OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1032 & 83-1122

TITLE FEDERAL ELECTION COMMISSION, Appellant v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE; ET AL.; and DEMOCRATIC PARTY OF THE U.S., ET AL., Appellants v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.

PLACE Washington, D. C.

DATE November 28, 1984

PAGES 1 thru 56

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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL ELECTION :

COMMISSION, : No. 83-1032

Appellant :

v. :

NATIONAL CONSERVATIVE POLITI- :

CAL ACTION COMMITTEE; ET AL. :

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DEMOCRATIC PARTY OF THE U.S., :

ET AL., : No. 83-1122

Appellants :

v. :

NATIONAL CONSERVATIVE POLITI- :

CAL ACTION COMMITTEE; ET AL. :

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Washington, D.C.

Wednesday, November 28, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

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APPEARANCES:

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Federal Election Commission, Washington, D.C.;
on behalf of Appellant in 83-1032.

STEVEN B. FEIRSON, ESQ., Philadelphia, Pa.;
on behalf of Appellants in 83-1122.

ROBERT R. SPARKS, JR., ESQ., McLean, Va.;
on behalf of Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in the Federal Election Commission against the National Conservative Political Action Committee and the related case.

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

ORAL ARGUMENT OF CHARLES N. STEELE, ESQ.

ON BEHALF OF THE APPELLANT

FEDERAL ELECTION COMMISSION

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

These consolidated cases present two issues. There is an initial jurisdictional issue, an issue that we have raised with regard to the second of the two cases, as to the standing of the Democratic Party and the jurisdiction under Section 9011(b) of the Act, their jurisdiction to bring it. I consider that that issue has been covered thoroughly, the arguments on both sides, in our brief and the brief filed by the Democratic Party, and did not intend to address it at this point unless there are questions from the Court.

QUESTION: I have one question, Mr. Steele. Is your argument diminished at all in its force by the fact that the FEC brought a suit on its own in this

case?

MR. STEELE: We do not consider that it is, because as we read the statute it seems to us that, though there is jurisdiction in the FEC to raise these issues, that the question in the statutory construction, that Congress did not intend private parties to be suing each other, is the same issue. So we think that the two are severable.

With regard to the central question posed by this case, which we would say is the power of Congress to limit aggregations and expenditures of wealth by political committees, which are organizations whose purpose is to influence the outcome of federal elections.

Where presidential candidates have agreed to accept public funds in lieu of private financings for their campaigns, we would say that there is no limitation in the Constitution or particularly in the First Amendment on the power of Congress to limit these expenditures as it is done here.

This case arose because the Appellees, two political committees, asked the Commission, in light of this Court's decision in the 1981 term in Common Cause versus Schmitt, in which this Court affirmed the decision of the court in the District of Columbia by a

four to four vote, the Appellees asked the Commission for an advisory opinion.

They asked for an advisory opinion to the effect that that decision made such expenditures in excess of the limitations of 9012(f) -- were permitted under the statute. The Commission answered in an advisory opinion that it did not think that the Court's decision in this case was dispositive of the constitutional issues, and reaffirmed in that advisory opinion its earlier opinion that Congress had in 9012(f) banned expenditures by political committees in amounts greater than $1,000 where presidential candidates have accepted the public financing.

There are really two reasons that we see why this statute did not violate the First Amendment. First of all, Congress found that there was a great necessity to protect the integrity of the Government and the public perception of the integrity, the public confidence in the Government, from the corrosive effects of public financing. And that was well documented to Congress.

QUESTION: From the corrosive effects of public financing?

MR. STEELE: Private financing, excuse me.

QUESTION: I thought you made a Freudian

slip.

MR. STEELE: I think I did.

And Congress had long considered these issues. They had felt that a system in which they could have -- set up public financing which would substitute for private financing, was one which could reduce these effects.

The second reason that we think that the First Amendment does not bar what Congress here has done is that Congress has very consciously and deliberately in this statute left ample scope for individual and group expression.

Turning first to the question of the purposes of the statute, of what Congress sought to achieve, we think that the record demonstrates that Congress knew what the effects would be where it had passed the public financing statute after years of debate, a statute which limited expenditures, which prohibited contributions to the candidates, and which created a system in which public financing was not merely a subsidy to the candidates of the two major parties, but was seen as only a substitute in which public financing was the major part of the package in which other forms of expenditures were limited.

But Congress knew that committees such as

these would take over the role that had previously been held by large contributors, and it was one of the factors that was very prominent in the debate in front of Congress; indeed, as we have set it forth in our reply brief, the debate which went on not only in 1971, which went on way back into the history of these statutes in 1966 and '67, when there were long, long debates in the Senate.

But Congress estimated and looked at the question of whether, if you prohibited these private contributions and came forward with public financing, would there not be a situation where private financing would come forward making expenditures which were not in control of the candidate or in control of the candidates' parties, but which would be done by committees composed of the candidates' supporters, composed of people who were, as I say, in the business of raising and expending funds to influence the elections.

And Congress concluded that they were. Congress concluded that in that situation you would have in effect a candidate who would be beholden to these large aggregations of private funds, a candidate whose campaign was limited to $40 million in this recent election under public financing, but who looked out

there and saw that groups were available who could make those expenditures on his behalf, millions of dollars, campaigns that replace and support his campaign, that the effect would essentially be the same, that he would wind up in the election needing to woo that private money, needing to know that that private money would come forward on his behalf, and thus would be in the long run beholden to that private money in the same way that he would have been beholden in the situation where there were private contributions.

QUESTION: Couldn't Congress have achieved pretty much the same result here without limiting the speech of third parties by saying that, where this contributing takes place by a private group that appears to be coordinated, that the candidate will lose so much of the public financing as is represented by the coordinated expenditures?

MR. STEELE: Congress -- I know of no place that Congress actually considered that as an alternative. In the course of the debates, Congress considered a variety of ways of trying to limit this problem.

