be a strong presumption against him.

The point I was raising, and I think it is a very valid point, is that you candidates will never really get a full hearing on those rules. You know, you do not really get to argue it or anything else and you are really stuck with it. You cannot start disobeying that in front of your constituency.

Senator CANNON. I agree. You have no chance to contest it on the rulemaking.

I think it is a very valid point you raise, but I am also concerned about the fact that a candidate needs to have some place he can go and get some kind of guidance.

Mr. GLASSER. Not if you accept all of our proposals. If you would accept all of our proposals, the scheme would be so simplified that that apparatus would not be required.

We, after all, believe and to a large extent the Court has agreed by now, that disclosure was the main remedy. That is a rather simple remedy. We believe in the first amendment area you do take your chances, you do say what you want and spend what you want, and you do not want a Government agency getting involved saying it was lawful or unlawful, certified or not certified, when you have not had a chance to deal with that presumption of legitimacy which the public has a right to read into.

The incident that Professor Winter referred to in New York involved the State election commission there certifying as having violated the law particular leaflet of a candidate. We eventually represented that candidate and got a first amendment decision reversing that, but by then the election was over and the candidate's opponent had printed up his own leaflet and taken out ads in the newspaper saying the State election certified my opponent as a lawbreaker. One was free speech and the other was not.

I think that that kind of thing is implicit when you have the intervention of the Government agency deciding what is permissible speech and what is not, that which is not contemplated by the first amendment.

We think if you go to a simpler scheme that relies primarily on the disclosure, which has never been tried in this country, and let the voters apply the sanction, let the voters give the advisory opinion on election day, I think we at least have the obligation to try that before we rush off into these other schemes whose results we can barely contemplate.

Senator CANNON. Of course, that is what we had in mind in the previous law; trying to go to the full disclosure provision and see if that would not take care of the problem.

Mr. GLASSER. Well, that was a full disclosure provision which was not narrowly enough drafted to avoid the infirmities that the Court pointed out. I think it is possible to draw a provision which does not suffer from the effects of predecessor law, does not spill over to political groups, like the Common Cause, like that, but which does deal with disclosing large contributions to major party candidates. That merely is where the abuse is, after all. Nobody is interested in who contributes \$50,000 to Norman Thomas' campaign. That is not what this law is supposed to be directed at. What we are really interested in and what this law is really directed at extensively is to let the people know what big money is behind the major Democratic and Republican candidates and once you draw the lines carefully on that I still submit that is a technique which has never been tried and is at least a drastic alternative that ought to be tried.

Senator CANNON. What is your suggestion for the problem of the independent spender or independent committee?

Mr. WINTER. We think you ought to raise the contribution limits so more money can flow to the candidates and they can control their campaigns.

There is nothing in the Court's decision you can do about it.

You are either going to be faced with an enormous ludicrous situation where you spend your time denying what all these people are saying or defending charges that you have coordinated with them.

I think you ought to raise the contribution limits.

Mr. GLASSER. We, in our position, do not face that problem, but the Court has left us with making that somewhat bizarre distinction that one kind of expenditure is OK and the other is not and it is OK if it is independent, which means you are going to expect conspiracy investigations as to who is saying what to whom and under what circumstances. Given that situation, the Court has said it is all right to maintain the contribution limits, but I think you ought to use your discretion to at least raise them to avoid the anomaly that the Court decision has left us with.

Senator CANNON. Thank you very much.

Senator PELL. Thank you very much indeed, gentlemen.

Mr. GLASSER. Thank you.

Senator PELL. There is going to be a rollcall vote, two of them, which should pretty well wind up the afternoon.

Mr. Brice Clagett, Covington & Burling, is the next witness and then Ms. Cynthia Burke, Secretary, Committee for Democratic Election Laws.

Mr. Clagett, you can come forward first and if the bell starts to ring I will have to ask you to submit the rest of your testimony and I will give the remaining 4 or 5 minute to Ms. Burke.

STATEMENT OF BRICE CLAGETT, MEMBER, LAW FIRM OF  
COVINGTON & BURLING, WASHINGTON, D.C.

Mr. CLAGETT. Thank you, Mr. Chairman.

My name is Brice Clagett. I am a member of the law firm of Covington & Burling. I was one of the lawyers for the plaintiffs in the case of *Buckley v. Valeo*, some of the consequences of which you are considering today. I do not appear here as a representative of those plaintiffs or anyone else, but simply as a citizen who over the past year has had occasion to do a good deal of thinking about the election laws.

I will just hit the high spots and give my statement to the reporter.

The Supreme Court has now clearly recognized that any regulation of campaign expenditures and contributions operates in a critically sensitive area of constitutional concern.

Moreover, the election law is both highly complex and in many respects, perhaps unavoidably, vague.

In these circumstances, the power to interpret the law is largely the power to make new law. A Commission with that kind of power has vast influence over the political process.

My testimony then concerns two adjustments that, in my view, need to be made to the committee's powers if your decision is to reconstitute it to say that from being held unconstitutional all over again.

It is highly inappropriate, and perhaps unconstitutional, for any agency in effect to make law in an area trenching so sharply on so basic a constitutional right as freedom of speech. The fact is that, when either a candidate or an ordinary citizen is told by the Commission that certain political activity would violate the law, he will in the overwhelming majority of cases refrain from engaging in that activity although he is convinced the Commission's interpretation is wrong. He will thus be chilled from exercising what a court might well ultimately hold were his rights under both the Constitution and the statute. He will in effect be subjected to a prior restraint on the exercise of his first amendment rights by action of the Commission.

It may well be that this chilling effect or prior restraint resulting from Commission pronouncements would itself be held to violate the Constitution. In my opinion, it would be. The Court had no occasion to decide that issue in *Buckley v. Valeo*, because the Court held the Commission's powers unconstitutional on other grounds.

So if the Commission is reconstituted without any changes to address the problem, I suggest there will still be a heavy constitutional cloud over the Commission and the removal of that cloud will necessarily await further litigation.

Now, Professor Winter a moment ago addressed himself to some extent to the same problem under the name of unconstitutional discretion in the Commission in the first amendment area and he suggested that one solution was not to give the Commission any rulemaking or advisory opinion power. That is one solution, but I see myself very strongly the force of Senator Cannon's observation that some guidance is needed for candidates and others so that citizens can get help in deciding what they can safely do.

So, I would suggest another solution to you. The Commission should not have rulemaking power. It should have the power if it has enforcement power to grant advisory opinions and issue guidelines, but there should be a very explicit provision to the effect that such pronouncements do not have the force of law, are valid only to the extent they conform to the statute, may not be used to create any presumption of violation or criminal intent in an action against a candidate or other citizen who has chosen to disregard them, and they are inadmissible as evidence against the citizen in such an action.

Such a provision is incorporated in Senator Buckley's bill, or that it could well stand being made more detailed and more explicit.

