IN THE SUPREME COURT OF THE UNITED STATES

COMMON CAUSE ET AL., Appellants	:	
v.	:	No. 80-847
HARRISON SCHMITT ET AL.; and	:	
FEDERAL ELECTION COMMISSION, Appellant	:	
v.	:	No. 80-1067
AMERICANS FOR CHANGE ET AL.	:	

Washington, D.C.

Wednesday, October 7, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:55 a.m.

APPEARANCES:

CHARLES NEVETT STEELE, ESQ., Federal Election Commission, Washington, D.C.; on behalf of the Appellant.

ARCHIBALD COX, ESQ., Cambridge, Massachusetts; on behalf of the Appellants.

JAN W. BARAN, ESQ., Washington, D.C.; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in the Common Cause and others against Schmitt and the consolidated case.

Mr. Steele, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF CHARLES NEVETT STEELE, ESQ.,

ON BEHALF OF THE APPELLANT

MR. STEELE: Mr. Chief Justice, and may it please the Court:

Amongst the responsibilities of the Federal Election Commission is that of administering the Presidential Election Campaign Fund Act. That is the Act contained at Chapter 95 of subtitle H of the Internal Revenue Code which provides that in the general election a grant of money to the candidates of political parties. In the 1980 election the grant to the candidates of the major parties was $29.4 million. The statute provides that that grant goes to the candidate of the party within ten days of his nomination, if he chooses it.

The statute makes the public funding provision optional for the candidates of all parties. If they accept the public funding, they agree to expenditure limitations not to exceed the amount of the grant, $29.4 million. They also agree not to accept private contributions.

The statute has been twice challenged. The first time it was challenged was in the case of Buckley v. Valeo decided by this Court. The challenge there was majorly one under the Fifth Amendment, though there was a First Amendment challenge on an analogy to the freedom of religion. But the major challenge there was that the statute as constructed discriminated, discriminated against minor parties and new parties on the grounds that by providing the amounts of money before the election to the major parties that it unfairly advantaged them against parties which could not obtain that pre-election funding.

This Court rejected that challenge. It concluded that the Congressional decision to provide for public financing was one well within its power, its power to legislate to protect elections, decided by this Court in Burroughs v. United States; and that the power over elections was such that this was a valid exercise of Congress' power under the general welfare clause to expend the monies that it raises.

QUESTION: It was also challenged on the grounds that it prohibited expenditures by individual candidates of their own money, and it was struck down in that regard, was it not?

MR. STEELE: Yes, it was. This case really involves a third challenge to it, I think, a challenge that

was not raised in Buckley; the statute then was identical and was not raised in the second case, which was the Republican National Committee, which was a case that was brought on behalf of the supporters of the Republican candidates in the 1980 election. And the challenge there was a straight First Amendment challenge not similar to the one in Buckley, but that the statute, by requiring the candidates to agree to an expenditure limit, abridged the rights of the candidate's supporters; that the supporters by being closed out in the public financing system had their First Amendment rights abridged.

This Court, affirming the decisions of a three-judge District Court in the en banc court for the Second Circuit, concluded that there was no such violation of First Amendment rights. As set forth in the court's decisions below, they noted that individuals in the public financing system have substantial opportunities for participating in that system, and listed them there.

In effect, this is a third challenge. This is a challenge to the First Amendment, another First Amendment challenge, that the supporters of the Republican candidate have their First Amendment rights violated because contributions that they wish to make cannot be translated into independent expenditures by political committees; rather than the challenge in the RNC case which was that

their First Amendment rights of supporters were abridged because they could not give to the candidate, and the candidate could not expend those monies.

This is a challenge that those supporters' First Amendment rights are violated because they cannot give that money to a political committee which will in turn transform those into expenditures.

The case arose in the following fashion. In the early summer of 1980 the three respondents announced plans that they would each raise funds, take contributions, aggregate those funds, take contributions from corporate PACs, take contributions from union PACs, take contributions from other political committees, take contributions from individuals.

They qualified themselves as multi-candidate committees under the statute. Those multi-candidate committees are permitted to take contributions of $5,000 under the statute in this Court's decision in Buckley, as opposed to those of other political committees which are limited to $1,000 contributions.

They announced plans that they were going to raise these monies and expend them on the grounds that they had an unlimited right to make those kind of expenditures. There was no application as to whether or not the Act applied to those; though I would note that one of the respondents, the

Americans for an Effective Presidency, sought and then withdrew for an opinion, an advisory opinion from the Commisssion as to whether the statute prohibited their activities, indicating that they felt that there was a constitutional problem; but that opinion was withdrawn.

Beyond that, none of them applied for what the Act does provide, which is a declaration as to whether the Act prohibits the activities that they were involved --

QUESTION: Mr. Steele, I gather back in 1976 -- am I right -- the Commission suggested that these were really independent expenditures that probably wouldn't come within to further the election of candidates. Is that so in, you know, the case of that GOP Feminist Caucus on the buttons for President Ford?

MR. STEELE: Yes. That was not a Commission decision. That was an informational letter. That was during the period after Buckley when the Commission --

QUESTION: Well, has the Commission -- may I put it this way -- interpreted subdivision (f) as inapplicable if they are in fact independent expenditures?

MR. STEELE: I think that the Commission has not.

QUESTION: Has not.

MR. STEELE: The arguments that I understand the respondents to be making are, first, that the Commission in considering regulations in 1976 after this Court's decision

in Buckley, the Commission after its reconstitution in May had hearings during June and July attempting to get regulations in place for the 1976 election.

During those hearings there was a substantial portion of those hearings, two days of those hearings, half of two days of those, devoted to the question of 9012(f). Respondents argue that the Commission, by not adopting a regulation that repeated the words of the statute, indicated that somehow that the Commission had decided that that was not applicable to independent expenditures.

I don't see how the nonadoption of the statutory words in a regulation yields that result.

QUESTION: But in any event, your answer to me is the Commission never has in fact constituted the statute as inapplicable to so-called independent expenditures by these --

MR. STEELE: That is correct.

QUESTION: And that's your position today, that the statute can't be read that way.

MR. STEELE: That's correct.

With regard to the informational letter that you asked about, as I say, that was an informational letter coming out of the staff. I think that there is language in there that is probably -- cuts against that position, but I don't think that was an official Commission position. And

moreover, the requesting party there said right up what it was doing was the so-called button and bows exemption which was enacted in '79 -- small, less than $1,000, small items. And the real question there was there was that --

QUESTION: But I gather the Commission's position is that we can't avoid deciding the constitutional question.

MR. STEELE: That is correct.

As I was saying, I think that one of the respondents here, the Americans for Change, argues to this Court that there is an interpretation of the statute which would allow it to avoid that. They did not seek an interpretation before the Commission. The other parties all seem to agree that basically the statute prohibits it.

In any event, the activity was undertaken on the grounds of the feelings of the respondents that their constitutional rights allowed them to do that activity.

In the face of these plans, the Commission, which under the statute in Section 9011(b) of Title 26 is authorized to bring suits to implement or construe provisions of the Fund Act, brought this suit, brought it in the statutorily required three-judge District Court for the District of Columbia.

QUESTION: Before you go on, what about a committee that was formed, an independent committee that was formed not to support any candidate, but in a three-way

political campaign, three candidates, three major candidates. This committee devoted itself entirely to being against, to the defeat of one of them in circumstances where taking votes away from that one would clearly favor one of the other two.