The difficulty in all of them, I think, for Congress was the belief that was strongly argued that if you did not reach out to the committees, that you were

going to have a difficulty with the standard of committees that seemed to be composed of supporters; that at some point -- what they were always debating was the reach of the statute, of how far it could reach. And where they drew the line was to the very political committees that are in the business.

QUESTION: Well, my thought stemmed from the fact that I think Congress would have been on a stronger footing so far as the First Amendment is concerned where it says, we're going to deduct some of the money we're giving you, to the candidate, where you're just dealing with the Government handing out money, rather than saying, we're going to forbid you from making a certain kind of expenditures for speech.

MR. STEELE: I think that the concerns that Congress expressed throughout it were, however, there's another countervailing interest, which is in not having someone make a determination in the two months before the election that the funding should be reduced. In other words, one of the things that Congress saw was a system where there would be an immediate block grant known in its amount to the candidate, and that there would be a grave danger that you would be interfering with the very speech of the candidate which the public fund was attempting to support if you get into a system

where someone, the Federal Election Commission or some form of decisionmaker, would have to decide, well, that group is so allied with the candidate that we'll reduce the candidate's funds.

And I think that they saw great difficulty with systems that involve that kind of interference.

QUESTION: Well, aren't we really talking about uncoordinated independent spending?

MR. STEELE: Yes, we are.

QUESTION: I mean, I thought -- can't the Election Commission already get at coordinated spending when it gets close enough that it can really be be blamed on the candidate?

MR. STEELE: I think that there is no question that the Commission under the statute can deal with that. I would say two things:

One, that there is tremendous difficulty in dealing with that in any period before the election.

QUESTION: Yes. To sustain this law, you're going to have to convince that the Congress can do what it did to wholly uncoordinated committees.

MR. STEELE: Yes. I think that Congress spoke of it in many terms. They spoke of it as the fact that they knew from past experience, they knew from their own personal experience. I mean, the debates are full of

indications that they knew in their own personal experience the ways that private money would flow into the system.

They had historical examples in front of them of how previous statutes where they had had narrow definitions of the terms "contribution" and "expenditure," where political committees sprang up, that there was no ability to prove immediate coordination, where there was perhaps no need for coordination in the sense of direct contact about expenditures, but spoke of the need for control of expenditures where they were done by political committees, particularly ones that comprised -- there was a good deal of conversation about the presidents clubs and things that were not directly in the control.

And that what Congress foresaw and what Congress predicted, what Congress held long hearings on, was the very questions that are presently before this Court: How could it devise a system by some method which would allow it to reach out and counteract the evil it saw in political committees that were composed of people who were supporters of a presidential candidate?

Because it felt that if it did not control to some degree those, that it would have a system in which

you would have unlimited private spending, where the candidate would be held back, where the candidates' party is held back, and where the balance would be overthrown.

And in that sense, I think that the '67 debates that we have set forth are very prominently figured there, because the original Long Act was a proposition which was passed by Congress in 1966 and which then in 1967, in a six-week debate in front of the Senate, was eventually made ineffective until further legislation was passed.

The very subject in debate there was the question of whether a subsidy to the two major parties with no restrictions of any kind on it, no restrictions at that stage on contributions to the candidate's party or to the candidate, a variety of other restrictions, no accountability. The Congress debated the issue, in a sense, of whether or not -- what you had to do to have control of that private financing in a public financing situation.

QUESTION: How does the statute or the combination of them reach an independent political action committee not coordinated with anyone and not for any candidate, but against a candidate, against any candidate who supports X, Y or Z positions?

MR. STEELE: In the public financing situation, the Commission interpreting the provisions of the statute here in question, 9012(f), has said that where you have -- again, the public financing statute deals with major party candidates. But taking the question as dealing with major party candidates, that the expenditure of funds against one of those candidates is to further the election of the other candidate. So that the way the statute deals with that is --

QUESTION: And you don't think that's any impairment of the First Amendment rights?

MR. STEELE: No, I would say that I think that the fact that the -- again, I think there's a question of statutory interpretation there, but that the fact that a negative expenditure can be to further the election, I think that there's nothing in the First Amendment that would permit in a sense only negative expenditures but not positive expenditures; that the reach of the First Amendment would be equal with regards to those.

As well as the question that was before the Congress -- and as I say, I think that the one major thrust of our argument is that Congress knew the problem it was facing, discussed it in great detail, had hearings on it, had testimony in what was, I would

re-emphasize, a very broad constitutional debate.

It was not solely a constitutional debate about the issue of the control of expenditures. There was also a constitutional debate about the propriety of the check-off, which this Court resolved in Buckley versus Valeo. There were proposals to have the check-off allow people to designate their parties on the check-off, which was felt by many necessary not to interfere with the political parties.

There was also a very strong debate about how to structure a public financing law so that it would not interfere with the rights of third parties, and one of the factors, if there is no control on independent expenditures, is that the subsidy that is then put forth puts third parties at a greater disadvantage.

QUESTION: Well, Mr. Steele, notwithstanding those concerns expressed by Congress, what about the fact that in Buckley versus Valeo spending by political associations was treated as expenditures entitled to protection under the First Amendment, full protection? Isn't that the problem that you have to deal with here?

MR. STEELE: I would deal with it in two ways. One, I would say that I think this Court's analysis in Buckley versus Valeo made it very clear that that was in a balancing test. I do not think that this

Court has said in Buckley, I think in subsequent cases -- I would cite to both the Bellotti case and the CARC case -- that this Court has spoken in terms of if independent expenditures do pose a danger -- and that is of course the question that was in front of Congress and in that sense is in front of this Court.

But that there is a difference in the constitutional balance with regard to expenditures; that the question is how these expenditures affect the process. And in that sense, I think that there is a balancing test there, rather than full protection under the Constitution for any expenditure of any kind.

QUESTION: What was the second case you referred to?

