

FEC v. NCPAC: A JUDICIAL MISINTERPRETATION OF BUCKLEY v. VALEO AND A PROPOSED REMEDY

INTRODUCTION

For a democratic society to flourish and prosper, its electoral choices must reflect the carefully reasoned and informed choice of its people. Unfortunately, people do not always rationally choose their elected officials. Too often voters base their decisions on incomplete information,¹ a lack of understanding of the issues,² or other extraneous factors stemming from an influx of money into the electoral process from the private sector.³

In 1971, Congress attempted to correct this problem by enacting the Presidential Election Campaign Fund Act.⁴ Congress concluded that only public financing would protect the integrity of the presidential electoral process.⁵ The Fund Act made it unlawful for an independent political committee⁶ to spend more than \$1,000 on behalf of a presidential candidate.⁷ Not only did the campaign contribution system prior to the passage of the Fund Act unfairly hinder presidential candidates who did not have vast financial resources,⁸ it also inadequately served the electorate.⁹

In *Federal Election Commission v. National Conservative Political Action Committee*,¹⁰ the United States Supreme Court held the limitations imposed by the Fund Act an impermissible restriction on free speech.¹¹

1. Verba & Nie, *The Rationality of Political Activity: A Reconsideration*, in *CONTROVERSIES IN AMERICAN VOTING BEHAVIOR*, 45-47 (R. Niemi & H. Weisberg eds. 1976).

2. A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* 186 (1960).

3. RePass, *Issue Salience and Party Choice*, 65 *AM. POL. SCI. REV.* 389, 400 (1971).

4. 26 U.S.C. § 9001 et seq. (1982 & Supp. III 1985) [hereinafter cited as the Fund Act].

5. S. REP. NO. 689, 93rd Cong., 1st Sess. 5-6 reprinted in 1974 U.S. CODE CONG. & AD. NEWS 5587. The report states, "The only way in which Congress can eliminate reliance on large private contributions and still ensure adequate presentation to the electorate of opposing viewpoints of competing candidates is through comprehensive public financing." 1974 U.S. CODE CONG. & AD. NEWS at 5591.

6. The Fund Act defines a political committee as: "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective office." 26 U.S.C. § 9002(9) (1982).

The Federal Election Campaign Act Amendments of 1979 define a political committee as including "any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (1982).

7. 26 U.S.C. § 9012(f) (1982).

8. H.R. REP. NO. 564, 92nd Cong., 1st Sess. 4 (1971) (the existing law did not provide a ceiling for spending by presidential candidates. This created a serious defect by giving a candidate with large financial resources an undue advantage over those whose resources are limited.)

9. See *id.*

10. 470 U.S. 480 (1985).

11. *NCPAC* involved a challenge of the constitutionality of 26 U.S.C. § 9012 (f) (1982), which made it a criminal offense for an independent "political committee" to expend more than \$1,000 to further that candidate's election. 470 U.S. at 490-501.

The Court relied on traditional first amendment analysis and its corresponding fear of governmental restriction of speech.¹² Although the decision respects free speech, it serves only the speech interests of those with the economic resources to advertise in the electronic or print media. In effect, *NCPAC* has restored the opportunity of the wealthy to be heard, while ignoring the corresponding opportunities of the poor and middle classes.¹³

This note addresses the problems posed by *NCPAC*. Initially, this note describes the parameters of the Fund Act, followed by an examination of its legislative history. This note argues that the Court mistakenly treated the PAC spending in question as expenditures, which are constitutionally protected, rather than as contributions, which are not. Finally, this note proposes a statutory fine-tuning of the Fund Act in an effort to separate the marketplace of ideas from the free market.

PRESIDENTIAL ELECTION CAMPAIGN FUND ACT

Congress originally passed the Presidential Election Campaign Fund Act as part of the Revenue Act of 1971.¹⁴ The Fund Act offers eligible presidential candidates¹⁵ of major¹⁶ and some minor¹⁷ political parties

12. *Id.* at 493, citing *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

13. Sen. Kennedy quoted a speech by Sen. Gore introducing the Election Financing and Reform Act of 1970.

[A]n election ought to be a time of serious discussion, a time when ideas are brought forth and debated—not for the sound they make but for their meaning, not for their marketability but their merit, not for their packaging but their content. . . .