Only by such a solution, I submit, can the Congress prevent the Commission from operating as a czar over the entire political process whose every view has the force of law for most practical purposes. Only thus can citizens be permitted their constitutional right to disagree with the Commission, to act on that disagreement, and to take their chances with the statute as the Congress wrote it and enacted it without any presumption, in fact, or law that they are in violation merely because of what the Commission has said. That kind of presumption, it seems to me, would follow some agency expertise or from the binding effect of regulations or however you characterize it, it is clearly unconstitutional when applied in the first amendment area.

My second point is this.

The 1974 act did impose one very substantial restraint on the Commission: the power of either House of Congress to veto the Commission's regulations. I submit that the legislative veto is an inappropriate and very probable unconstitutional restraint and should be excluded from any new legislation if the Commission is to be given rulemaking power at all.

If the rulemaking function is an Executive function, as the Court very strongly suggested, then the veto is an impermissible intrusion on Executive authority.

I note from the President's statement of February 16 and Mr. Scalia's testimony this morning that the President shares the view that the legislative veto is constitutional. Yet, he proposes that you reenact it, which strikes me as in the extreme. It is the responsibility of the Congress and the President no less than of the Supreme Court to judge proposed legislation against the Constitution and if it deems it unconstitutional it should not enact it.

The Court found it unnecessary to pass on the legislative veto issue as such in the *Buckley* case since it held the Commission's rulemaking power unconstitutional because of the appointment method.

Senator PELL. Excuse me for interrupting, but I want to give Ms. Burke a chance here.

Would you put the rest of your testimony in the record?

Mr. CLAGETT. I could indeed, sir.

Senator PELL. Your statement will be made a part of the record. [The statement referred to follows:]

STATEMENT BY BRICE M. CLAGETT, MEMBER, LAW FIRM OF COVINGTON & BURLING, WASHINGTON, D. C.

Mr. Chairman, members of the Subcommittee: My name is Brice M. Clagett, and I am a member of the law firm of Covington & Burling, in Washington. I was

one of the lawyers for the plaintiffs in the case of *Buckley v. Valeo*, some of the consequences of which you are considering today. I do not appear here as a representative of those plaintiffs or anyone else, but simply as a citizen who over the past year has had occasion to do a good deal of thinking about the election laws.

I am not here to take any position on whether the Federal Election Commission should be re-created on the basis of a constitutionally permissible method of appointment or whether, rather, its powers should be transferred to some other agency or agencies. I wish to make only two limited points with regard to S. 2011:

(1) If the Commission is re-created with its prior enforcement powers, it should not be given rulemaking authority; it should be given power to issue guidelines and advisory opinions, but the status of those pronouncements should be qualified so as to protect the constitutional rights of citizens which the Supreme Court has recognized.

(2) If, contrary to my first point, a new Commission is given rulemaking power, its rules should not be made subject to a legislative veto.

I. The Supreme Court has clearly recognized that any regulation of campaign expenditures and contributions operates in a critically sensitive area of constitutional concern. The Court left no doubt that such regulation inevitably encroaches on free speech and makes inevitable a balancing process between compelling governmental needs and first amendment freedoms. When activity by citizens in this most sensitive area is subjected to regulation, especially with criminal sanctions, the inhibiting effect on political expression is acute.

Moreover, the election law is both highly complex and in many respects, perhaps unavoidably, vague—as was fully recognized in the Senate debate last fall on the Commission's office-account regulations (121 Cong. Rec. S. 17873-89, daily ed., Oct. 8, 1975).

In these circumstances, the power to interpret the law is largely the power to make new law. A commission with that kind of power has vast influence over the political process, not necessarily excluding the power to determine the result of particular elections.

The existing Commission has used these powers with a vengeance. In many respects its pronouncements made new law—sometimes where the statute as enacted by the Congress was silent; sometimes in rather striking disregard of what the statute did say. Attached as an appendix to this statement is a list of just a few of the more conspicuous lawmaking pronouncements the Commission issued in only 4 months of operation.

I don't mean to be too hard on the Commission. Given the exceptional complexity and vagueness of the statute, possibly no interpreting and enforcing agency could have avoided making itself subject to the same criticism.

It is highly inappropriate, and perhaps unconstitutional, for any agency in effect to make law in an area trenching so sharply on so basic a constitutional right as freedom of speech, and on a subject so crucial to our survival as a free democratic country as the electoral process itself. The fact is that, when either a candidate or an ordinary citizen is told by the Commission that certain political activity which he wishes to undertake would violate the law, he will in the overwhelming majority of cases refrain from engaging in that activity although he is convinced the Commission's interpretation is wrong. Even if he is otherwise disposed to litigate the issue, if he is well advised by counsel he will be aware (1) that a court probably will enforce a Commission rule as having the force of law, at least unless it flatly and unquestionably is contrary to the words of the statute, and (2) that a court will give great weight to any Commission pronouncement, because of alleged agency expertise, in deciding on the proper interpretation of the statute. He will thus be chilled from exercising what a court might well ultimately hold were his rights under both the Constitution and the statute. He will in effect be subjected to a prior restraint on the exercise of his first amendment rights.

It may well be that this chilling effect or prior restraint resulting from Commission pronouncements would itself be held to violate the Constitution.<sup>1</sup> The Court had no occasion to decide that issue in *Buckley v. Valeo*, although the

<sup>1</sup> See, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958), where the Court held that tax-assessment procedures which shift the burden of proof to the taxpayers are not adequate where First Amendment issues are at stake. See also, e.g., *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 43 L. Ed. 2d 448, 460 (1975); *Saia v. New York*, 334 U.S. 558 (1948); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Lamont v. Postmaster General* 381 U.S. 301 (1965).

plaintiffs raised it, because the Court held the Commission's powers unconstitutional on other grounds. So if the Commission is re-created without any changes to address the problem I have outlined, there will still be a heavy constitutional cloud over the statute and the Commission, and the removal of the cloud will necessarily await still further litigation.

I suggest that the proper solution is that a re-created Commission should not be given rule-making power, except perhaps with respect to the federal-subsidy provisions. If it is given enforcement responsibilities, it should have the power to issue guidelines and advisory opinions—those are necessary so that citizens can get help in deciding what they can safely do—but there should be a provision to the effect that such pronouncements do not have the force of law, are valid only to the extent they conform to the statute, may not be used to create any presumption of violation or criminal intent in an action against a candidate or other citizen who has chosen to disregard them, and are inadmissible as evidence against the citizen in such an action.

The present statute has a provision (section 437f) that protects a citizen who acts in accordance with a Commission advisory opinion. That is a good provision and should be retained. What I suggest is a further provision to protect a citizen who, because he disagrees with a Commission pronouncement, chooses to act in disregard of it and finds himself the object of proceedings. Such a person of course must take his chances that a court will decide independently that his actions violated the statute. But he should not be made worse off, and in effect forced to bow to whatever restrictions the Commission chooses to place upon him, because of the danger that a court will be influenced by the position the Commission has taken.