MR. STEELE: I think that's implicit in both. The Berkeley case, we refer to it as CARC. It's the Citizens Against Rent Control versus Berkeley. I think in both those cases, I think the Court dealt with the analysis as the question was one of the governmental interest balance.

I would return to the fact that --

QUESTION: And you think that the interest for purely independent political associations is different than that in Buckley versus Valeo?

MR. STEELE: Yes, because I think that the

608(e) statute that was considered there ran the entire gamut. It covered individuals, groups, political committees, all kinds of associations. Dealt with by this statute are only political committees, political committees within the meaning of the statute, ones whose business is influencing federal elections and who receive contributions. It is a much narrower focus of the statute than was present in the statute in Buckley.

The second point that I would want to make is that in this broad debate there was considerable concern expressed by Congress, that is that is enshrined in the statute, which was noted in Buckley versus Valeo, allowing for individual and group speech and associational rights to come forward in the political process.

They have been listed. I don't want to run through them all, but there are very significant ones. First of all, under this very statute individuals are not limited in their expenditures. Appellees argue that this makes the statute discriminatory.

It seems to me, to the contrary, what it shows is that Congress was very sensitive to the balance it was making, and in a Constitution whose basic protections are for individual rights, while you have a question of whether those individual rights to associate

and to cperate thrcugh a grcup have been curtailed by the statute, nonetheless the very protection of individuals to spend is of great importance.

There are also prctections in the statute for volunteer activities, for expenditures toward political meetings and grcupings. There was a tremendcus in Congress that this balance that it felt it was striking -- and again, I refer to the fact --

QUESTION: Let me interrupt you once mcre, Mr. Steele, because it seemed to me that in Buckley when the Court upheld the prcvision limiting contributicns, that one of the reasons the Court gave for dcing that was that individuals could contribute to pclitical associations and pool their resources and gain expression in that fashion.

And yet you're now saying that that aspect can be curtailed as well. So I'm just wondering how consistent that is with Buckley.

MR. STEELE: I think it was one of the things that the Court referred to, and I would say that there certainly is the ability to join in political asscciaticns. Again, there was great discussion --

QUESTION: Well, that's a pretty hollow right, to just join the association, if the asscciaticn is then limited to spending $1,000.

MR. STEELE: The right --

QUESTION: That isn't much of a right then, is it?

MR. STEELE: Well, I think again the question of whether the limit is drawn too low is essentially a legislative one, but that the question of whether that can be limited again is a question that was dealt with in the contributions area.

I agree that one of the rights left there is to contribute and to participate in political associations. Again, this statute does nothing to curtail issue discussion. We have a long discussion in the Common Cause versus Schmitt, and there are questions as to when an issue group might move over to being one that was seeking to support a candidate.

But centrally the statute does not deal -- it deals only with the political committees, of which there are some 8,000 presently, of which about 4,000 are political committees of candidates and parties.

QUESTION: Can a political committee simply avoid the limit by publishing a periodical that endorses a candidate in an editorial?

MR. STEELE: The interpretation -- there is a provision in the statute protecting the press right. It seems to me and it seems to the Commission that that is

a functional analysis of whether or not that is a regular periodical.

But yes -- and also, again in the statute, in the 441(b) area, internal communications are not at all -- so it does seem to me that those are areas which Congress has exempted out. it has treated the press differently.

QUESTION: Well, could one of these committees, no matter how characterized, simply avoid any limitation by publishing some kind of periodical?

MR. STEELE: I think that it would depend upon the question of how periodical it was, but I think that a periodical appearing before the election that was a broadside would be held not to be within the protection of that statute. But that would be a statutory interpretation problem with regard to 431(f)(4)(B), I guess is the section.

QUESTION: Let me go back to your statement that fixing the amounts is for Congress. And of course conceding that generally that's true, suppose instead of $1,000 it was $100. Same?

MR. STEELE: I think yes. I think the general proposition still holds true. I think --

QUESTION: And $50?

MR. STEELE: I think the general proposition

still holds true.

QUESTION: One dollar?

MR. STEELE: I think the general proposition still holds true.

QUESTION: What could you do -- how much First Amendment expression can you engage in for one dollar or $50 or $100?

MR. STEELE: Well, when I say that the general proposition holds true, I think that this Court has said in various cases that if it saw that the -- took as the motive of Congress to stop the speech, as opposed to limiting the amounts of expenditures in elections, that that would go to the question of the motive of Congress.

QUESTION: Well, wouldn't the one dollar in effect stop? Wouldn't that be an almost absolute barrier to expression?

MR. STEELE: I think that it would curtail the expression of the political committees down to nil for all practical purposes, yes.

QUESTION: Then it is the same as though Congress would say, no, no committees would be permitted to express themselves?

MR. STEELE: That would be a different statute than is here. Congress debated the $1,000 limit. More

would have opened it up.

CHIEF JUSTICE BURGER: Mr. Feirscn.

ORAL ARGUMENT OF STEVEN B. BEIRSON, ESQ.,

ON BEHALF OF APPELLANTS

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.

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

With respect to the question that the Chief Justice just posed about the dollar limitations, it might be well to remember that in a somewhat analogous provision of the federal election laws, Section 441(b), the Congress applied an absolute prohibition upon corporations and unions on expending any amount of money in independent expenditures to further the election of candidates for federal office.

And I think that particular provision is very helpful in trying to analyze this --

CHIEF JUSTICE BURGER: It's a mistake. The light seems to be out of order, Mr. Marshall.

You may continue.

QUESTION: In the Right to Work Committee decision of the Court a couple years ago, which did deal with the prohibition against corporations and unions, that case went off on the proposition that corporations have always been treated differently for purposes of

political expenditures since way, way back than individuals have.

I don't see how that supports anything about what a political committee can do.

MR. FEIRSON: Well, Mr. Justice Rehnquist, I think if you go back and look through the NRWC case, the rationale for why corporations have always been treated differently is their ability to aggregate wealth and to use the corporate form. In fact here, when we deal with these particular Appellees, we are also dealing with the corporate form and all the incidents that goes with it.