MR. STEELE: Yes.

QUESTION: What about that kind of a committee?

MR. STEELE: That is a question which has never come in front of the Commission, so that my answer would be, is not something that an interpretation that I think the Commission in any way has made. But it would seem that the terms of the statute are to further the election of a candidate, and that an expenditure to defeat one, even where there are three, would be one that would further the election of anybody but. So that I would think that there is an argument under the statute that that certainly is something that would further the election.

I would reiterate again that I do not think that that question has been posed to the Commission, either by the facts of this case or in any request for an advisory --

QUESTION: And you don't think that's any interference with First Amendment rights?

MR. STEELE: Well, I think that under Buckley v. Valeo and numerous other Court decisions of this Court, but Buckley v. Valeo most prominently because it is in the area,

that this Court has articulated a balancing standard; that the rights, the First Amendment rights, I think that there are First Amendment rights implicated here, because there is under this Court's decision in Buckley v. Valeo, there is the expenditure of money to achieve statements of political ends.

But the court below, I think, which found the statute constitutional, in effect said that the balance that Congress here struck in trying to protect individual rights in the public financing scheme was not a valid one. But I think it very clear, and I hope that our brief which I will try not to go through all of the legislative history, but do not thereby wish to avoid what I think is one of the major thrusts of our brief, which is that Congress considered this statute, considered the problems, including the constitutional problems, and struck a balance that it felt that did what its major purpose was, which was to, under the federal funding statute, which was to create a substitute for private financing, to allow within that, to allow individuals substantial opportunities to continue to participate in the elections.

Again, I cited the RNC case where I think there was a long recitation of those. We have set those forth in the ends of our brief. But there are substantial rights protected by the statute. It is not considered to be a

contribution under the statute for a person to offer their services. It is not considered a contribution under the statute for people to travel on behalf of a candidate up to an amount of $2,000. There is an exemption for use of homes, and it's broadened so that it's not merely a personal home but in effect is shelter, and that there are substantial opportunities for individuals to participate.

Section 9012(f) itself makes very clear, and if it's not clear by the fact that it refers only to political committees, it seems to me it's clear from the legislative history that Congress balanced to allow individuals to make expenditures under the statute.

QUESTION: Is it your position that only the Commission may bring an action under 9011(b) to implement or construe the Act before a three-judge court?

MR. STEELE: The statute provides for other parties to bring such an action, so I think it is not the Commission's position that only the Commission can. The question in my mind then becomes, and I would in a sense say that the jurisdictional question there then becomes whether or not the action is one really to implement or construe the statute; that in effect that what I would say is that it is not a substitute for actions to enforce the Act under 437(g) or other provisions.

QUESTION: Which might involve fact-finding in

that certainly.

MR. STEELE: Yes.

Congress, in enacting the public financing statute, explicitly sought to establish it as an alternate to private financing -- not a mandatory alternate but one chosen by the candidate. In so doing, Congress looked at what it saw as the reality of political life and debated the problem that would arise if having limited that fund, committees were able to be formed to expend unlimited amounts of money and thereby to in effect dwarf the fund.

For Congress saw, Congress debated -- indeed, at pages 22 and 23 of our -- 21 and 22 of our brief, going slightly over to 23, is a series of debates in the 1971 history. We have earlier referred to the fact of the 1966-67 history which first drafted the statute. But there were attempts to go both ways. There were attempts by some Senators to say if you allow a thousand dollars per committee, you are allowing a substantial loophole. You are allowing -- there will be committees formed all over the place that will expend money in amounts up to a thousand dollars, and it will substantially undercut the fund.

There were amendments that sought to reject the idea that individuals could spend money, saying that well, if you allow individuals to spend money, they, too, will undercut the fund. There were other attempts to amend the

statute to say well, we need to broaden this. We need to let more come out here. There was substantial talk of the constitutional rights of individuals. And in effect, the choice that the Congress made -- and I think it's clear in that history and clear in the statute -- was an attempt to prohibit large, aggregated wealth from dominating over the public fund, while protecting the individual rights.

Turning to the question -- the decision of the District Court below, the three-judge District Court below, the court there analyzed this case as basically one that involved only the pooling of funds. In effect, they rejected the Congressional assessment of the fact that political committees, particularly large, multi-candidate committees such as these, were very different from individuals who merely pooled funds. In effect, the decision of the court below suggests that as pooling agents these committees directly exercise the First Amendment rights that an individual would be doing.

The Congressional judgment was very different. The Congressional judgment was that this was not central to the individual's right. And the question of the statutory test comes forward here.

I would say that under this Court's decision in Buckley v. Valeo that the test of a public financing statute such as this is whether it serves a rational basis, and that

in that vein that the Congressional decision that in order to protect this fund, in order to have this fund not dwarfed so that a candidate looking out over the whole political scene would not have to think I know that out there there is substantial amounts of money; I must woo that money, if I am going to be successful in my candidacy. And people can spend, as the three committees here did, approximately $9 million in the course of election, a sum that's roughly one-third of that which the public fund provides.

If they look out in future years knowing that in this election there were these three respondents and two other committees that did that, but that there are some 1,200 political action committees of corporations, political action committees of unions that will, if the decision below is upheld, be able to spend that kind of money, any candidate will have to woo that money. He will have to consider that the positions he takes, the arguments he makes will necessarily be swayed by the expenditure of that money; and that is precisely what Congress sought to avoid with the public financing statute.

For one of the purposes approved by this Court was the ability to free the candidate from having to seek those private funds, put forward this system of public financing as a substitute, not merely as a supplement. And indeed, in this Court's decision, the rationale for rejecting the Fifth

Amendment challenge, the discriminatory challenge, was precisely that; that the new parties and so forth were not disadvantaged because there was this cap, because there was this substitute. They could seek money; they could seek money outside the system. And therefore, though the major parties were given this subsidy, the minor parties were not disadvantaged in the constitutional sense because they were still able to raise the private funds.

QUESTION: Let me put a variation of the hypothetical I had put to you earlier. Suppose a committee, an independent committee is formed for the stated and publicized purpose of getting out the largest possible, maximum vote, and it is clear in that setting that the maximum, the larger the vote, the large vote will favor one of the candidates.

Would you say that that would fall in the same way that a committee formed to defeat one candidate because it has an influence on the election?

MR. STEELE: I think that though perhaps in reality one might be able to decide that getting out the vote overall might benefit one candidate, I think that that's a decision -- to say that that was what Congress meant of furthering the election of one candidate would be astray; in effect, that legally the getting out the vote -- and indeed, the statute very explicitly protects get out the

vote activity in a number of ways; indeed, it's a question that the Commission has wrestled within the context of whether simple signs saying "Get out the vote," paid for by committees and so forth, are ones that violate the statute. But that in effect that get out the vote, even though one might be able in a political science sense to say that it had indeed advantaged one candidate over the other, was not what Congress was aiming at when it was speaking of furthering the election of a candidate.

The court below spoke in terms of the fact that there was no quid pro quo here; there was no possibility of a quid pro quo between these independent committees and that of the candidate. Again, it would seem that that judgment is one in which the court below says that, in effect, that the Congress was wrong, because the Congress' judgment, in effect, was first of all that the interest here was for public financing, to protect the public financing; that there did not need to be a quid pro quo.