Only by such a solution, I submit, can the Congress prevent the Commission from operating as it has, perhaps unavoidably, in the past: as a czar over the entire political process whose every view has the force of law for most practical purposes. Only thus can citizens be permitted their constitutional right to disagree with the Commission, to act on that disagreement, and to take their chances with the statute as the Congress wrote it and enacted it.

II. The 1974 Act did impose one very substantial restraint on the Commission: the power of either house of Congress to veto the Commission's regulations. I submit that, while the restraints I have suggested are appropriate if not necessary for constitutionality, the legislative veto is an inappropriate and very probably unconstitutional restraint, and should be excluded from any new legislation if the Commission is to be given rule-making power at all.

The plaintiffs in the *Buckley* case challenged the legislative veto as an unconstitutional infringement of separation-of-powers principles. If Commission rules subject to the veto are regarded as legislative in nature, then the veto results in what is in effect legislation by Congress without the President's having his constitutionally required opportunity to participate in the legislative process. If, on the other hand, the rule-making function is executive—as the Court strongly suggested in its discussion of the method of appointing the commissioners—then the veto is an impermissible intrusion on executive authority. And the Act's provision for a veto by either House acting alone is even more questionable than the more usual device of a concurrent resolution. The *Federalist*, No. 51 (Madison), Cooke ed. 1961, p. 350.

The Court found it unnecessary to pass on the legislative-veto issue as such, since it held the Commission's rule-making power unconstitutional because of the appointment method. The Court's opinion contains a lengthy footnote (slip opinion page 134, n. 176) which carefully outlined the legislative-veto question and expressly left it open. In that footnote the Court cited two law review articles which argued that the legislative veto is unconstitutional.<sup>2</sup>

There are other strong intimations in the Court's opinion in *Buckley* that the legislative-veto provision of this statute will be held unconstitutional when the question comes before the Court. The Court recognized that the Commission, viewed as a legislative agency because of the appointment method, could properly exercise any powers which Congress could exercise directly or through one of its committees. But the Court squarely held that rule-making is not such a power. That being the case—it having been held that Congress cannot make campaign rules through the instrument of a legislative agency—I find it hard

<sup>2</sup> Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," 66 *Harv. L. Rev.* 569 (1953); Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," 63 *Calif. L. Rev.* 983, 1081-82 (1975).

to see how the Court could avoid holding that direct participation by Congress in the rule-making process through the legislative veto is likewise unconstitutional.<sup>3</sup>

The legislative veto is particularly inappropriate where, as here, it creates a sharp conflict of interest. Members of the Congress, of course, are candidates for office, and as such they are intimately affected by the Commission's regulations. If, as has been repeated endlessly, a primary purpose of campaign reform is to avoid even the appearance of impropriety, that end is hardly served by constant and detailed embroilment of the Congress in interpreting and fleshing out the campaign restrictions under which they—and their challengers—operate. Of course implementation of the campaign law contains a host of opportunities for tilt in favor of incumbents, and repeated congressional involvement will continually feed the suspicion that the Act is an incumbent's protection law. Far better to let the rule-making process be carried on, under proper safeguards, by a genuinely independent and impartial agency rather than one under incumbent domination. I should think that the Congress would welcome the opportunity to avoid future public spectacles of the sort that occurred over the rejection of the office-account regulations last fall.

Finally, if the legislative veto is resurrected there will be ample room for an argument that, even if such veto provisions in other contexts may not be unconstitutional, its presence in this highly charged political context makes the Commission an arm of Congress, even absent congressional appointment of the commissioners, and thus constitutionally invalidates the rule-making power. It could also be argued that the resulting incumbent domination violates the constitutional rights of challengers.

I am personally persuaded that the legislative veto in the 1974 Act is unconstitutional and that the Supreme Court will, if necessary, so hold. To resurrect it in a new statute would leave the Commission and its rules under a constitutional cloud which only new litigation could—eventually—resolve.

Thank you.  
Attachment.

#### ATTACHMENT

1. Interim guidelines to govern special New Hampshire election, 40 Fed. Reg. 40668 (Aug. 21, 1975).
2. Eligibility of contributions for matching grants under Subtitle H, FEC Notice 1975-40, 40 Fed. Reg. 41933 (Sept. 9, 1975).
3. Interim guidelines to govern special Tennessee election, 40 Fed. Reg. 43660 (Sept. 16, 1975).
4. Spending limit applicable to a candidate running for two Federal offices simultaneously, FEC Notice 1975-44, 40 Fed. Reg. 42839 (Sept. 16, 1975).
5. Disclosure regulations, 40 Fed. Reg. 44698 (Sept. 29, 1975).
6. Office-account regulations, 121 Cong. Rec. S. 17873-89 (daily ed. Oct. 8, 1975).
7. Rule requiring candidates to file reports with the Commission, House Rep. No. 94-552, 94th Cong., 1st Sess. (Oct. 9, 1975).
8. Attorneys' or accountants' fees as expenditures, AO 1975-27, 40 Fed. Reg. 51351 (Nov. 4, 1975).
9. Delegates to national nominating conventions: rules on contributions and expenditures, AO 1975-12, 40 Fed. Reg. 55596 (Nov. 28, 1975).
10. Contribution to a candidate from members of his immediate family—overruled by the Supreme Court (slip op. 48, n. 59), AO 1975-65, 40 Fed. Reg. 58393 (Dec. 16, 1975).

Mr. CLAGETT. I would like to add two very brief points, extremely brief, that are not in my written testimony.

Senator PELL. Certainly.

<sup>3</sup>The brief submitted by the Justice Department in *Buckley* for the Attorney General as appellee and for the United States as amicus curiae argued that the legislative veto could be justified only if the Commission was a legislative agency, which of course the Court has now held it cannot be (pp. 111-12). The brief correctly described the Watson law-review article, one of those cited by the Court in its opinion, as "the most recent and thorough study [which] concludes that [congressional control] devices are often an unconstitutional intrusion into executive authority" (p. 111, n. 70). Congressional power to veto regulations of executive or independent agencies is a device expressly found constitutionally "unacceptable" and "invalid" by Watson (op. cit. at 1082).

Mr. CLAGETT. This is in response to comments that were made this morning. One was about public financing.

It has been widely assumed, both in testimony here today and elsewhere, that expenditure limits can, in effect, be restored through Federal subsidies. While it is quite true that the Supreme Court did not hold expenditure limits unconstitutional as applied to recipients of Federal subsidies, in my opinion, that issue remains wide open. The Court had no occasion to consider a claim by a candidate eligible for Federal subsidies; but to subject him to the expenditure limits in return for subsidies is to impose an unconstitutional condition on the offering of Federal benefits.