QUESTION: Well, to the extent you're dealing with the corporate form, you can probably get them under the section involved in NRWC, can't you?

MR. FEIRSON: No, because that section does not -- would not pertain here, inasmuch as under a Federal Election Commission regulation they have registered as a political committee and thereby have taken themselves out from underneath 441(b). So in essence the only difference here between the Appellees in this case and NRWC, and that case, is that NRWC failed to register under the particular provision, the particular regulation of the Federal Election Commission that would have taken it out from underneath 441(b).

QUESTION: Well, certainly none of the

arguments, at least in reading Judge Becker's opinion in the district court, suggest that all of these defendants were corporations and that they should be subjected to the corporate restrictions in the Act.

MR. PEIRSON: I think it is clear from the record that both of the Appellees are corporations. They are corporations almost identical to NRWC. That is, they are nonprofit corporations, they do not have any members.

QUESTION: Well, but Judge Becker distinguished NRWC in his opinion on the ground that it dealt with corporations. So it strikes me that this argument at least wasn't made to his court.

MR. PEIRSON: I don't believe that is correct. The argument on NRWC and the fact that you cannot distinguish the corporate form of NRWC and the corporate form of the Appellees was indeed made to the district court.

I think what Judge Becker was saying in attempting to distinguish NRWC was, it is a different case for the following reason: He said that in corporations, when you're dealing with corporations, you're dealing with an economic entity rather than an ideological entity, and that was the basis of his distinction.

I think that's a faulty basis, because NRWC is not an economic entity, it is an ideological entity, similar to the Appellees, which has in fact the same purpose as the Appellees, which is to attempt to influence federal elections.

My basic point is that if you look at what NRWC was as an entity, their corporate form, how they were structured, and you look at the 441(b) prohibition, which is absolute, it is very difficult, if not impossible, to find any distinction between that case and that particular party and these particular Appellees.

They are all corporations, they are all nonprofit corporations, they are all ideological corporations. None of those three parties have any input at all from their contributors as to how they are run or how they are managed or how the expenditures are made.

So in the 441(b) situation which was present in NRWC, this Court unanimously upheld a total prohibition on independent expenditures. What we have in the Fund Act is a somewhat less restrictive limitation, in that it does permit the $1,000 spending limit.

And we would urge the Court to closely look at

the 441(b) and the NRWC analogy to see if there are any distinctions of constitutional dimension. There are always some distinctions, but we would argue that there are very, very few, if any; in fact, there are no distinctions of constitutional dimension.

Earlier questions focused on the difference between coordinated expenditures and independent expenditures. Part of the problem with that in this setting -- and I think it's a problem that the Congress recognized -- was that it is virtually impossible in the space of an election campaign -- that is, from the time the candidates are nominated until the time the election is held -- for the Federal Election Commission or any other decisionmaking body to determine what is and is not a coordinated expenditure.

For example, with respect to Justice Rehnquist's question about a different type of statutory scheme where the candidates' dollar totals would go down if coordinated expenditures were made. Well, if you put yourself in the position of the candidate, it's an impossible choice.

If you say to a candidate, you'll have $40 million unless at some time later somebody decides that somebody made a coordinated expenditure, the candidate's going to say, no, thank you. That is just a practical

reality.

If the public funding scheme is going to work, if candidates are going to accept public funding, which every single major party presidential candidate has done since it went into effect, there must be a certainty. There must be a certainty that they will get the full grant that's coming to them. Otherwise they're going to have to turn it down and say, I'll take my chances getting private contributions.

And so as soon as you start to focus too much on the distinction between independent and coordinated expenditures, you get into, I think, a can of worms, because these are very difficult decisions, they're very fact-oriented, and there's no way at all that they can be made within the space of the campaign.

I think it's also important in considering how 9012 interacts with the other provisions of the Fund Act to remember that as a whole the Fund Act, as this Court found in Buckley, enhances pertinent First Amendment values by releasing candidates from the rigors of fund-raising.

In other words, it does two things: It gives candidates more time to discuss issues that are important to the country, rather than trying to raise funds; and in addition, it enables the candidates to in

thecry discuss those issues in a more open and free-flowing fashion and not worry about how it might affect potential financing support.

QUESTION: Well, why is that -- why is one to be preferred over another for First Amendment purposes?

MR. FEIRSON: I don't suggest for a second that one is to be preferred over the other for First Amendment purposes. What I suggest is there has to be a balance between the two, and that this is not a black and white situation where the Appellees come in and say, our First Amendment rights have been violated and unless you show me some compelling governmental interest you're going to lose.

What I'm saying is that before you even get to the compelling governmental interest, this Court ought to take into consideration what are competing and countervailing First Amendment values.

QUESTION: A lot of that line of analysis was followed by the Court of Appeals for the District of Columbia Circuit in Buckley against Valeo, and squarely rejected by this Court -- the idea that you enhance First Amendment values by subduing some people's speech and increasing other people's speech.

MR. FEIRSON: Well, I think in that case what the Court was focusing on, what this Court focused on,

was the subduing of the speech of the rich versus the poor or Easterners versus Westerners. What we have here is a mutual provision. It's not liberal or conservative, it's not East or West, North or South.

It goes to a particular type of organism, a particular type of organization, like a corporation, like a labor union. It is an organism that aggregates wealth, like a corporation, like a labor union. And this Court in NRWC said that it was within the Congress' discretion to make a determination that organizations like corporations, labor unions, or, I believe the quote is, "other similar organizations" are worthy of this type of regulation.

And we would submit that this is -- that the Appellees are other similar types of organizations. They aggregate funds and they spend money which is not theirs. And 9012(f) does not attempt to regulate the expenditure of funds by individuals, that is, when they are spending their own money. It does not attempt to regulate the expenditure of funds by groups; that is, when groups of people actually band together, pool their money and spend it.