Unless the will of the people can be determined and maintained in elections there can be no government of, by and for the people. Unless the elective process is surrounded by effective safeguards, there can be no real assurance that the will of the electorate will emerge. . . . Since election to political office is public business of the highest order, election to federal office, at least, ought to be publicly financed. In no other way can the stench of money in politics be completely eliminated from the elective process.

117 CONG. REC. 41,778 (daily ed. Nov. 17, 1971)

14. PUB. L. NO. 92-178, § 801, 85 Stat. 497, 562 (1971).

15. The Act provides:

(b) Major parties.—In order to be eligible to receive any payments . . . the candidates of a major party . . . shall certify . . . that—

(1) such candidates . . . will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled . . . and

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates . . . except to the extent necessary to make up any deficiency in payments received out of the fund . . . and no contributions to defray expenses which would be qualified campaign expenses . . . have been or will be accepted by such candidates . . .

(c) Minor and new parties.—In order to be eligible to receive any payments . . . the candidates of a minor or new party . . . shall certify . . . that

(1) such candidates . . . will not incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled . . . and

(2) such candidates . . . will accept and expend or retain contributions to defray qualified campaign expenses only to the extent that the qualified campaign expenses

the option of receiving public financing for their general election campaigns.¹⁸ It created a system whereby presidential campaigns are publicly financed through a voluntary one-dollar check-off on federal tax forms.¹⁹ This laid the foundation for the comprehensive presidential public financing system enacted in 1974.²⁰ If a qualified candidate accepts public financing, the Fund Act makes it a criminal offense for independent political committees to spend more than \$1,000 to further that candidate's election.²¹ It also includes provisions regarding payment of the funds,²² financial examinations of the official campaign committees,²³ Congressional

incurred by such candidates . . . exceed the aggregate payments received by such candidates out of the fund

26 U.S.C. § 9003 (1982).

16. 26 U.S.C. § 9002(6) (1982) (the Fund Act defines a major party as "a political party whose candidate for the office of President in the preceding presidential election received . . . 25 percent or more of the total number of popular votes received by all candidates for such office").

17. 26 U.S.C. § 9002(7) (1982) (the Fund Act defines a minor party as "a political party whose candidate for the office of President in the preceding presidential election received . . . 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office").

18. 470 U.S. at 482.

19. Pub. L. No. 809, § 302(a), 80 Stat. 1587 (current version at 26 U.S.C. § 9006 (1982)).

20. FECA Amendments of 1974. 2 U.S.C. § 441a(b) (1982 & Supp. III 1985) [hereinafter cited as FECA of 1974].

21. 26 U.S.C. § 9012 (f) (1982).

22. The Act provides:

(a) Establishment of campaign fund.—There is hereby established . . . a special fund to be known as the "Presidential Election Campaign Fund". The Secretary of the Treasury shall . . . transfer to the fund an amount not in excess of the sum of the amounts designated to the fund by individuals

(b) Payments from the fund.—Upon receipt of a certification from the Commission . . . for payments to the eligible candidates . . . the Secretary of the Treasury shall pay to such candidates . . . the amount certified Amounts paid to any such candidates shall be under the control of such candidates.

26 U.S.C. § 9006 (1982).

23. The Act provides:

(a) Examinations and audits.—After each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party

(b) Repayments.—

(1) If the Commission determines that any portion of the payments made to the eligible candidates . . . was in excess of the aggregate payments to which candidates were entitled . . . such candidates shall pay to the Secretary . . . an amount equal to such portion.

(2) If the commission determines that the eligible candidates . . . incurred qualified campaign expenses in excess of the aggregate payments to which the eligible candidates . . . were entitled . . . it shall notify such candidates of the amount of excess and such candidates shall pay to the Secretary . . . an amount equal to such amount.

(3) If the Commission determines that the eligible candidates of a major party . . . accepted contributions . . . to defray qualified campaign expenses . . . it shall notify such candidates of the amount of the contributions so accepted, and such candidates shall pay to the Secretary . . . an amount equal to such amount.