I think on the basis of the Court's precedence a strong case can be made that that is unconstitutional, and I would strongly recommend you lift the expenditure limits for candidates as well as for those whom the Court has listed that are nonaccepted.

Finally, I must also take issue with Senator Kennedy's answer to Senator Cannon's question this morning. Clearly, you could not make subsidies mandatory and attach expenditure limits to them. That would be precisely the imposition of general compulsory expenditure limits, which the court flatly held was unconstitutional.

Senator PELL. Thank you very much.

Senator Cannon.

Senator CANNON. Thank you very much.

Senator PELL. Our next witness is Ms. Cynthia Burke, Secretary, Committee for Democratic Election Laws.

Thank you for being so patient.

#### **STATEMENT OF MS. CYNTHIA BURKE, NATIONAL SECRETARY, COMMITTEE FOR DEMOCRATIC ELECTION LAWS**

Ms. BURKE. I will submit the full text of my statement for the record and just highlight a few points here.

The purpose of my testimony is to propose that the Federal Elections Commission, or whatever body is charged with administering the FECA be empowered to grant exemptions from the requirements to report if evidence can be shown that such disclosure would subject candidates and their supporters to government harassment and economic reprisals.

Now, this proposal that the Committee on Election Law has to make is based on the precedents of the laws in Minnesota, Washington State, and Washington, D.C., all of which are similar to the Federal Election Commission.

It is also based on some language in the Supreme Court opinions on disclosure as it relates to minor parties and on page 3 of my statement, toward the middle, you will see that we point out that the Court describes what sort of evidence of harassment would be required to support a candidate's request for exemption from the requirements to report the identities of campaign contributors.

The Court said: "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either government officials or private parties.

"The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties."

Now, the Committee which I represent is currently organizing support for a suit filed by the Socialist Workers campaign committee.

The suit was filed by the American Civil Liberties Union on behalf of the committee. I believe this committee has demonstrated government interference with the rights of supporters. I think that that case is a good one to demonstrate why such an exemption mechanism is needed for whatever body ends up charged with administering this law.

Now, just last October, a three-judge panel here in Washington, D.C., ordered the Washington, D.C., Board of Elections and Ethics to provide a hearing for the local Socialist Workers campaign committee.

The Court declared that it is within the powers of the Board to rule that the contributor-disclosure provisions of the law are constitutionally inapplicable to the Socialist Workers campaign committee if the evidence produced supports the plaintiffs' claim.

My Committee's proposal would put the Commission in accord with the spirit of the Supreme Court's opinion on this matter, which I urge the Senators to read carefully. It is simply not adequate to direct such parties to the courts for resolution of their concerns because this can be a very lengthy and extremely expensive process. I think that these parties and candidates are entitled to an inexpensive and speedy disposition of their problem and I think the proposal that we make today would be a step, positive step, in the direction of opening up the political system to all points of view.

Thank you.

Senator PELL. Thank you very much, Ms. Burke.

Senator Cannon?

Senator CANNON. No questions.

[The written statement of Ms. Burke follows:]

STATEMENT OF CYNTHIA BURKE, NATIONAL SECRETARY, COMMITTEE FOR  
DEMOCRATIC ELECTION LAWS

My name is Cynthia Burke and I am the national secretary of the Committee for Democratic Election Laws. The Committee is a non-partisan civil liberties organization which initiates and supports legal challenges to laws which restrict or deny ballot access or voting rights to any individual or political party.

The Committee submitted a friend of the court brief in the challenge to the Federal Election Campaign Act brought by former Senator Eugene McCarthy, Senator James Buckley, and the New York Civil Liberties Union. Our brief demonstrated how the Act, in its entirety, discriminates against third party and independent candidates and their supporters.

The Act's requirement that the identities of campaign contributors be disclosed to the government inhibits and deters supporters of parties and candidates with dissenting points of view from exercising constitutionally protected rights.

We were one of the first organizations to oppose this law as an unconstitutional interference by the government into the electoral arena for the purpose of propping up the Democratic and Republican parties and weakening their opposition from movements outside those two parties.

The Committee for Democratic Elections Laws is currently organizing support for a suit filed by the American Civil Liberties Union in September, 1974, on behalf of the Socialist Workers campaign committees. This suit contends that forced disclosure of the identities of socialist campaign supporters would subject them to harassment and persecution from government agencies like the CIA

and FBI. Documentation of illegal surveillance of members and supporters of the SWP has come from the FBI itself which has been compelled under court order to release over 4,000 pages of formerly secret files in the course of another suit filed in 1973 by the Socialist Workers party seeking to bring an end to this illegal activity.

The Socialist Workers case demonstrates the need for a mechanism whereby this party, and other similarly affected, can gain relief from the contributor-disclosure requirements of the Act. My purpose in coming before you today is to propose that the Federal Election Commission be empowered to grant such exemptions. I will now motivate that proposal.

The recent Supreme Court decision on the McCarthy/Buckley suit was, overall, contemptuous of the rights of supporters of third party and independent candidates and upheld most of the unconstitutional provisions of the Act. However, the Court's opinion on disclosure as it relates to third parties concurred with some of the observations made by the plaintiffs and friends of the court about the threat posed by forced disclosure of the identities of supporters of third party and independent political movements.

While upholding disclosure in general the Court said:

"It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation."

The Court went on to say:

"We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fear of reprisals may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena."

The Court then described what sort of evidence of harassment would be required to support a request for exemption.

"The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributor's names will subject them to threats, harassment or reprisals from either government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties."

The Socialist Workers Campaign Committee has demonstrated such a pattern of government interference with the rights of supporters. The seemingly never-ending revelations of government persecution of dissident organizations show that other parties and movements have been and will be subjected to the same treatment in the future.

That is why CoDEL proposes that the Federal Election Commission be empowered to conduct hearings and issue exemptions.

There is precedent for this in the laws of Minnesota, Washington state, and Washington, D.C., all of which are administered by commissions similar in function to the Federal Election Commission. In 1974 the Minnesota Ethics Commission exempted the Socialist Workers campaign committee from the requirements of that state's law for precisely the reasons that I have just gone into—incontrovertible evidence of government persecution of this legal American political party.

Just last October a three-judge panel here in Washington, D.C., ordered the Washington, D.C., Board of Elections and Ethics to provide a hearing for the local Socialist Workers campaign committee. The Court declared that it is within the powers of the Board to rule that the contributor-disclosure provisions of the law are constitutionally inapplicable to the Socialist Workers campaign committee if the evidence produced supports the plaintiff's claim.

My Committee's proposal would put the Commission in accord with the spirit of the Supreme Court's opinion on this matter. It is simply not adequate to direct such parties to the courts for resolution of their concerns. Going through the courts can be a lengthy and extremely expensive process. These parties and candidates are entitled to an inexpensive and speedy disposition of their problem.

I urge serious consideration of this proposal. The American electoral process, under the present circumstances, is not accessible to all. The proposal that I have made would be a positive step in the direction of opening up the political system to all points of view.