All 9012(f) attempts to regulate is an organism which accumulates funds from contributors, and when these contributors have no control or say over how

those funds are spent then you have a political committee. And it is only in that circumstance that 9012(f) would apply. And I think it's a very different situation than Buckley, where you had an across the board type of prohibition.

With respect to Justice O'Connor's question about whether or not, if you have a $1,000 limitation, does that make the small contributor's contribution rights hollow, I don't think it does. And the reason is I think you have to focus on what is the speech right of the contributor.

QUESTION: Well, I think it's more than a contribution right, isn't it? At least as relied upon by this Court in Buckley, it was a right to speak, if you will, as an individual through a group means, by means of pooling your assets to amplify your voice.

MR. FEIRSON: And I think that that was true in Buckley. We would submit it is not true here. There can be no pooling here, because the record is undisputed that the contributor, once the money goes in, has absolutely no say over how that money is spent or even if it is spent.

When these Appellees -- and the record is undisputed on this -- send out solicitations saying, send us so many dollars for such-and-such a presidential

candidate --

QUESTION: Well, I suppose Congress could regulate the extent to which committees must require participation, but it hasn't chosen to do that.

MR. FEIRSON: Well, the point would be that if the committees required significant participation then it would be likely to come out from underneath the definition, because it would be more like a --

QUESTION: But be that as it may, that is a subject that Congress could regulate, presumably?

MR. FEIRSON: That's correct.

Thank you.

CHIEF JUSTICE BURGER: Mr. Sparks.

ORAL ARGUMENT OF ROBERT F. SPARKS, JR., ESQ.,

ON BEHALF OF APPELLEES

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

It is our position in these cases that Congress did not intend that Section 9012(f) apply to limiting independent expenditures. We say that because of the Congressional history and legislative debate surrounding Section 9012 in the Fund Act passed in 1971 and its predecessor legislation, the Honest Election Act of 1967. And we say so because of the wording of the statute itself.

Secondly, we contend that if the statute is construed by this Court to reach independent expenditures, then it cannot survive and that it unconstitutional, because it may be sustained only if it fosters the goal of guarding against real or apparent corruption. And we suggest to this Court that there is no legislative evidence of connection between independent expenditures and corruption, nor is there any record evidence of such a connection.

This statute is a criminal statute which operates in an inarguably First Amendment area. As such, we suggest that it should be read and construed narrowly.

Section 9012(f) was lifted almost word for word from Section 310(f) of the Honest Elections Act of 1967. It is for that reason that we have argued to the Court that the legislative debate surrounding that statute is pertinent here.

Section 310(f) was the result of a compromise between Senator Long, who wanted simply to fund presidential elections -- and the '67 Act also funded senatorial elections -- and do no more, and those who, led by Senator Gore, wanted not only to fund presidential and senatorial elections, but in aid of that public funding wanted to limit expenditures by

others.

310(f) was a compromise between those views. We believe that the legislative debate surrounding 310(f) shows that what 9012(f), which is the successor to 310(f), was intended to do was force publicly funded candidates to live within the budget provided by the public grant, by limiting expenditures by party-connected non-authorized committees to pay -- and this is the language from the Senate report about the Honest Elections Act -- "for a candidate's expenses."

QUESTION: This is a statutory argument, I take it?

MR. SPARKS: It is, Your Honor.

QUESTION: And what did the district court say to you about that?

MR. SPARKS: Your Honor, I made this argument in my papers, but I did not in oral argument before the district court.

QUESTION: Then the district court didn't address it?

MR. SPARKS: It did not, Your Honor. I take it --

QUESTION: And you're making an alternative argument for affirmance?

MR. SPARKS: Yes, sir. I'm seeking to provide

this Court with a way of avoiding the constitutional issue.

QUESTION: I would think the district court would have had to reach the statutory argument first, if you presented it.

MR. SPARKS: I presented it in my papers, but not in argument, Your Honor.

What was happening in 1967 and what Congress had seen happening was that party-connected but unauthorized committees -- that is, committees that had not been authorized in writing by the candidate to make expenditures on the candidate's behalf -- were out paying expenses for the candidate, paying for his trips into a state, for instance. That is what Congress struck at in the '67 Act and, we urge by implication, in 9012(f).

Now, in 1971 there was precious little debate about the true intent of Section 9012(f). What debate there is, however, we have set out in our brief, and that centers on a debate between Senator Pastore and his opposition. Curiously enough -- and we readily concede this -- Senator Pastore is the only one who discussed independent expenditures, and he argued both sides of the case.

At one time he said 9012(f) was not intended

to reach independent expenditures. So long as the people are independent of the candidate, they are free to speak as they will, he said. He is the only one, on the other hand, who suggested at one point in his debate that it might reach independent expenditures. But in the end he came back to his original position, which was that it was not intended to reach independent expenditures.

His opposition, following the lead of Senator Gore back in 1967, who was then no longer in the Senate, wanted to expand Section 9012(f) and to have it reach all manner of groups, everyone save individuals. They were unsuccessful in that. Their effort was turned back.

The debate on the '67 Act and the '71 Act is extensive. I have read many, many pages of it. And I may be wrong on this, but I believe I can say to this Court that nowhere in that debate does Congress address independent expenditures by independent groups. The concern back them was non-authorized but party-connected committees, because, frankly, big-time independent expenditures did not exist back then.

QUESTION: May I just ask this. What does, in your view, 9012(f) reach if it doesn't reach these expenditures?

MR. SPARKS: We believe that it now reaches, that it was intended to reach, only party-connected expenditures for a candidate on his behalf or those that were otherwise somehow coordinated with him, at his request or suggestion. And we readily concede that if the Court construes it that way, then Section 9012(f) today is redundant and unnecessary, because since '71 when the Act was passed Congress has now characterized such expenditures as in-kind contributions. In 1974 they did so. So now the Fund Act would be redundant -- or, excuse me, 9012(f) would be redundant, if this Court read it that way.

But we are looking at Congressional intent in 1971, and the Fund Act has not been tampered with since. Congress has been silent.