(4) If the Commission determines that any amount of any payments made to the eligible candidates . . . was used for any purposes other than—

(A) to defray the qualified campaign expenses . . . or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds

review of the proceedings,²⁴ judicial review,²⁵ and criminal penalties.²⁶

... which were used, to defray such qualified campaign expenses, it shall notify such candidates of the amount so used, and such candidates shall pay to the Secretary ... an amount equal to such amount.

(5) No payment shall be required from the eligible candidates ... to the extent that such payment, when added to other payments required from such candidates ... exceeds the amount of payments received by such candidates

26 U.S.C. § 9007 (1982).

24. The Act provides:

(a) Reports.—The Commission shall ... submit a full report to the Senate and House of Representatives setting forth—

(1) the qualified campaign expenses ... incurred by the candidates of each political party ... ;

(2) the amounts certified by it ... for payment to the eligible candidates of each political party;

(3) the amount of payments, if any, required from such candidate ... and the reasons for each payment

26 U.S.C. § 9009 (1982).

25. The Act provides:

(a) Review of certification, determination, or other action by the Commission.—Any certification, determination, or other action by the Commission ... shall be subject to review by the United States Court of Appeals for the District of Columbia

(b) Suits to implement chapter.—

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [sic] any provision of this chapter.

26 U.S.C. § 9011 (1982 & Supp. III 1985).

26. The Act provides:

(a) Excess expenses.—

(1) It shall be unlawful for an eligible candidate ... knowingly and willfully to incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates ... are entitled

(b) Contributions.—

(1) It shall be unlawful for an eligible candidate of a major party ... knowingly and willfully to accept any contribution to defray qualified campaign expenses, except to the extent necessary to make up any deficiency in payments received out of the fund. ...

(2) It shall be unlawful for an eligible candidate of a political party (other than a major party) ... knowingly and willfully to accept and expend or retain contributions to defray qualified campaign expenses in an amount which exceeds the qualified campaign expenses incurred

(c) Unlawful use of payments.—

(1) It shall be unlawful for any person who receives any payment ... or to whom any portion of any payment received ... is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than—

(A) to defray the qualified campaign expenses ... or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds ... which were used, to defray such qualified campaign expenses.

(d) False statement, etc.—

(1) It shall be unlawful for any person knowingly and willfully—

(A) to furnish any false ... information to the Commission ... or to include ... any misrepresentation of a material fact, or to falsify or conceal any ... information relevant to a certification ... or an examination ... or

(B) to fail to furnish ... any ... information requested

(e) Kickbacks and illegal payments.—

(1) It shall be unlawful for any person knowingly and willfully to give or accept any kickback or any illegal payment in connection with any qualified campaign expense

Congressional Concerns Behind the Fund Act

President Theodore Roosevelt first proposed publicly funding the legitimate expenses of each major party in 1907.²⁷ Congress did not act on the use of public financing of federal elections until 1971 when it used its power under the general welfare clause²⁸ to pass the Fund Act and the Federal Election Campaign Fund Act.²⁹ Congress designed the acts to complement each other³⁰ to assure that merit, rather than budget size determines a candidate's fitness for public office.³¹

Congress passed the Fund Act to assure that each major-party candidate³² spent the same amount of money in the general election.³³ Congress sought to eliminate money as the deciding factor in presidential elections³⁴ by equalizing the financial resources of the competing candidates while insuring that each candidate had enough money to adequately bring his or her message to the public.³⁵ Congress also prohibited candidates from accepting funds from non-public sources³⁶ to prevent public funding from becoming "simply an additional layer on top of the existing level of spend-

(f) Unauthorized expenditures and contribution.—

(1) . . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditure to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, if an aggregate amount exceeding \$1,000.

26 U.S.C. § 9012 (1982).

27. State of the Union Message of December 3, 1907, *reprinted in* H.R. Doc. No. 1, 60th Cong., 1st Sess., pt. 1, at LXVII (1910).

28. U.S. CONST. art. I, § 8, cl. 2.

29. PUB. L. No. 92-225, 86 Stat. 3 (1972) (original version at 18 U.S.C. § 610 (1971)), *amended by* Federal Election Campaign Act Amendments of 1979, PUB. L. No. 96-187, 93 Stat. 1339 (1980) (current version at 2 U.S.C. §§ 431-65 (1982)) [hereinafter cited as FECA].

30. 117 CONG. REC. 41,761-62 (daily ed. Nov. 17, 1971) (statement of Sen. Pastore, sponsor of amendment).