Thank you.

FACT SHEET ON SOCIALIST WORKERS CHALLENGE TO FEDERAL ELECTION  
CAMPAIGN ACT OF 1971

(Socialist Workers 1974 National Campaign Committee, et al.,  
versus Hon. W. Pat Jennings, et al.)

1. The suit was filed in September, 1974, by attorneys Joel Gora, staff counsel of the American Civil Liberties Union, and Paul Chevigny of the New York Civil Liberties Union.

2. The suit, filed in federal court, asks that provisions of the Federal Election Campaign Act of 1971 be declared unconstitutional on their face and as applied to the Socialist Workers campaign committees. The ACLU suit maintains that the law violates the First, Fourth and Ninth amendment rights of the plaintiffs and cites government-admitted programs of surveillance and attempted disruption of the Socialist Workers party as the basis for requesting that the campaign committees not be forced to turn over the names of contributors and vendors to the government. The case is now in pre-trial discovery. Common Cause requested and was granted the status of co-defendant with the government.

3. FBI and CIA harassment directed against the Socialist Workers party is documented in the party's suit against the federal government seeking an end to this illegal activity (Socialist Workers Party, et al, versus Attorney General of the United States, et al.) Attorneys for that suit are Leonard Boudin and Herbert Jordan, Support and fundraising for the costs of this case is coordinated by the Political Rights Defense Fund.

4. Eleven local challenges have been filed against the application of state and municipal disclosure laws to the Socialist Workers campaign committees. Many of these are being handled by the American Civil Liberties Union.

5. In September, 1974, the Minnesota Ethics Commission voted to exempt the Minnesota Socialist Workers Campaign Committee from disclosure on the basis of government harassment.

6. In October, 1975, a three judge panel in Washington, D.C., ordered the D.C. Board of Elections and Ethics to provide a hearing wherein the local Socialist Workers campaign committee can present evidence of government harassment pursuant to a request for exemption from the disclosure provisions of the local ordinance. This case (Doe v. Martin) was cited in the Supreme Court ruling on the Buckley/McCarthy challenge to the Federal Election Campaign Act of 1974.

Senator PELL. Thank you very much for being with us and for your patience in sticking through all this. I apologize for moving ahead as we did.

This winds up these hearings.

At this point in the hearing record, I submit written statements or letters of additional interested persons who were not able to appear here today to testify.

[The material referred to follows:]

STATEMENT BY HON. BILL FRENZEL, A U.S. REPRESENTATIVE FROM THE STATE OF  
MINNESOTA

Mr. Chairman, I regret that I was unable to appear before the Subcommittee this morning. My Ways and Means Committee is marking up the Debt Ceiling Bill, so I could not be present here.

I urge your Subcommittee to promptly pass a bill to reconstitute the Federal Elections Commission. The bill should provide for the normal Presidential appointment and Senate confirmation of the six-person Commission on a staggered term basis, as provided in either the Schweiker bill or the Scott-Kennedy Bill.

My first preference is to pass a reconstitution bill with no frills. I have a great fear that the addition of extra baggage to a reconstitution bill could imperil the passage or signing of that bill especially if the extra baggage is controversial.

Nevertheless, I realize that some amendments will be added. My feelings on the principal proposals to date are as follows:

1. I think the Congress should exercise self-restraint and not add a congressional public financing provision. Not only would it be more appropriate to consider congressional public financing after we had a chance to evaluate the experience of Presidential public financing, but also no feature presents a greater risk in getting a reconstitution bill signed than public financing.

2. I do not think that it is reasonable at this time to accept the Buckley-Steiger proposal to raise contribution limits. I am sympathetic with that concept, but since the current election process is already in midstream, this is no time to change horses. Again, it would be better to review this matter after the election in light of the 1976 experience.

3. The proposals for an independent prosecutor should be reviewed. The present Commission is based on the concept of compliance rather than prosecution. We would hope that prosecution would be limited and that our election laws would be structured to encourage people to take part in the political process rather than to scare them out of it.

4. I would urge that Congress not be given a veto over advisory opinions. The Congress so far has vetoed each set of regulations to come before it. No set of regulations has become effective yet. Candidates must have some basis on which to act. Right now the only basis we have is advisory opinions. Further, I believe the veto of advisory opinions gives Congress too much control over the Commission.

5. There have been suggestions to emphasize further the compliance aspects of the law over the prosecution aspects. In particular a 30 day compliance period has been suggested. I support this idea and hope the Senate will consider it.

6. There are also proposals to ensure disclosure of independent expenditures and disclaimers on independent media expenditures. Since the court decision has apparently opened a large loophole in this area, I think its proposals are worthwhile and hope the Senate will agree to them.

7. Perhaps the most controversial suggestion is one which either negates the advisory opinion 23, the SUNPAC case, or use the roundabout approach to do the same things by requiring that advisory opinions be put into regulation from within a time certain or expire. This controversial proposal carries with it the element of risk about the final enactment of this legislation. I hope Congress can resist the temptation to mess around in this area.

Thank you for the opportunity to present this testimony to your Committee.

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STATEMENT BY ROBERT S. STRAUSS, CHAIRMAN, DEMOCRATIC NATIONAL COMMITTEE

Mr. Chairman, I wish to take this opportunity to express my concern, as Chairman of the Democratic National Committee, for the interests of my Party, our presidential candidates, and the Federal Election Campaign Act in light of the recent Supreme Court ruling on *Buckley v. Valeo*.

First let me say that in my judgment, the Court's opinion was a substantive victory for those of us who have felt so strongly about the need for reform and regulation on campaign financing.

I need not chronicle for you the activity of the Democratic Party in seeking a legislative response to the faults in our political system that became manifest during the Watergate tragedy. We were the propelling force in the enactment of the Federal Election Campaign Act of 1974. We knew then, and we know even better now, that the reform act was not perfect, but that it did substantively address many of the major abuses that have plagued American federal campaigns for many years. I want to make it very clear that I have no intention of retreating from my support, nor our Party's support, of the major tenets of this legislative act. We support the Law, and the enforcement and strengthening of its provisions. In light of the Supreme Court decision, I have concerns about the ability of candidates to function on a day-to-day basis.

We have to be fully cognizant of political reality, and determine a course of action that will provide immediate stability and continuity and preserve as much as possible of the original design. This can only be accomplished by a realistic timetable of legislative and executive action.

This is not the time to chronicle the record of the Federal Election Commission—it has both advocates and detractors. Generally, I believe the FEC to have

done an admirable job in very fresh terrain, under tense and difficult circumstances. It is a source of stability and a resource of technical assistance. We must strive to insure that a sense of continuity be maintained for the 1976 election process, and the public's funds carefully disbursed throughout this critical political year.