We believe that the very wording of 9012(f) itself supports our argument. That statute prohibits not all expenditures, not any expenditures, not independent expenditures, but only those which, if incurred by a candidate or his authorized committee, would further his election.

We believe that that awkward wording itself suggests that what Congress was striking at were expenses paid for a candidate. And there are other common sense basic principles of statutory construction

which we believe support our contention that the statute should be read that way.

One, Congress knew how to outlaw all or independent expenditures when it wanted to. This Court had no trouble understanding that that's what Congress intended to do in 608(e)(1) in Buckley. Congress didn't do so.

Two, if Congress was really concerned about independent expenditures and the real or apparent corruption of expenditures, of independent expenditures on candidates, then they struck at that goal in a curious way when they exempted wealthy individuals. And wealthy individuals existed back before 1971 and they certainly exist now.

The record in this case shows that ten individuals spent more than one million dollars to support Mr. Reagan's election in 1980. One of them spent more than a half a million dollars.

And finally, it is curious that Congress put no similar independent expenditure limitation, if that's what it is, in the Primary Act. There is no restriction upon independent expenditures during the presidential primary campaign, even though that campaign is publicly funded.

Now, this Court in Buckley upheld the Fund Act

on two grounds: first as a means of eliminating the influence of large private corruptions -- excuse me, contributions; and secondly, as a means of relieving candidates of the rigors of fund-raising.

Section 9012(f) furthers neither of those goals, for: first, it addresses expenditures, not contributions; and secondly, candidates are already publicly funded; they no longer have to face the ordeal of fund-raising. Each of them in 1984 received $40 million in furtherance of his campaign.

In addition, because 9012(f) exempts individuals and exempts the institutions of the press and broadcast media, it is woefully underinclusive and leaves the field of independent expenditures wide open to those influential groups and individuals.

Where a statute, like 9012(f) does, operates in an area of First Amendment freedoms, it can be upheld only if it serves a compelling governmental interest, and even then only if it is narrowly drawn to achieve that end. Since Buckley it has been clear that when a statute limits campaign expenditures the only compelling interest sufficient to uphold the statute is the avoidance of real or apparent corruption.

We have already argued that Congress did not intend in 9012(f) to reach independent expenditures.

But if the Court finds that it did, then Buckley teaches that corruption must be the evil aimed at by that statute, and only corruption. And it was not.

There was much talk about corruption resulting from contributions, but not from independent expenditures. Indeed, there was precious little, if any, talk about independent expenditures, because they almost didn't exist back when the Fund Act was being passed.

Secondly, there is no legislative connection whatever between independent expenditures and corruption. First, as I said, because independent expenditures almost didn't exist; and secondly, because in 1976 this Court found -- and the record before it was a complete record -- that there was no evidence of corruption sufficient to uphold an independent expenditure limitation. It's no wonder, then, that Congress didn't find corruption in 1971.

QUESTION: Isn't it possible to at least infer from the debates that Congress was concerned about corruption when it passed 9012(f)?

MR. SPARKS: It was indeed concerned about corruption arising from contributions, Your Honor, not from independent expenditures. It was indeed concerned about corruption, and it was to relieve the possibility

of corruption from direct contributions to candidates that it said: We will not permit those; instead, we will publicly fund the candidates, and they may not ask for nor may they accept contributions.

Just as in 1976 there is no record evidence of corruption, there is none in 1984. The district court exhaustively examined the record. The record consisted of more than 200 stipulations. And it noted the complete absence of any real or apparent corruption. It found little more than what it considered things to be in the mainstream of American political tradition.

But the Democrats apparently were concerned that there was no evidence of direct corruption, so what they tried to do was persuade the lower court that there was an appearance of corruption. And they tried to do that through a poll, a public opinion poll.

The lower court discussed this. It properly rejected that poll because, in its view -- and we hope it is this Court's view as well: "The constitutionality of legislation ought not to turn on a national plebiscite. It is for Congress to find" -- "It is for Congress to find the reality or appearance of corruption, and not the man on the street."

QUESTION: Well, if the appearance of corruption is a valid purpose, something against which

Congress may legislate, why can't the appearance of corruption be determined by a plebiscite? You can argue, it seems to me, that perhaps the appearance of corruption is something which is not as high on the scale of constitutional values as corruption itself, but if you concede that the appearance of corruption is something against which Congress can legislate, why shouldn't the appearance of corruption be proveable by a poll?

MR. SPARKS: Well, Your Honor, first of all, it's my understanding that the way Congress would find such corruption, the proper way, would be for it to hold public hearings and take testimony. It's an appealing notion that legislation ought to be passed on by plebiscite, but if so it has to be --

QUESTION: Like testimony from a pollster?

MR. SPARKS: For instance.

QUESTION: Yes.

MR. SPARKS: We didn't have our poll. We would have loved to have our polls in as well, Your Honor.

QUESTION: Yes, exactly.

QUESTION: Well, wouldn't one of the weaknesses of a plebiscite or a poll depend on who framed the question?

MR. SPARKS: Exactly, Your Honor. It would indeed, and we think that the legitimacy of this statute should not turn on the answers of a few thousand people who were asked a couple of questions over a weekend a couple of years ago.

Secondly, this statute is not narrowly drawn to achieve what can only be the only legitimate goal, which is the avoidance of corruption.

QUESTION: Would you reject, then, completely as a valid goal the preservation of public confidence in the integrity of elections?

MR. SPARKS: No, ma'am, I would not. I believe that's a perfectly legitimate goal of Congress. But it's not one that they expressed in passing this legislation.

This statute is not narrowly drawn to achieve its end. There are other, more narrow means to achieve the end sought here, if this is the end that Congress sought, and they are elsewhere provided in the Act, again suggesting that Congress really did not have the outlawing of independent expenditures in mind.

First, there can be and there are elsewhere in the federal election laws requirements of disclosure of independent expenditures. NCPAC and FCM's independent expenditures are publicly reported to the Federal

Election Commission.