Even accepting the argument that a quid pro quo is necessary, that corruption is necessary or the appearance of corruption is necessary, the court below did not really come to grips with the Congressional judgment that if you had large-scale committees like this, you were inevitably in a situation where a candidate needed to pay attention to what those committees brought forth, needed, in effect, to decide

that if he did not pay attention to what those committees were advocating, he would not be able to -- he would not be as likely to be as successful in his election campaign.

In effect, Congress' judgment was that the dangers of a quid pro quo that were there were very great, and that in any event that if you have a public financing system set forth by $29.4 million, if the private funding goes well beyond that in the terms that we have set forth in our briefs, that many of the Senators use, that committees will be created to go beyond the authorization of this Act; that if you have a system where the private funding is $60 million or $90 million -- that was not true in this election; it was $9 million roughly, as I say, one-third -- but that if you have a situation such as that, that you have the public fund being merely a takeoff point. It is merely a subsidy. It is a subsidy then to the parties, the major parties or to minor parties who have obtained the five percent in the last election, which would not be for the full $29.4 million but in a ratio. But that there is only then a system not of a substitute of public financing, but of a system where public financing is a supplement to private financing.

The Congress rejected that idea, rejected that idea in the basic statute, rejected that idea in 9012(f) itself explicitly.

As I say, I do not want to -- I certainly don't have the time to go through all the Congressional history again; but I would make once more the point that I think that our brief has set forth, is that this was a very explicit Congressional choice. This was not something that crept up unawares on the Congress. Congress debated this in '66-'67. When the statute came back in '71, it occupied them for a long period of time during those debates. As I say, there were amendments back and forth.

The Congressional choice here was to protect public financing and to prohibit the private financing by political committees. It made a very distinct balancing. It does not prohibit it entirely. It allowed it up to a thousand dollars for these political committees. Again, these political committees are aggregations of wealth.

I would reserve the remainder.

CHIEF JUSTICE BURGER: Mr. Cox.

ORAL ARGUMENT OF ARCHIBALD COX, ESQ.,

ON BEHALF OF APPELLANTS

MR. COX: Mr. Chief Justice, may it please the Court:

The issues in this case have extraordinary importance, not only because they implicate the First Amendment but also because the decision will profoundly influence, if not determine for many years in the future the

role of aggregated wealth from presidential elections.

The central question as we see it here is whether Congress has the power to restrict the aggregation and expenditure of wealth by political committees, by organizations whose primary purpose is to support a candidate for election, where the presidential candidate has agreed to accept public funds in lieu of private financing of his campaign.

That question, we submit, was not decided in Buckley and Valeo. That case was concerned with a sweeping ban on all independent expenditures, including expenditures by individuals, by a wide variety of associations.

Section 9012(f), on the other hand, restricts only expenditures by political committees; that is to say, by centrally managed organizations whose major purpose is to raise money by widespread solicitation of contributions, and then having aggregated the funds, to promote the election of a candidate.

We submit the restriction does not violate the First Amendment essentially for two reasons. First, it serves the important purpose of preserving the integrity of government and public confidence in the integrity of government against the corrosive effects of private financing in presidential election campaigns. And second, it leaves wide scope for political speech and expression by

individuals and by groups, including various associations other than political committees as I have defined them.

QUESTION: Mr. Cox, what do you do with respect to the Court of Appeals treatment of your standing at pages 28a and page 29a of the jurisdictional statement?

MR. COX: We say first that that question need not be faced by this Court, because of the decision in McCulloch against the Society of Honduran Seamen in 372 U.S. 10. There the court had two cases before it. In one of them the plaintiffs' standing and the jurisdiction of the District Court was established. In the other case it was debated, as it would be debated here. And this Court held in the McCulloch case -- that was the flags of convenience case that some of you will remember -- that it could go to the merits in both cases.

So I think Your Honors do not need to be concerned with that question. The case, we submit, of course, should be remanded; and we would think that that would be an issue to be fought out again in the District Court.

QUESTION: So you're arguing basically the same position as the Commission has argued.

MR. COX: That's correct. Of course, when that question requires decision -- and we have covered it in our papers on the jurisdictional statement -- when that question requires consideration, then we would be at odds. But I

don't think this Court has decided. If the Court does go into it, it's covered in our papers in the answer to the motion to dismiss or affirm.

In developing the constitutionality of the statute, I acknowledge, of course, that the restriction in 9012(f) impinges on freedom of speech and freedom of association. But those rights, we submit, as this Court has often held, are not absolute. There is some room for balancing where the restriction is targeted to protect the public. Again, this faces evil other than some evil supposed to be inherent in the ideas or the information expressed and its effect on the minds of the public.

QUESTION: Those two rights you referred to, Mr. Cox, they come about as near, as near to being absolute as any of the First Amendment rights, do they not?

MR. COX: The Court has often said that they are subject to qualification if we satisfy the strict scrutiny test, and here we submit that we do satisfy that test. The Fund Act, as I said, was framed and enacted to secure the integrity of government and the confidence of people in the integrity of government. And this Court on previous occasions has recognized that those are sufficient and compelling, sufficiently compelling interests to survive the strict scrutiny test.

Now, developing the compelling purpose, the

corrosive effects of private financing of presidential campaigns have, of course, been well documented both in Congress, this Court, and in other writings. Then Congress determined to eliminate them by an offer to substitute public funding so that the presidential candidate, in the words of Senator Pastore, might take office a free man, might take office neither himself nor his appointees, his administration in any way beholden to those who had put up the money to elect him.

The Congress was also aware that to secure that purpose it had to go beyond simply forbidding the acceptance of contributions and the expenditure by the candidate and his authorized committees of more than the amount of the public fund -- in the 1980 election, $30 million a piece.

Congress realized, and as Mr. Steele said, it was explicitly discussed, that there was grave danger of subterfuge, meaning evasion not deceit; that there was grave danger of circumvention simply by friends of the candidate, those who had long been in his party moving out, setting up over here, without consultation, an independent committee. They'd all worked together for years. There'd be no need for any kind of consultation. And indeed, history shows that there's very grave danger that that amount of private money might very well swamp the public funding.

In addition, we submit, the Congress had ample

basis for concluding that the members of political committees who raise contributions and spend money to elect the President, independently as they characterize them, present a threat of actual or apparent undue influence upon the successful candidates in this race.

This really, it's a matter of common sense, I suggest. There's not much difference between the position of the man who says I contributed $5,000, $25,000 -- it couldn't be $25,000 now, but $5,000 -- to the President's election; I want an appointment with the Assistant Secretary for this or that department. And the money, as has often been put, serves as a right to get in the door and to get a sympathetic hearing.

Well, there's not much difference in the case of someone who says I spent, I raised and spent by a political committee $5 million. I would like a hearing with so and so, and a sympathetic hearing. And the effect, of course in some cases there's no effect, and we wish there would never be an effect. In other cases one doesn't know.

The danger was the converse of an expression of Justin Dart that we quote in our brief, "Dialogue with politicians is a fine thing, but with a little money they hear you better." And I suspect that in an election where there can be no private contributions, having spent a large sum of money may lead to being heard better.

QUESTION: The House itself has not accepted or has not enacted legislation which provides for public financing of House of Representatives campaigns, has it?