It is very clear that continuity at this point has indeed been disrupted by the Supreme Court decision. Questions have been raised and remain unanswered. Indeed, our legal staff has prepared a detailed official complaint against the President and the President Ford Committee, documenting substantive and serious violations of the Federal Election Campaign Act with respect to President Ford's 1975 travels. Yet our complaint remains unfiled. We do not know who or what to file it with. No one knows what the state of reform will be on March 1, 1976. This instability and vagueness are dangerous and unconscionable, as well as unfair to candidates of both parties. We must restore structure and order to the process without delay.

I do not seek to make a normative evaluation of the many proposals that are now before you. But I do want to make a realistic presentation of political reality in light of the very short timetable that we are presented with.

I do not wish to prejudice the possible legislative outcome or merit of any of the proposals that have been introduced to amend the Federal Election Campaign Act of 1974. Indeed, I would hope that my comments help to create a climate in which these proposals can be given full and responsible debate and resolution. But we have an immediate problem, and in light of this urgency, I urge you to consider and adopt emergency legislation which will give an appropriate institution the power to issue certifications, advisory opinions and interpretive rulings forthwith. Obviously, I would be positively disposed to legislation providing for public financing of congressional elections, as in S. 2919. However, time is so critical and so short that I urge you to tackle immediate problems before commencing activities in still newer and fresher areas of political reform.

We are all well aware of the broad range of thought, and the intensity of feeling, which exist on the subject of reform of the financing of American politics. A parallel continuum exists with respect to the performance and propriety of the Federal Election Commission. Yet, this is not my most pressing concern. My responsibilities as Chairman of the Democratic National Committee, make me focus on the incalculable problems faced by my presidential candidates as long as the status of the FEC remains in question. Most of our candidates cannot sustain even a lapse of a few days in the payment of federal matching funds. Many of our campaigns are operating on a day-to-day cash flow. A time lapse in the certification and distribution of federal funds could be so disruptive to the political process that it could have a dangerous impact on the outcome of both the Democratic and Republican presidential nominating systems. This must be avoided.

You on this Committee, and in Congress can avoid such a course of events by prompt remedial action. It is my first preference that you act favorably on S. 2911 so that the current structures and procedures of the Federal Election Commission proceed uninterrupted and unchanged, subject to the appropriate Executive appointment which would bring the Commission into compliance with the Court's ruling. If, however, passage of S. 2911 cannot be accomplished prior to March 1, 1976, I am prepared to ask the Supreme Court for a 30 day extension of the Commission's mandated responsibility. As we in the political processes proceed via the appropriate judicial route, I would hope that Congress too would proceed expeditiously at the very least to enact S. 2918 which would prevent any disruption in the payments of funds to our presidential candidates and political parties.

Obviously, I believe it crucial that you act quickly to avoid continuing disruption. Mr. Chairman, I appreciate the opportunity to present my views on behalf of the National Democratic Party, and commend you for your diligent attention to these problems so very decisive to the 1976 political process. Thank you.

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U.S. SENATE,  
OFFICE OF THE SECRETARY,  
Washington, D.C., February 16, 1976.

HON. CLAIBORNE PELL,  
*Chairman, Subcommittee on Privileges and Elections, Committee on Rules and Administration, U.S. Senate, Washington, D.C.*

DEAR SENATOR PELL: I am taking the liberty of presenting two suggestions for the Subcommittee's consideration in connection with hearings and proposals

modifying the Federal Election Campaign Act of 1971, as amended, in the aftermath of *Buckley v. Valeo*. These suggestions grow out of my experiences as an ex officio member of the Commission.

The first suggestion concerns the continued presence of ex officio members on a presidentially appointed Federal Election Commission as is provided in S. 2911 introduced by Senators Schweiker and Cranston and S. 2912 offered by Senators Kennedy and Scott (Pa.). A second suggestion relates to the availability to the Senate of information on alternatives such as that provided in S. 2918, also introduced by Senators Kennedy and Scott (Pa.), a bill which proposes, at least, on a temporary basis, to turn over the certification function with regard to presidential funding to the Comptroller-General.

The position of the voting members of the Federal Election Commission on these various proposals is one which will be presented by Commissioners Thompson and Aikens at your hearing on February 18. The suggestions contained in this letter do not reflect on their position but rather relate to matters of peculiar interest to the Senate as I see the situation.

As an ex officio member of the Commission, it has been my intention that the office of the Secretary of the Senate represent the Senate as an institution of government with a vital interest in the successful functioning of the Federal electoral process. My office has endeavored therefore to exercise our best judgment in this connection on various subjects and issues before the Commission which would be reflective of the public interest as well as in accordance with the law. In that perspective, it seems to me that the Senate's ex officio member also serves as a focal point for exchange of information leading to a better understanding of problems of Senate candidates and campaigns as distinct from problems associated with House and presidential candidates and campaigns. Similarly, it is my hope that this office will be able to provide insight into the problems of candidates for the Senate as they relate to the Commission's decisions and rules. It also seems to me valid for the Senate's ex officio to make recommendations to the Senate Rules Committee with a view to adjustments to the law which may be revealed by experience to be desirable.

Other responsibilities prevent me from spending a great deal of time at the Commission. In order, however, to insure a full participation on the part of the Senate, I have, with the concurrence of the Majority and Minority Leaders, designated a Special Deputy of the Secretary of the Senate, (Ms. Harriet Robnett, J.D.) who is assigned exclusively to work in connection with the Commission.

At the inception of the present Commission, I held the view and other members concurred that ex officio members should have all rights and privileges and responsibilities of the other Commissioners, except the right to vote. From time to time, we have experienced some reluctance to observe that understanding on the part of the voting-members of the Commission and its staff.

The need and value of an ex officio member is, of course, a matter primarily for determination by the Senate and the Congress. The Subcommittee may wish to discuss the role or define it differently than I have herein described. I have no wish to intrude on the decision of the Subcommittee in this regard but I do wish to suggest that the role of the ex officio be discussed at your hearing and be considered by the Subcommittee with reference to any proposal it may recommend to the full Committee.

In the event the Subcommittee favorably reports at this time a bill providing for changes in the Commission to comply with the Court's decision and includes therein provision for the continued participation of the Secretary of the Senate and the Clerk of the House of Representatives as ex officio members, I believe that an amendment should be added expressly noting that ex officio members have all rights, privileges and responsibilities of voting members of the Commission except for the right to vote. Additionally, I hope the Subcommittee will consider the need to assure that the ex officio officer, as a matter of right, shall be empowered to participate fully, except for the vote, in meetings of the Commission and that an ex officio member may be represented by a formally designated special deputy acting on his behalf and in his absence. An amendment to accomplish such a result would provide for the addition of the word "voting" in the second sentence of section 437c(c) of Title 2, U.S.C. so that the sentence as amended would read: "A voting member of the Commission may not delegate to any person his vote or any decisionmaking authority or duty vested in the Commission by the provisions of this title."