All of their expenditures, all of their public communications for and against funded candidates, and all others, by the way, contain disclaimers of any connection with the candidate and identification of the group that is speaking.

QUESTION: Are the names of the donors required to be disclosed?

MR. SPARKS: Yes, Your Honor, donors to --

QUESTION: In the report to the Commission?

MR. SPARKS: Yes, Your Honor; not just gross amounts.

QUESTION: No matter what the amount is?

MR. SPARKS: No, Your Honor. Mr. Steele will probably correct me on this --

QUESTION: I think there was a bottom limit.

MR. SPARKS: There's a $50 or a $200 threshold, below which I don't think the donors' names must be disclosed.

QUESTION: Has there ever been any study made by Congress or by anyone, a public study, as to the coordination or the incidence of donors to both the independent committee and a party committee?

MR. SPARKS: If there is I'm not aware of one.

QUESTION: That would be evidence of coordination, I suppose?

MR. SPARKS: Similarity of contributors? I'm not aware that such a study has been done, Your Honor.

Finally, groups like NCPAC are prohibited from reproducing a candidate's campaign materials and there are limits on the amount of contributions to political committees.

All of these are less restrictive, but just as effective means, that already exist in the statute. Congress need not have taken the meataxe approach that it did here of all but outlawing all effective independent expenditures.

QUESTION: Well, if you concede that the statutory construction argument is resolved against you, at least for purposes of this argument, and say that Congress did go further here, I think you have to admit that Congress thought it was necessary to go further than the other means that you say you think are perfectly adequate.

MR. SPARKS: Your Honor, let me hasten to say that I didn't intend to concede that --

QUESTION: No, all I meant was that when you argue about the extent of the statute here and going further than necessary, you necessarily assume that the

statutory construction argument is resolved differently than you say it should be.

MR. SPARKS: All right, Your Honor.

Justice Rehnquist, a while ago you were asking questions about this Court's Right to Work opinion and whether or not it simply controls this case and resolves the issue altogether. It does not, for two reasons:

First, as Mr. Feirson pointed out, the FEC has a regulation which says that political committees may incorporate and yet still avoid the proscriptions on corporate expenditures contained in 441(b). They may incorporate for liability purposes only.

And two, the statute which is before this Court today restricts expenditures by political committees, which are defined in the Fund Act and in the Federal Election Campaign Act as including groups incorporated or otherwise. So that this case, albeit with an unincorporated political committee, would be before this Court today if this Court viewed the FEC's regulation as not disposing of that issue.

Your Honors, throughout the FEC's and DNC's briefs they refer to us as being a nominally independent, professionally run, effective; that the candidate knows who is helping him and why. At one point one of the Appellants refers to the ability of

groups like Appellees to exert significant influence on the political process.

We think that these are all code words for saying that we're effective and that, because we're effective, our speech ought to be choked off. We do not understand the law to permit that.

Mr. Steele suggested in his argument that the messages of the publicly funded candidates are somehow being interfered with by the independent expenditures engaged in by Appellees here. We are not aware that anybody in America feels that the candidates were not able to get their messages across.

They also refer to our expenditures as a mere subsidy or a supplement. Those too are code words.

They suggest that we are somehow coordinated with the publicly funded candidate. That is not so. In fact, in 1980 Common Cause and the Carter-Mondale committee filed administrative complaints against both Appellees here and, after almost three years of investigation, the FEC came up empty-handed. It took no action against us whatsoever on the coordination claims or on any other claim. The fact is, we're not coordinated.

Finally and perhaps most importantly, Mr. Steele suggests that because of Appellees and their

independent expenditures the candidates might somehow be beholden to our Appellees. First of all, there's no record whatever -- no record evidence whatever on that score.

Secondly, please consider what Mr. Steele is really suggesting. What he is saying is that, because our candidates -- our clients, who pool small contributions of many ordinary citizens, citizens of ordinary means, and spend those in support of a candidate, that those expenditures might cause the candidate to pay attention to those voters.

Well, that is the American way, as we understand it. What Mr. Steele is really concerned about is that these expenditures might be effective, and that a candidate might realize that the voters are getting his message and would be responsive to those voters. Well, that is the point of the process as we understand it.

In short, it seems to be Appellants' position that groups like NCPAC and FCM and their many contributors are better see and not heard; that they are to troop to the polls obediently every election day and vote and go home; that they can participate through the party process, but through no other.

We think that in this case silence is not

golden, that this statute was not intended by Congress to reach independent expenditures, but if it was it can't.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Steele? You have now five minutes remaining.

REBUTTAL ARGUMENT OF CHARLES N. STEELE, ESQ.,
ON BEHALF OF APPELLANT THE
FEDERAL ELECTION COMMISSION

MR. STEELE: I would like first to deal with the issue of the statutory interpretation. We have set forth in our reply briefs in footnotes 2 and 3 where we think that that was dealt with by Appellees in the court below.

It seems to us that they effectively conceded that the statute covers their expenditures, not only in their papers to the district court below, but in their answer to the complaint, which stated that the expenditures they would make -- it was also their statement in the advisory opinion request that they sought from the Commission.

With regard to the point relating to the statutory history and to the intention of Congress, again our reply brief sets forth at some length, as well

as our opening brief does, the discussions that were held in Congress. It seems very clear to me that, first of all, the term "independent expenditures" was used. I would note that "independent expenditures" was not used in 608(e), but that that was clearly the import of what this Court dealt with in Buckley versus Valeo, 608(e) having been the broad expenditure limit that was struck down by this Court.

But the discussion in Congress related to the question of private money. There was considerable discussion about contributions. There was considerable discussions about expenditures. So that the concept that Congress did not understand that these kinds of expenditures would come forth in a publicly financed system, one where there was an expenditure limitation on the candidate, expenditure limitations on his party, prohibition of private contributions to the candidate, limitations of contributions to the party, seems to me one that is totally at odds with the nature of Congress as experts who know a great deal about campaign financing, who discussed it.