MR. COX: Neither House nor Senate is yet publicly financed, no. And this, of course, even with the President or the presidential election is a choice offered to the candidate, and 9012(f) applies only when the President has said I will take the public funds; I and my people won't spend more. Otherwise, unlike the situation in Buckley and Valeo, the restriction on spending even by political committees does not come in to play. It is only where the candidates so choose it.

This summer there was a particularly egregious example of the kind of coercion that may be implicit or may be made explicit with respect to expenditures. The National Chairman of NCPAC, closely associated with the Fund for the Conservative Majority, wrote to Congressman Badillo if you will make a public statement in support of the President's tax cut package and state that you intend to vote for it, we will withdraw all radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for taking that position on taxes.

Now, I don't think usually the threat would be made that blatantly. Indeed, here one may wonder whether it

doesn't even approach bribery. But this sort of thing is implicit over and over again, and Congress said we don't want it to take place. We think forbidding it is essential to put the President and his administration into office free men.

We've quoted in our briefs the opinions of externs, pointing out that those who have the hold on the candidate aren't the people who contribute to the political committee; they're the people who raise and control and spend the money. And as I said before, I think the danger from expenditure is just about as great as the danger when they raise contributions for the candidate directly.

QUESTION: How about the danger from donation of services as such?

MR. COX: I'm sorry.

QUESTION: How about the donation -- the danger from donations of services as such?

MR. COX: Well, renderage of service free is a contribution, as I remember, under ordinary circumstances. I wouldn't say if, Justice Rehnquist, you're talking about those people who are close to the candidate and help write speeches and things like that, I don't think I could argue that 9012(f) covers everything that might involve some sort of debt from the candidate.

QUESTION: How about just --

MR. COX: But I don't think the debt has half as corrosive effect on public confidence when it comes from having worked together rather than when it just simply comes from having raised and spent large sums of money. It's the money that has the -- destroys the public confidence.

QUESTION: Well, how about someone who takes off six months from his job and simply canvasses the country without compensation?

MR. COX: Well, I can't deny that there is maybe some feeling of obligation to look out for him. I just don't think it's as serious. And I don't think the failure to cover that renders the statute so seriously underinclusive as to make it --

QUESTION: Mr. Cox, your position does require some method of distinguishing between these expenditures, which you say may be limited, and the kinds of expenditures that the Court said could not be limited in Buckley, namely independent expenditures by an individual.

MR. COX: Well --

QUESTION: And, or I suppose you wouldn't say that if ten people get together and pool their resources and make an -- and all agree to publish a certain series of ads, you wouldn't think this (f) would apply to that, would you?

MR. COX: I would think that if ten people get together and each puts up a share and each helps write the

ad, that that is not -- does not have the characteristics of a political committee. I think the distinction lies primarily in the words "political committee," the definition of "political committee" which the Court gave in Buckley and Valeo where it spoke of an organization, the major purpose of which is to promote the election of candidates. And I think the emphasis is on the word -- an emphasis, not the only emphasis -- is on the word "organization;" that we're talking, as Mr. Justice Marshall said in the California Medical Association case, about separate entities, something which has a life of its own. It goes out and raises money from others who have no appreciable control over how the money is spent or over what is said.

Now, that means that there are many forms of expression that 608(e), which was held unconstitutional in Buckley and Valeo, forbade, that the present statute doesn't reach even in the context of public funding, which itself is a definite. It doesn't reach individual expression. It doesn't reach individuals acting jointly where it's short of being an organization.

QUESTION: Let me ask you something. I suppose that if a committee like this rather than directly supporting a candidate spent a lot of money on issues without mentioning a candidate, that this section wouldn't reach that?

MR. COX: Well, if it's an issue-oriented organization, it's not a political committee, to begin with.

QUESTION: Although it certainly may have a large impact on the election.

MR. COX: If it's an issue-oriented organization, it is not reached, whatever may be its impact.

QUESTION: Well, an issue-oriented organization only for purposes of this election. It was formed in connection with an election, and it disbands when the election is over. But its sole -- all it does is advocate an issue or several issues.

MR. COX: Well, then I think the question would be whether it could be found -- if it's really focusing on the issues and it wishes to win the day on those issues, then I would say it was not covered by Section 9012(f). If the intent --

QUESTION: Even, Mr. Cox, if the issue is one supported by one candidate and opposed by the other, so that the expenditures by the pro-issue people would benefit one candidate and not the other.

MR. COX: I'm trying to relate this in my mind to the words of the statute: "knowingly and willfully further the election of a candidate." I have no doubt that the case is covered where if it's a political committee, if they say the best way to elect our candidate is to hammer that

issue. On the other hand --

QUESTION: Well, the issue committee is then, if it's a sole issue, is that committee then a political committee for purposes of --

MR. COX: No, no. But Justice White asked me to assume, as I understood it, that it was a political committee for all -- in the past and in the future --

QUESTION: Let me ask you, would you accept or would you object to a construction of (f) that would limit -- that would bar only those expenditures, to those expenditures for communications that include explicit words of advocacy of election or defeat of a candidate?

MR. COX: We think that interpretation, which was put on 608(e), would not be correct here, no.

QUESTION: So you think --

MR. COX: If it were the only way to save the statute, I suppose I wouldn't object to it. But I think --

QUESTION: But you think it would cover more than that.

MR. COX: You say it would? I think it would cover more than that. I think the question is one of intent, and there is no violation unless --

QUESTION: Well, you would reach pretty far into issue-oriented organizations as long as they said to themselves the way to win this election is to --

MR. COX: Well, I wouldn't think so, Mr. Justice, because that first, as the Court indicated in Buckley and Valeo, it must be an organization, the major purpose of which is to elect candidates. And second, it must have a specific intent, knowingly and willfully to further the candidate.

If it's genuinely concerned with its issue or if its major purpose overall is the issue, then it's not covered by 9012(f). I think that would cover just about all issue orientations.

QUESTION: But the way you put that would -- I'm not sure that's very much different from this limitation that I am suggesting to you.

MR. COX: It would -- the difference would be where the advertisement is clearly focused on the election of a candidate, but they avoid the use of, were it, the name. The express way in the limiting definition is one that we would not adopt.

Thank you.

CHIEF JUSTICE BURGER: Mr. Baran.

ORAL ARGUMENT OF JAN W. BARAN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. BARAN: Mr. Chief Justice, and may it please the Court:

With your indulgence I wish to discuss for just a

couple of minutes exactly what type of committees are before you and the activities that they undertook with respect to the 1980 election.

Appellee committees -- Americans For Change, Fund For A Conservative Majority, and Americans For An Effective Presidency -- are voluntary associations supported solely through voluntary, statutorily-limited contributions, primarily by thousands of individuals across the country. They have been duly registered with the Federal Election Commission; they file regular reports disclosing all of their receipts and all their disbursements.

In 1980 these committees solicited and accepted the voluntary contributions with the understanding that the funds would be used to purchase communications to support the candidacy of the Republican nominee at that time, former Governor Ronald Reagan.

The sort of expression that was purchased by these committees include newspaper advertisements, radio and television advertising, letters, flyers, brochures, even bumper strips and buttons. Some of these samples of expression undertaken in 1980, and which is the expression that is challenged by the Appellants in this case, are reproduced in the Appendix to the brief of Americans For Change.