31. *Id.* at 18,885 (statement of Sen. Bentsen) ("Wealth must not be allowed to become the yardstick for political talent.")

32. Under the Fund Act, qualifying minor-party candidates receive less than major-party candidates. 26 U.S.C. § 9004(a) (1982).

33. Subsequent amendments have extended public financing to include primary election campaigns. PUB. L. No. 93-443, § 403-08, 88 Stat. 1291 (1974) (codified at 26 U.S.C. § 9008 (1982 & Supp. III 1985)).

34. 117 CONG. REC. at 42,063 (daily ed. Nov. 18, 1971) (statement of Rep. Staggers) ("[T]his legislation . . . would eliminate money as the principal determining factor of who is elected to federal office. . . . We must assure that wealth or access to great sums of money, with its attendant corrupting influence, does not become a qualification for federal elective office.").

35. *Id.* at 41,963 (daily ed. Nov. 18, 1971) (statement of Sen. Pastore) ("the candidate will have enough money to be exposed to public attention so that the public will know him, know the issues as the candidate sees and solves them on the same level as the next man who is competing for that office").

36. *Id.* at 42,626 (daily ed. Nov. 22, 1971) (statement of Sen. Miller) ("[The candidate] is going to have to make up his mind; if he wants to get his financing out of the fund, then he cannot get a nickel anywhere else.").

ing."³⁷ Otherwise, Congress feared that the existing system would lead to a system dominated by special interests and unresponsive to the public will.³⁸

By applying criminal sanctions³⁹ to unofficial campaign committees that spend money on behalf of candidates, Congress limited the scope of the Fund Act to funds spent by political committees that are not authorized by an eligible candidate.⁴⁰ PACs, however, do not monopolize contributions or independent expenditures as tools for attaining legislative goals.⁴¹ Individual contributions can also be tied to the donor's legislative goals.⁴² PACs contribute to and spend money on behalf of candidates in order to promote political views and legislative agendas. Thus, as the role of PAC money expands in presidential campaigns, PAC influence grows.

PAC expenditures, like those prohibited by the Fund Act and subsequently revived by *NCPAC*, represent an investment in a particular candidate.⁴³ Return on this investment comes in the form of enhanced influence.⁴⁴ Candidates know that PAC lobbyists will invariably ask for assistance in advancing their legislative agendas.⁴⁵ Thus, Congress included Section 9012(f) in the Fund Act in order to prevent special interest groups from controlling the financial side of presidential politics.

37. *See id.* at 41,777 (daily ed. Nov. 17, 1971) (statement of Sen. Kennedy).

38. *See* H.R. REP. NO. 564 at 4.

39. 26 U.S.C. § 9012 (1982).

40. *Id.* at § 9012(f)(1) (1982).

41. *See* Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603, 611 (1980).

42. In a classic example, businessman H. Ross Perot gave \$75,900 to congressional candidates in 1974. This included contributions of \$27,400 to 12 members of the House Ways and Means Committee, which nearly recommended an amendment that could have resulted in his receipt of a \$15 million tax refund. *See id.* at 611, n.46. *See* Hunt, *Perot Would Gain \$5 Million Benefit in Tax Panel's Bill*, WALL ST. J., Nov. 7, 1975, at 1, col. 4. Combatting such forces served as the basis for the \$1,000 individual-contribution limit in the FECA. 2 U.S.C. § 441a(a)(1) (1982 & Supp. III 1985).

43. As a senator stated:

When somebody gives us \$1,000, \$2,000, \$3,000, or \$5,000, we spend a little more time with that guy. We give him a little more consideration and attention, and if he writes us, we read his letter personally, and we read it two or three times. . . . Oh no, you are under no obligation. Maybe you are not but the thought is back there, because this guy helped you, and you want to show your friendship and appreciation.

To put it bluntly: some form of public financing is the only way to put an end to the day of "labor's" man or "industry's" man or whatever else's man . . . Under the [Fund Act], he would be the people's man.

117 CONG. REC. 41,938 (daily ed. Nov. 17, 1971) (statement of Sen. Mansfield).

Sen. Long also spoke: "While many large campaign contributions are made in good faith, others are designed to promote special interests. In my opinion this sometimes borders on corruption, one of the evils that can be eliminated from presidential elections . . ." *Id.* at 41,745.