Turning now to a second suggestion for your consideration. I know you recognize that what remains of the thirty day stay of judgment granted by the Supreme Court as it affects the powers and duties of the Federal Election Commission is brief indeed. The time frame could be actually inadequate to complete Senate and House consideration, action and agreement on any legislation including proposals to reconstitute the Commission. I believe, therefore, that it would be particularly helpful to the deliberations of the Senate to have available for members as much accurate information as possible concerning alternative methods for handling presidential campaign financing duties now carried out by the Commission.

It is with that in mind that I would suggest that Treasury be invited to present oral or written testimony concerning what action, if any, it could take concerning payment of Presidential campaign funds should Congress and the President not agree on legislation during the thirty day stay period. I also believe Treasury's comments should be sought on whether the Treasury itself, if authorized by law to do so, could take over the functions of certification possibly under arrangements utilizing the Federal Election Commission including their staff and procedures.

The above suggestion is of particular pertinence in view of the letter of February 5 to the Majority Leader from the Comptroller General wherein the latter describes the prospect of a possible transfer of the certification function as disruptive and one that his office is inadequately prepared to take.

The determination of legislation affecting the Commission and certification, of course, will lie with the House as well as the Senate. However, whatever decision is reached, I believe would be improved by assuring so far as possible at all stages of the legislative process the availability of accurate information on the scope of alternatives open for Congressional action.

In closing, allow me to express again my hope that the Subcommittee will consider, discuss and determine the merits of continuing the presence of the Secretary of the Senate as an *ex officio* member on a new Commission under the pending legislative proposals. The inclusion of this letter in the printing record of your hearings would be appreciated.

Sincerely,

FRANCIS R. VALEO,  
*Secretary of the Senate.*

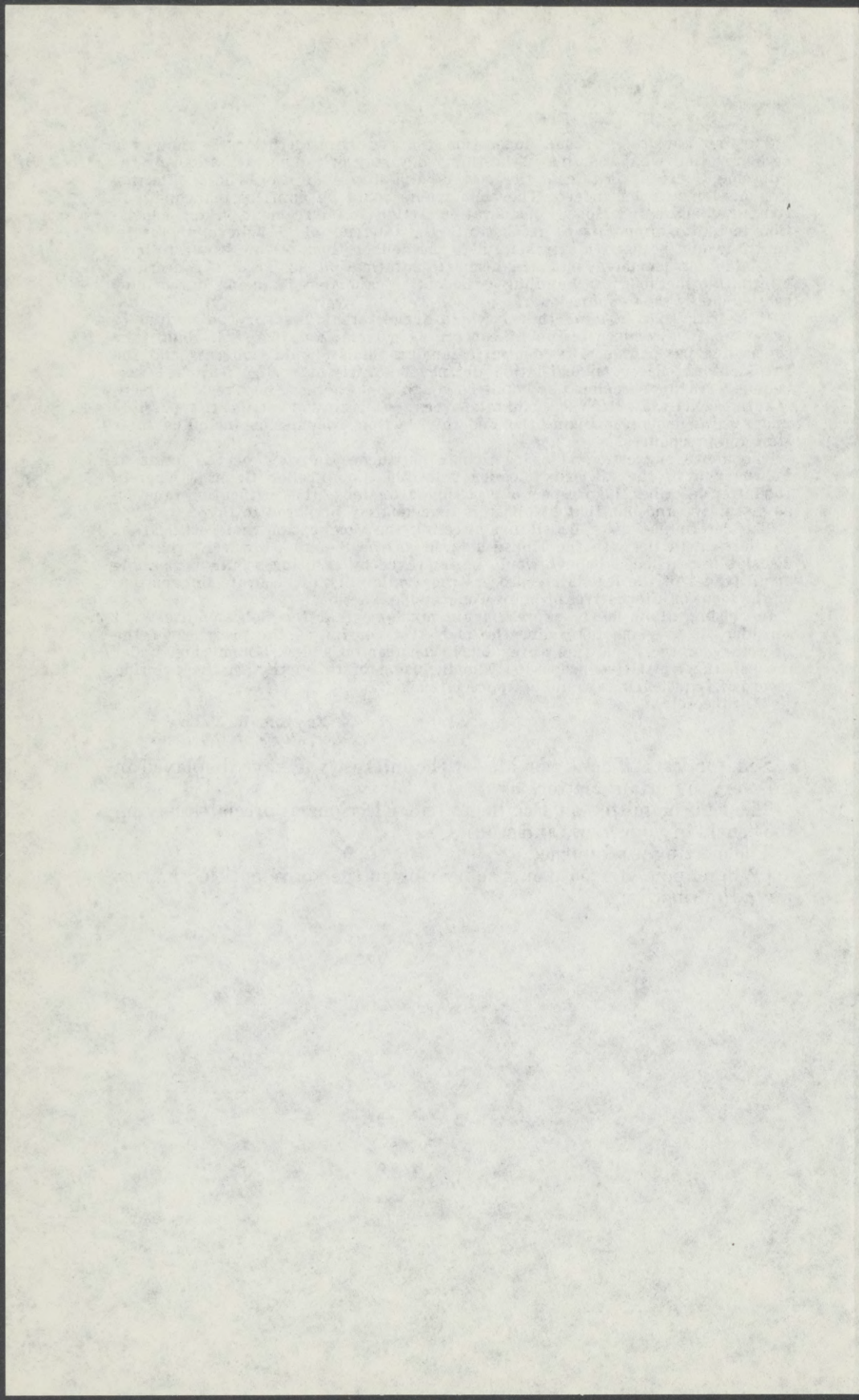
Senator PELL. Thank you all for the interest you have displayed in this very important matter.