Mr. Cox referred to an attempted distinction

between issue discussion and candidate discussion. I would direct the Court's attention to Appendix A, which is a newspaper advertisement that depicts what Americans For Change believe to be the record of President Jimmy Carter on various issues concerning jobs, the budget, inflation, and with the record of Ronald Reagan when he was Governor of California.

I don't know where the Appellants wish to draw the line for purposes of the statute that is at issue here, but certainly that same advertisement either in its present form is dealing with issue discussion of those issues that surrounded the campaign in 1980, or perhaps with some deletion of a word here or a word there it would to the satisfaction of Appellants.

With respect to when an organization becomes a political committee under the Federal Election Campaign Act, we cite to several advisory opinions that have been issued in the course of several years by the Federal Election Commission concerning when a group becomes a political committee for purposes of not only the Federal Election Campaign Act but the Fund Act as well. And in that collection of opinions, which appears on pages 34 and 35 in Footnote 38 -- this is the brief of Americans For Change -- includes a loose association -- that is the Commission's phrase -- a loose association that in 1980 published a

summary of positions by candidates Reagan, Carter and Anderson concerning "key moral and religious liberty issues." And that organization was held by the Commission to be a political committee.

The types of advertising and communication undertaken by these committees in 1980 were done so without the cooperation or consultation or direction or control of Ronald Reagan or his campaign. That is conceded in this case by all the parties. They are as such independent expenditures, which is not only a statutorily-defined term contained in the Federal Election Campaign Act, but is a concept that was very clearly recognized by this Court in Buckley v. Valeo, and referred to more recently in the California Medical Association case.

These are expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate which have been undertaken by, in this case, committees without the consultation, direction, or control of the candidate.

We seek affirmance of the unanimous decision of the three-judge court for two basic reasons. First, we believe that there is a construction which is not only proper but one which Congress had in mind when it passed Section 9012(f) ten years ago, which would not make that statute applicable to independent expenditures. In the

alternative, if the statute is construed, as suggested by the Appellants, to apply to independent expenditures, then it is unconstitutional under the First Amendment for the reasons and principles enunciated by this Court in Buckley v. Valeo.

Mr. Steele indicated that the Federal Election Commission had not come forth with any construction as to what constitutes an expenditure to further the election of a candidate, and in fact, in response to questions from the Court was hardly precise as to what that term means.

Expenditures to further the election of a candidate are the types of expenditures that are limited by Section 9012(f). This action, which is brought under Section 9011(b), I assume seeks to implement and construe this section. Since we are not challenging the constitutionality in the sense of having brought this case before the court below, we were sued. The Appellants are the ones who brought this suit to implement and construe Section 9012(f).

9012(f), when it was passed ten years ago, made sense as a limitation on coordinated expenditures by unauthorized committees. It may not make a great deal of sense today because in the intervening ten years we have not only had the Fund Act passed, but also the Federal Election Campaign Act of 1971, and three subsequent major amendments

to both those acts, plus this Court's decision in Buckley v. Valeo.

These campaign financing statutes have gone through tremendous readjustment, upheaval, repeal, sections held unconstitutional by this Court; and the way they exist today are hardly the way that they perhaps were originally envisioned back in 1971, and certainly would not be advance of the model of draftsmanship and clarity.

But back in 1971 there were no limitations on contributions. The general limitations on contributions were not enacted by Congress until 1974.

QUESTION: The '71 act simply required the approval of the candidate for any media expense, did it not?

MR. BARAN: That is correct, Justice Rehnquist. The Federal Election Campaign Act of 1971, which is a separate piece of legislation from the Fund Act in which 9012(f) is contained, in its original form contained a limitation on all candidates, not just publicly financed candidates but privately financed candidates for President, House and Senate, and that limitation set a dollar amount as to what expenditures the candidates could make for media communications, the same communications that these committees undertook in 1980 -- newspaper ads, television and radio advertising. And in addition to setting the limitation, the Congress placed in that statute in Title 1 a

certification process, all of which is described in considerable detail in the opinion of the Court in ACLU v. Jennings, which is set forth in our brief. And this certification process required any individual, group or committee to obtain the written permission of the candidate before they would be able to purchase advertising from a broadcaster or from a magazine or publication.

So ironically, this formula, this statute, which was considered by the Senate three months before they considered Section 9012(f) and the Fund Act, if it had been able to pass constitutional muster in ACLU v. Jennings and had continued in existence in this original form up to the 1980 election, these committees would not have been able to undertake the advertising and activity that they did without having first gone to Ronald Reagan and getting his permission, because the broadcasters would have denied them the opportunity to purchase that type of advertising, as would have the newspapers.

We point out in our brief that it was not the Fund Act or 9012(f) that Congress chose to address in seeking to limit independent expression in campaigns. Through the history of campaign financing legislation the Congress has consistently utilized the Federal Election Campaign Act as a vehicle by which they in various forms sought to limit independent expenditures.

The first such effort was the Title 1 provision that I have just described. When that was held unconstitutional by the three-judge court in ACLU v. Jennings, in 1974 Congress enacted another limitation of $1,000 on independent expenditures, and that limitation was Section 608(e) that this Court reviewed in Buckley v. Valeo and struck down as unconstitutional.

After that decision, the Congress essentially threw up its hands and said we cannot limit the genuinely independent activities of individuals or groups or committees as long as they are out there acting on their own and not under the direction or control of the candidate. And since that time we have had no further attempts by Congress to impose this type of a limitation in any other form.

The legislative history surrounding both the Title 1 provision as well as Section 9012(f) is set forth in great detail in our brief. It does not support the contention of Appellants that Congress sought to specifically limit the types of activities that these committees have undertaken. There is no clarity in either the reports of the Congress or on the floor debates that when 9012(f) was enacted, Congress was thinking about regulating the so-called organized committees that were going to operate independently of the candidate.

QUESTION: Now, what's your suggestion as to the type of expenditures that Section (f) does reach?

MR. BARAN: Your Honor, these would be what I would characterize as coordinated expenditures.

QUESTION: I thought you said -- I don't know -- what are those?

MR. BARAN: Those would be expenditures that have been made at the direction or control of the candidate or in consultation or cooperation. There is a very lengthy provision in the Federal Election Campaign Act --

QUESTION: But you said a while ago, you said coordinated expenditures by an unauthorized committee.

MR. BARAN: Yes, Your Honor.

QUESTION: But this would be an authorized expenditure by an unauthorized committee.

MR. BARAN: That is correct. The terminology is somewhat confusing and arcane, but one of the new ingredients in the campaign financing laws introduced in 1971 was this notion of an authorized committee.

CHIEF JUSTICE BURGER: But if the committee coordinates, if this so-called independent committee coordinates, doesn't that affect its independent, alleged independent status?

MR. BARAN: Yes, Your Honor, but it would not make that committee an authorized committee. The statute very

clearly sets forth that an authorized committee is only that committee that has been authorized in writing by the candidate. If there were these committees operating, and they were doing so in coordination with the candidate, then perhaps the candidate would have to come forth and authorize them formally. It's a formal process. And this again is the historical context in which Congress was confronting this issue of campaign financing back in 1971.

QUESTION: Mr. Baran, was this argument made in the three-judge court?

MR. BARAN: Yes, Your Honor.

QUESTION: And what happened to it?