Senator Gore in 1967, when he raised the whole question about the efficacy of the Long Act and said, rejecting one of the arguments that I think is made in favor of what this statute could have been, said about

the Long Act. Well, that will only be a subsidy, listed explicitly nine points.

The second of those nine points was precisely that expenditures would be made by unauthorized committees. The whole debate that led to the Honest Elections Act of 1967 that was reported out was dealing with the question of how do we deal with unaccountable expenditures? It was the form of the complaint that was made against the statute as it had passed in 1966, and that was the statute that was carried forth to 1971.

Finally, I would say that, with regard to the question of whether everything is a code word for effectiveness, I think that it is indeed true that what Congress was aiming at in Section 9012(f) was committees who would be able to conduct the kind of national campaign that cost millions of dollars. There is no question that what it sought to prohibit was political committees, precisely because they were able to do that.

That does not mean to me, and I should think that it would not mean to this Court, that what Congress was there intending to do was to cut off the individual's rights of speech and association. Individuals are protected in their volunteer activities. They're protected under the statute here in

terms of making expenditures. There are a variety of ways in which Congress has dealt with that.

So that the answer with regard to the effectiveness is, yes, precisely the reason that Congress saw these independent committees, who could not be found to be not independent in the course of the election, the danger that it --

QUESTION: Mr. Steele, may I interrupt just a minute? How do you suggest that an individual with $150, $200, $300, can make an expenditure that would be in any sense relevant to the campaign? Where would he make it?

MR. STEELE: Local radio.

QUESTION: Locally?

MR. STEELE: Local radio, one of the things set forth --

QUESTION: How much advertising can you buy for $150?

MR. STEELE: The record has a great deal of evidence that was put in precisely with regard to that point.

QUESTION: Is that in your brief or just in the record?

MR. STEELE: I think it's referred to in our brief in the summation, but the printed appendix -- not

only in the record, it was printed in the appendix, and it's in the stipulation of facts as to the amount of advertising that an individual by himself could buy.

And as we have said in the brief and with regard to the discussion about the Taft amendment, we don't think that the reach of the statute -- the reach of the statute is against political committees, not against groups of individuals pooling their funds, so that you have on top of the ads that you could get in the local newspaper or on the local radio station or even the local TV station --

QUESTION: What would be the dimensions of a $100 ad in the New York Times?

MR. STEELE: Very small, if they'd take it.

QUESTION: Could you find it?

MR. STEELE: No question. Again, I think that was the precise balance that Congress was really concerned about in all of these debates, was how to get a handle on limiting the large aggregations of wealth that came into political committees and the expenditure of those, without interfering with the rights of individuals, small groups.

A long discussion about the Pastore amendment, about groups of Columbia University professors. I've never known why they chose that as the hypothetical.

But that was the precise balance that Congress was trying to make, how to reach the aggregations through political committees, but not interfere with the individuals' and small groups' rights to have some influence.

It would not be sufficient to mount a national campaign, but it was precise these shadow campaigns, as we have spoken of them, that Congress was concerned about. If you don't limit unauthorized political committees in their expenditures, Congress felt you would have those kinds of campaigns. And as we've set forth in our brief and again as is mentioned, that seems to have come true.

Here you have a statute that prohibits it, that the Commission has said has prohibited these activities for a long time. It's been challenged by Appellees. They have mounted major campaigns. If there was not that prohibition, some 8,000 political committees could do the same thing. The size of that is considerably larger than the public fund, whatever the public fund.

But in answer to your question, we did put into the record attempts to show what an individual could buy in terms of local advertising.

QUESTION: Let me try another hypothetical on

you that I think has some historical background. A national campaign with a third party candidate for president, who by all realistic analyses has no prospect. But independent, totally independent, uncoordinated committees are formed to support him, with the predictable result that it will drain votes off of one of the candidates. And let's even assume that their purpose is to drain votes off of one candidate.

And what about that? Now they're supporting a candidate, but it has that consequence. Can the Commission go behind the surface and say this is a corrupt effort to influence the election? Not to elect this man, but to influence the election for one of the other two major party candidates?

MR. STEELE: I think it can. I would say that, with regard to minor party candidates -- major party candidates are dealt with very differently in the Fund Act than minor party candidates.

QUESTION: My hypothetical is that this third party fellow didn't get any public funding. He got no public funding at all.

MR. STEELE: I think that, yes, I think it would be an extraordinary situation that would make the court go behind it. But given the hypothetical, I think, yes, that the Commission has the power to look

behind it to find that the purpose of that campaign was to further the election of one of the major party candidates.

QUESTION: What section of the statute would you rely on for that?

MR. STEELE: I would say that that would be an interpretation of the statutory language that's involved in this section, Section 9012(f). Again, as I say, I think it would be an extraordinary instance, because it would be in effect a non-bona fide candidate for president.

But if that was the purpose, I think that the purpose question would come to focus on Section 9012(f), which is the statute before you.

QUESTION: Well, a good many people would think that some of the third party candidates were injected and supported for precisely the reason I set up in my hypothetical in the past. So that it's not such a far-fetched idea, is it?

MR. STEELE: No, and I don't mean to say that I don't think that there are difficulties involved in that. I think one of the things that the Commission has had to wrestle with in the advisory opinion process, because of the prospects after 1980 and coming into 1984 for the fact that there might be third party candidates

who were publicly financed, was the implications of those.

QUESTION: Could the Commission get at that before the election, or only by a criminal proceeding after the election?

MR. STEELE: As always, in the short space of the general election, one of the reasons that we would see this as a statute is that it's very difficult for the Commission to get at that in the space before the election.

QUESTION: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:03 p.m., argument in the above-entitled case was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1032 - FEDERAL ELECTION COMMISSION, Appellant v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE: ET AL.; and

#83-1122 - DEMOCRATIC PARTY OF THE U.S., ET AL., Appelllants v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)