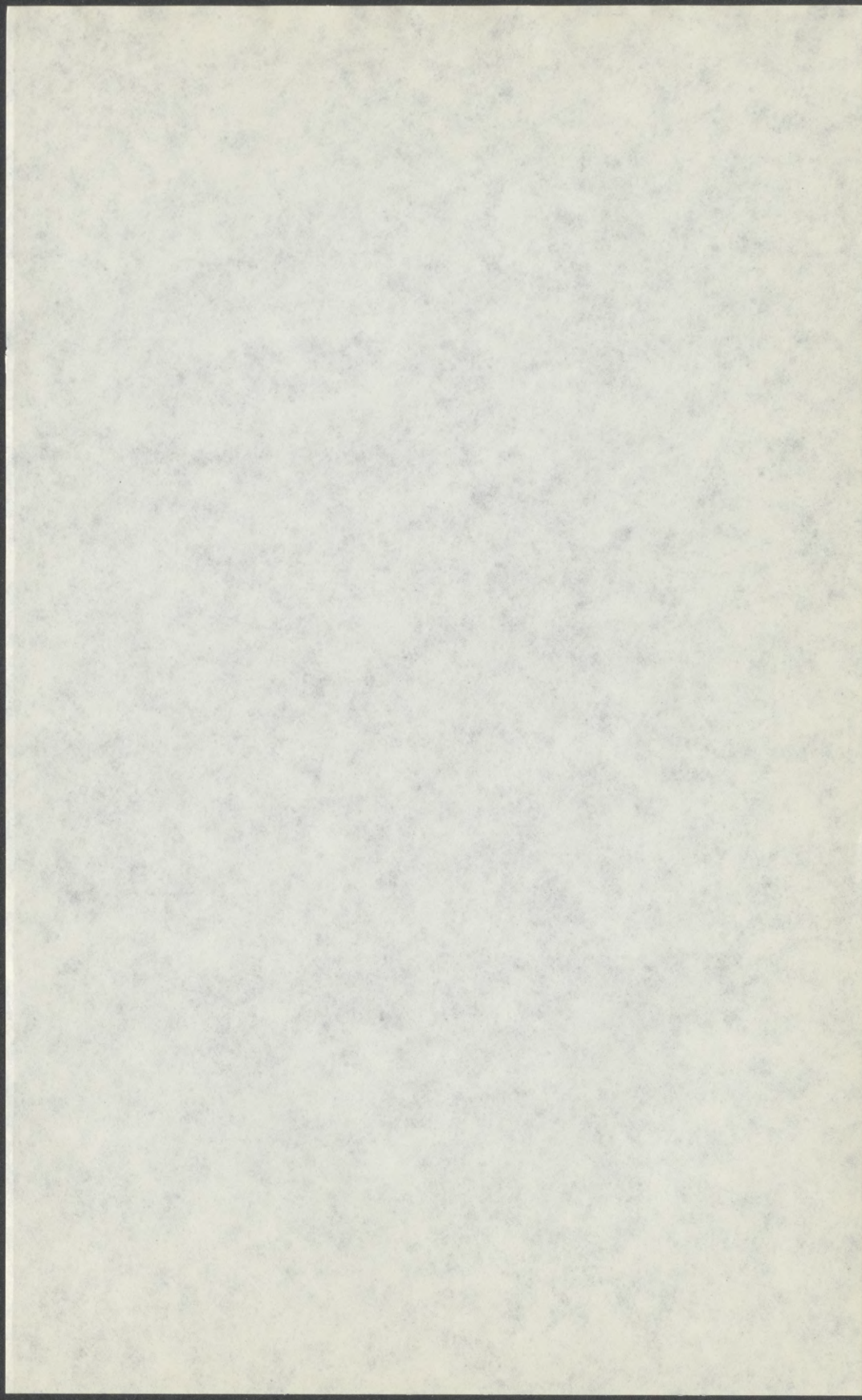
The Subcommittee on Privileges and Elections appreciates having the benefit of your views and studies.

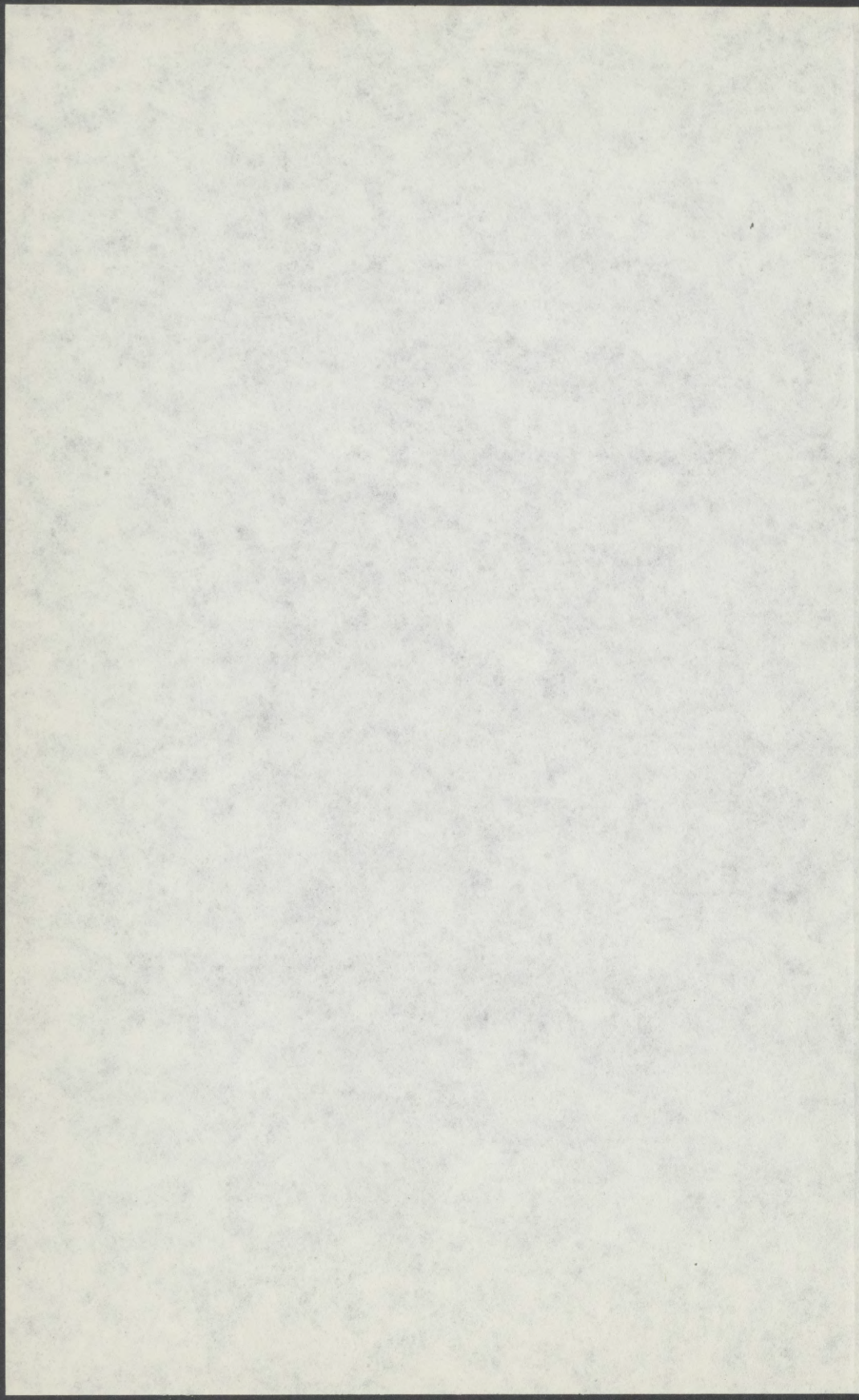
The meeting is adjourned.

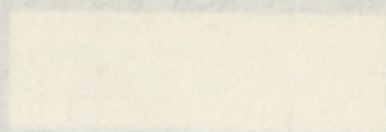
[Whereupon, at 4:55 p.m., the hearing in the above-entitled matter was adjourned.]













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