MR. BARAN: The court rejected it.

QUESTION: Like the Election Commission does, did this morning in any event.

MR. BARAN: Yes, Your Honor, they did this morning, and they have implicitly in their briefs, but they've never promulgated a rule that sets forth as to the scope of Section 9012(f). They have been unable even this morning to tell you what's an expenditure to further the election.

QUESTION: Well, it may be, but they say that your expenditures are reached by it anyway. That's pretty clear.

MR. BARAN: They say so, Your Honor. We dispute that.

QUESTION: Well, I understand; that much is clear.

MR. BARAN: Yes, yes. We wouldn't be here if they didn't say that.

QUESTION: Yes.

MR. BARAN: The history surrounding Section 9012(f) I will only refer to briefly, but I wish to point out to the Court's attention that Senator Pastore, who is the author of not only 9012(f) but the Fund Act, when confronted with questions on the floor of the Senate as to what would be the effect of the statute with respect to certain committees organized by what he calls faculty members of Columbia University or schoolteachers, he says, you know, they're operating on their own, they're independent, they're able to do whatever they want to.

And this legislative history, in our opinion, totally repudiates the contention of the Appellants that Congress in enacting 9012(f) was seeking to control the activities of genuinely independent organizations.

If Section 9012(f) were not construed as a limitation on coordinated expenditures, then the statute becomes unconstitutional as a restriction on First Amendment rights of expression and association.

Like Section 608(e) that this Court addressed in Buckley v. Valeo, the restrictions contained here are substantial, direct restrictions on both the quantity and

the quality of political expression as undertaken in conjunction with our campaigns.

Both Appellants this morning indicate that the campaign funding act is important because the candidate has made a decision to accept this public funding, and therefore the expenditure limitation that is imposed on the candidate.

This Court recognized in Buckley, and it was so recognized later in the Republican National Committee case, that the overall general expenditure limitation that is voluntarily assumed by the candidate who makes this election is not a restriction on the rights of the candidate's supporters where the supporters remain free to undertake their own independent expression on behalf of that candidate, so long as they do so outside of his campaign or outside of his direction or control.

In Buckley the Court noted that a $1,000 limitation in 1975 was insufficient to purchase a one-quarter page ad in the Washington Post newspaper here in Washington. That figure has doubled in terms of advertising rates by 1979. Whatever restriction occurred with respect to the quantity of speech that could be purchased for $1,000, it has doubled, more than doubled in the intervening years since Buckley.

With respect to the quality of advocacy that can be undertaken in light of Section 9012(f) as a restriction

on independent expression, the type of limitation that would exist after the statute were construed to limit organized collective political independent expression would mean that there will be only four avenues of expression in conjunction with publicly financed campaigns. Those avenues would be the campaign, the political parties, the institutional press, and wealthy individuals.

It is conceded that if Senator Schmitt, who is an appellee in this case, were a rich man and had the resources to go out and purchase exactly the same advertising that these committees undertook in 1980, that that would not only not be reached by Section 9012(f), but that action on the part of the individual is constitutionally protected, as it was recognized by this Court in Buckley v. Valeo.

On the other hand, the committees have attempted to gather together persons of like mind who do not have the unlimited resources that they would be able to exercise statutorily and constitutionally, and in lieu thereof have chosen to pool their resources and to purchase expression and to utilize professional help in terms of formulating their message, and to attempt to persuade the public as to why it should vote for Ronald Reagan in 1980. And that is the core of the expression that this Court has before it today.

There is no question that the wealthy man can go

out and buy the same advertising, but the appellants think that it is not fair and constitutional to impose a limitation on these groups and their supporters.

The interest that the appellants have advanced in support of this restriction appears to be two: first is the interest of preserving the integrity of the public financing statute. As we indicate in our brief and as I just referred to, we don't believe that is the interest that rises to the area of being compelling, and that the statute first of all was never contingent on an overall expenditure limitation; and secondly, the only reason it was sustained in the Republican National Committee case was that these supporters still reserved their right to undertake independent expression.

The other interest that has been advanced is the proper interest and concern of Congress to prevent corruption and the appearance of corruption with respect to candidates after they become public office-holders.

This Court noted in Buckley that in the context of independent expenditures, there is not the opportunity for the contributor to sit down with the candidate or his representative and say okay, here's $50,000 or whatever amount of money you wish to denote.

CHIEF JUSTICE BURGER: We'll resume at that point at 1:00.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was recessed for lunch, to be resumed at 1:00 p.m., the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Baran, I think you were in the middle of a sentence. You can pick up where you left off.

ORAL ARGUMENT OF JAN W. BARAN, ESQ.,

ON BEHALF OF THE APPELLEES -- Continued

MR. BARAN: Thank you, Mr. Chief Justice, and may it please the Court:

Up to the moment of our recess I was addressing Section 9012(f) of the Fund Act, having previously concluded the proper construction of the statute is that it does not apply to the activities of the appellee committees.

QUESTION: Could I ask you, I take it you think there is no question that you can present this issue here. You didn't cross appeal, did you?

MR. BARAN: No, Your Honor. We did not.

QUESTION: And your argument was rejected below.

MR. BARAN: Yes. It was addressed by the three-judge court and rejected for the reasons stated in their opinion, which in our brief we fully articulated were not valid.

QUESTION: But I take it if you won on the statutory ground you wouldn't be expanding your relief then. It's just that the Act couldn't prevent these expenditures.

MR. BARAN: That is correct. Our contention is that the activities of these committees in 1980 were either not regulated, or if there was an attempt at regulation would be unconstitutional. In either sense they should be permitted to do what they did.

With respect to the First Amendment interests, which Mr. Cox conceded are present in this case and which this Court noted in Buckley and in the California Medical Association case, are deserving of the highest protection under the First Amendment.

The statute can be sustained only if it serves a compelling governmental interest which is narrowly drawn and cannot be accomplished through less restrictive measures.

In reviewing a similar statute in Buckley, Section 608(e), which has been referred to many times earlier today, this Court concluded that the one compelling interest or the one governmental interest that was advanced in that case was not served by --

QUESTION: Justice Blackmun asked what a compelling interest was. What do you think it is? Do you think it's more than just an interest that is important enough to outweigh any interests on the other side?

In that sense it would be compelling, in the sense that it outweighs other interests?

MR. BARAN: That is correct, Your Honor. It would

have to be compelling in the sense that it would offset the First Amendment values.

QUESTION: So it's just a balance.

MR. BARAN: It is a balance.

QUESTION: It means no more than a balance.

MR. BARAN: That is correct.

QUESTION: Well, that's just really a substitute for any analysis, isn't it?

MR. BARAN: I'm sorry, Your Honor.

QUESTION: That's really just a substitute for any analysis, to say that it meets or it doesn't meet a compelling interest. It's really the bottom line of the decision of the Court, because it will be affirmed or reversed depending on how the balance comes out.

MR. BARAN: That is correct, Your Honor.

QUESTION: So that's really all it means is that you're looking for -- and all you're submitting is that the interests on the public side or in favor of the statute are insufficient to justify the restriction.

MR. BARAN: Yes, Justice White. We do not contend that the government does not have a valid interest in preventing corruption or the appearance of corruption in the political process. We argue that just as in the Buckley case this limit does not serve that interest, and that there are numerous other measures in the existing statutes of the

campaign financing laws, some of which were enacted after this Court's decision in Buckley, which more constitutionally and more effectively address the interest that the government had back originally in '71 and in subsequent years to prevent the corruption in campaign financing.

The interest at all times has been focused on contribution limits. Senator Pastore referred to it as the situation where there is the "intimate contact" between the contributor and the candidate, which may create the potential for undue influence or some sort of corrupt quid pro quo. And as this Court noted in Buckley, when one refers to independent expenditures where an individual or a group is undertaking their advocacy outside of the control of the candidate, such an environment does not arise in the sense that Congress was focusing on it when it was passing these campaign financing laws.

The interest is served much better by other means than a limit on the expression itself. Some of those measures which have been noted in the past include the disclosure provisions. Since the Buckley decision not only have there been the continued disclosure provisions requiring the disclosure of all receipts and all disbursements, but after your decision the Congress enacted in '76 a further requirement that independent expenditures,

specifically by these type of committees, have to be separately reported. And the Federal Election Commission has promulgated even separate forms for the reporting of independent expenditures. And on top of that, on that particular form the treasurer of the committee has to swear that the expenditure was in fact independent.

QUESTION: Well, don't you think the candidate would know of that report and probably accord an audience, if he would accord an audience to someone who contributed directly?

MR. BARAN: We do not dispute, Justice Rehnquist, that the candidate may be aware of effective advocacy that is undertaken on his behalf. The issue that we believe is crucial to the determination of the presence of a compelling interest is whether this candidate has any control over this advocacy in the sense that he would have control over contributions that he receives; and he spends those contributions the way he and his campaign managers believe ought to be spent. And the only way that he can get control over that potentially under the corruption argument is by making some sort of illicit promise in return for the availability of the money.

But under these circumstances there is no dispute that the committees in their conduct in 1980 on behalf of Ronald Reagan were not under his control. They were

expressing their views which are representative of those who contributed --

QUESTION: Am I in error?

MR. BARAN: -- And advocated their election.

QUESTION: I didn't think the argument on the other side was that money was given as a result of a promise, but that once the money was given there was a collection time afterwards. Isn't that their argument?

MR. BARAN: That is their argument, and --

QUESTION: Are you going to address that?

MR. BARAN: Yes, Your Honor. Justice Marshall, that argument is persuasive if, as you say, the money is given, if the money is handed over to the candidate.

QUESTION: Oh, I didn't say that. The money is given just the way you say, and then afterwards they go by and say remember me, I'm the one that gave you a million dollars with no strings attached to it; and in the second breath he says, "But I'd like a job." That's what they're talking about.

MR. BARAN: They may be discussing that situation, but that situation has been addressed through contribution limits, and we --

QUESTION: Well, you say that --

MR. BARAN: Our position is that the money --

QUESTION: That probably doesn't happen.

MR. BARAN: That it is not a problem, it is not the type of situation --

QUESTION: It is not a problem.

MR. BARAN: No, Your Honor.

QUESTION: It's not a problem that people give money in the hope of getting something for it. That's not a problem.

MR. BARAN: That is a problem. We don't believe that that is present in this case, in this situation.

QUESTION: Well, wouldn't the question come down to whether there is evidence of some such situation in order to have that spill over on evaluating whether the committee was truly independent or not?

Isn't that an evidentiary question?

MR. BARAN: Yes, Your Honor. It's an issue that's not before this Court as to whether these committees were in fact independent. They were sued.

QUESTION: I thought the whole purpose of the Act was you wouldn't have to prove all these things. I thought that was the purpose of the Act. Because if you gave money and expected a return, and you were promised a return, wouldn't you violate more laws than this one? Wouldn't you violate laws long before this one?

MR. BARAN: There are other statutes, as bribery and graft statutes, yes.

QUESTION: So this law was passed to get to other ways of getting to it, isn't it?

MR. BARAN: Absolutely, Justice Marshall, without restricting the First Amendment rights of expression and advocacy and association that are clearly present under any circumstances.

QUESTION: There's no First Amendment right to buy a job.

MR. BARAN: That is correct, Your Honor.

QUESTION: I'm glad we agree on that.

MR. BARAN: And that is not our contention or factual issue here.

QUESTION: Mr. Baran, do you agree with what I understand to be the distinction drawn by counsel for appellants between single issue groups and political committees as defined in the Act?

In other words, may single issue groups, which now are quite abundant in our country, can they be distinguished from political committees as a practical matter?

MR. BARAN: It is a very difficult distinction to make which, as Mr. Steele indicated this morning, the Commission grapples with those issues and on occasion has to make an evaluation as to whether a particular organization is an issue organization or whether it's a political committee.

The definitions under the Act -- and I might say that there are, I believe, three definitions in the campaign financing laws -- one in the Campaign Act, one in the Fund Act, one in the Primary Act -- are not even all in harmony. They all say something a little differently, mostly because they were all passed in different years.

QUESTION: But do you agree that if there were no question that an organization was an issue organization, do you agree that Section (f) does not reach it?

MR. BARAN: Not at all, Your Honor. In the absence of a limited construction as to what constitutes an expenditure to further the election of a candidate, it clearly would encompass certain issue advocacy. If these committees had undertaken their advertising campaigns and other expression in 1980 and simply said we think the SALT II is a terrible idea and any President who adopts SALT II should not be re-elected, they would still be covered by 9012(f).

QUESTION: Yes, but, Mr. Baran, there are clearly some single issue groups which would not be covered because maybe both candidates take the same position as that group does, or takes a contrary position, either way. If you had say an organization which supported membership in the United Nations or whatever it might and both candidates agree that is either good or bad, you surely wouldn't call that a

political committee.

MR. BARAN: I wouldn't call that. I --

QUESTION: There really isn't any danger that it would be called a political committee under the statutory language either, is there?

MR. BARAN: Well, Your Honor, I cited an advisory opinion in this morning's argument issued by the Commission that addressed the question of a loose association that wanted to discuss issues on religious subjects, and how the different candidates stood on those particular issues. And in 1980 there were three candidates receiving public funding.

The point we would make is that the term "further the election" has not been narrowly construed by any party here except us, and our construction is that Congress was searching to limit coordinated expenditure activity.

QUESTION: Let me see if I've got one of your responses clear. I'm not clear on it.

A group of people identified as bipartisan, both Democrats, Republicans and Independents, a mixed group, get together an organize a committee, an anti-SALT II treaty committee. And you say that's a political action committee?

MR. BARAN: I don't know, Your Honor. I am saying that --

QUESTION: And would be so protected by the First Amendment?

MR. BARAN: -- The history of the Commission in its construction of what constitutes a committee is very broad; but I can say that if an organization were to make identical expenditures regarding SALT II, and we all agree that they're a political committee, then under appellants' argument --

QUESTION: Well, you're starting with a conclusion. Let's go back to my facts.

MR. BARAN: Certainly.

QUESTION: A group of leaders clearly identified as activists in both major political parties, they're all of one mind on SALT II, either for it or against it, and they organize a committee. Make this one an anti-SALT II committee. And my question is, is that a political committee under this Act?

MR. BARAN: In my opinion it is not.

QUESTION: I thought you had given the contrary response before to someone.

MR. BARAN: If I did, I apologize for misspeaking.

QUESTION: Well, I may have misunderstood you.

MR. BARAN: I would suggest at the same time, however, that the discussion of these type of issues, number one, can be so inextricably combined with the current campaign with inevitable references to candidates --

QUESTION: But I thought you would say that if

that very committee the Chief Justice mentions, if that very committee said and any presidential candidate who is of a contrary view should not be voted -- you should not vote for.

MR. BARAN: I think if there is that advocacy for a candidate --

QUESTION: Exactly.

MR. BARAN: And that --

QUESTION: And even though they don't name the candidate, but it may be that the two candidates differ on the question.

MR. BARAN: Yes.

QUESTION: And you would think that would be a political committee.

MR. BARAN: I know that it --

QUESTION: Under the Act. Under the Act.

MR. BARAN: I know that it would be an expenditure to further the election of somebody.

QUESTION: I see.

MR. BARAN: And it might be a political committee.

QUESTION: I see. I see.

MR. BARAN: We are talking about two terms here that are crucial to the construction of the statute --

QUESTION: Right. Right.

MR. BARAN: -- Which have very broad implications.

QUESTION: Which maybe tells us something about

the ambiguities of the statute or the flaws in the statute rather than in what the Commission has tried to do.

QUESTION: One doesn't have to name the candidate to make it perfectly clear which of the two is being supported. For example, in the SALT II, the committee would simply have to advocate rejection or adoption in the best interest of the United States and never mention any candidate, but the record of one or the other would tie together.

I haven't read any of the rulings in this respect by the Commission. How would it rule on something like that?

MR. BARAN: I would prefer, Justice Powell, to defer --

QUESTION: I've asked the wrong counsel.

MR. BARAN: -- To the representative of the Commission who I'm sure will be --

QUESTION: Well, I'll reserve the question for Mr. Steele.

MR. BARAN: The less restrictive measures, in addition to these reporting requirements that are contained in the Act, also include requirements that if an independent committee or even an individual undertook their independent expenditure in the form of advertising, that the advertising must clearly note who purchased that ad and the fact that it was not authorized by any candidate. And there is a

provision in the Federal Election Campaign Act that says categorically that these committees could not take any of the advertising or any of the materials produced by the Reagan campaign and reproduce them. The provision of the Act says that that is a per se contribution and is no longer independent.

So these restrictions which are contained in other sections of the Campaign Act certainly are efforts on the part of Congress to ensure that whatever independent advocacy is undertaken is in fact independent, and that the Commission will monitor those efforts.

QUESTION: Can the kind of a committee that you represent, may the kind of committee you represent contribute directly to the campaign of a candidate?

MR. BARAN: No, Your Honor. The Reagan campaign was prohibited by law from accepting any contributions.

QUESTION: Because --

MR. BARAN: Because the candidate made a voluntary decision to accept the public funding, and the condition of that acceptance on the candidate is that he cannot accept any more contributions.

QUESTION: So you were speaking of some alternative, less restrictive measures. Is one of them a limitation on the contribution to the kind of a committee you represent?

MR. BARAN: Yes, Your Honor. In addition to the prohibition on contributions to the candidate, the committees that I represent, all the funds they raise are limited by the statute. In fact, they're limited by the provision that was upheld by this Court in California Medical Association. That contribution limit is the one that is imposed on the supporters of these committees.

QUESTION: So your committee can't get more than $5,000 from any one person.

MR. BARAN: That is correct, Your Honor. From any person.

QUESTION: Any person.

MR. BARAN: Including another political committee if one were to decide to support the activities of appellees.

For these reasons, Your Honors, we seek affirmance of the unanimous three-judge court decision below.

If there are no further questions, I'm pleased to conclude my argument.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Steele? You have two minutes remaining for your rebuttal.

ORAL ARGUMENT OF CHARLES NEVETT STEELE, ESQ.,
ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. STEELE: I would like to make, I think, two points: one, with regard to the dangers that expenditures

pose. I think that the suggestion here by the committees is that expenditures do not pose such a danger.

I think that the Congress in this statute and in similar statutes outside the Hatch Act and 441(b), which is the prohibitions on corporations and labor organizations, has explicitly made that judgment that expenditures present the same kind of danger as contributions.

Secondly, I would like to emphasize something that I said earlier, which is with regard to the ability of individuals to engage in activity which is protected by the Act, specifically with regard to the example that Justice Rehnquist proposed of personal services; that the Act in Section 431, the definitional section, the first statement is that a contribution does not include such services. In other words, again, the Act in many places has made a balancing between things which would be -- certainly are things of value to a campaign and certainly are things that the campaign may be very happy to have, but it's balance that an individual has a right to do that kind of services, again mentioning also in our brief the travel and the housing.

If there are no further questions --

QUESTION: I have one. Let me have a variation of the hypothetical I gave to your friend.

Let's suppose a group of people form a foreign

policy committee against Camp David agreements. It's perfectly clear that that's identified with one of the candidates, and it may be ambiguous as to the others who may or may not have declared themselves.

In your view would the Act's, the provisions of the Act, make that a political committee?

MR. STEELE: It would seem to me that that is an issue committee rather than a political committee. I do not think that the Commission had ruled on that; it has not been asked that specific question. It did have a case where the allegation was made that Mobil Oil by making an expenditure putting forth the position on what should happen to the development of oil, that that was not -- and in an area where there were two candidacies, were Senate candidates, but I think the principle holds true -- that one candidate was in favor of controlling the oil companies and one was not, that that was not violating the prohibitions of the Act.

QUESTION: That's not quite as sharp a distinction as the foreign policy committee against Camp David agreements.

MR. STEELE: Yes. I agree. But I was saying that in terms of places where I think the Commission has been. I would think that where you do not have the connection of an issue to a vote explicitly that that is right at the borderline. I would say that where a committee is speaking

only to issues and is not making the connection over the candidates, I would think that was not necessarily a political committee. And I would think more prominently for purposes of 9012(f) that you would not have a file -- you have the knowing and willfully furthering the election. So you would have to say that by coming out on an issue that the committee was knowingly and willfully attempting to further the election. And I would think that, therefore, there would be another element that would say that that expenditure --

QUESTION: But if the Commission, hypothetically, decided to proceed on that on the assumption that this was a willful act, would you not have very grave First Amendment problems with respect to these people trying to express their views about a foreign policy matter?

MR. STEELE: I think in some sense you do, and I think that with regard to what Justice Marshall said earlier, one of the things that this Act has attempted to do, and I think has done in 9012(f), is attempt to put a barrier so that you don't really have to look in to each instance of a quid pro quo and make those kind of factual investigations.

If the Commission were to have to make that kind of determination, what Professor Cox referred to as looking to see whether the intent was to further the election, you

get into a very difficult area. And I think to some extent the statute has tried to make a prophylactic rule.

QUESTION: Does that bring you up against some possible substantive due process questions?

MR. STEELE: I could see --

QUESTION: Cross petitions that rely on no evidence but just on presumption, statutory, legislative presumptions?

MR. STEELE: I don't see the problem in terms of the way the statute has phrased it. Again, there are some limits to the English language in terms of the specificity, and "to further the election" does not answer every question, but it does seem to me a strong guide to what Congress meant.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:24 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of: Common Cause Et Al., v. Harrison Schmidt Et Al,; and Federal Election Commission, v. Americans for Change, Et Al.

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BY Sharon Ann Connelly