44. *See* Miller, *Congressmen Begin to Push for Campaign Kitty*, WALL ST. J., Mar. 21, 1977, at 18, col. 3.

45. Even when contributions are based on previously taken positions or votes, PAC donors generally have a strong interest in the future as well. *See* Wertheimer, *supra* note 41 at 615.

*FEC v. NCPAC***Background**

In 1983, the National Conservative Political Action Committee⁴⁶ and the Fund for a Conservative Majority⁴⁷ announced their intention to spend large amounts of money on behalf of President Reagan's re-election campaign.⁴⁸ In response, the Democratic Party, the Democratic National Committee and the chairman of the Pennsylvania Democratic State Committee⁴⁹ brought suit against the two political committees seeking a declaration that Section 9012(f) constitutionally prohibited such expenditures.⁵⁰ The district court held Section 9012(f) unconstitutional on its face as violative of the first amendment.⁵¹

The appeal to the Supreme Court raised two issues. First, the Court considered whether the Democratic Party and the Democratic National Committee⁵² had standing under the Act⁵³ to seek a declaratory judgment upholding Section 9012(f).⁵⁴ Secondly, the Court addressed the constitutionality of Section 9012(f) itself.⁵⁵ Justice Rehnquist, writing for the majority, found Section 9012(f) a fatally overbroad⁵⁶ mechanism for fighting

46. NCPAC is a nonprofit, nonmembership corporation formed under the District of Columbia Nonprofit Corporation Act in August 1975 and registered with the Federal Election Commission as a political committee. Its primary purpose is to attempt to influence the election or defeat of candidates for federal, state and local offices through contributions and expenditures. It raises money by general and specific direct mail solicitations. It does not maintain separate accounts for receipts from its general and specific solicitations, nor is it required by law to do so. 470 U.S. at 490.

47. The Fund for a Conservative Majority is incorporated under the laws of Virginia and registered with the FEC as a multicandidate political committee. In all material respects, it is identical to NCPAC. *Id.*

48. Both NCPAC and Fund for a Conservative Majority solicited money on behalf of President Reagan's 1980 presidential campaign. They spent money on radio and television advertising in an effort to convince people to vote for Reagan. *Id.* at 483.

49. Edward Mezvinsky, chairman of the Pennsylvania Democratic State Committee brought the suit in his individual capacity as a citizen eligible to vote for President of the United States. *Id.*

50. A three-judge District Court for the Eastern District of Pennsylvania consolidated the Democrats' suit with a similar suit filed against the same defendants by the FEC. *Id.*

51. In declaring § 9012(f) unconstitutional, the District Court held: "Under the method of analysis we believe appropriate . . . section 9012(f) must fall. Almost all of the conduct it prohibits is protected by the first amendment." 578 F. Supp. 797, 839 (1983).

52. Mezvinsky did not pursue an appeal to the Supreme Court. 470 U.S. at 483, n.1.

53. *See supra* note 25.

54. The Court held that the Democrats lacked standing under § 9011(b)(1). The Court noted that the Democratic National Committee, as the national committee of a political party, may have brought an "appropriate" action under § 9011(b)(1). Since the Fund Act confers "exclusive jurisdiction with respect to the civil enforcement of" the act upon the FEC, the Court found it inappropriate action for the Democratic National Committee to bring the lawsuit. *Id.* at 486.

55. *Id.* at 483.

56. An overbroad statute burdens or prohibits constitutionally protected activities as well as those that the Constitution does not protect. *Hill v. City of Houston*, 764 F.2d 1156, 1161 n.16 (5th Cir. 1985). If the statute is overbroad on its face, the Court will strike it even if the speaker's actions or speech are not protected because it may also apply to others, not before the Court,

potential corruption or the appearance of corruption.⁵⁷ The Court, consistent with its holding in *Buckley v. Valeo*,⁵⁸ found that the expenditures at issue produced speech at the heart of the first amendment.⁵⁹ Thus, the Court granted money and the speech it produces the highest level of protection.⁶⁰ It justified this as reflecting the nation's commitment to uninhibited, robust, and wide-open public debate.⁶¹

The Court conceded that Section 9012(f) punished spending rather than the propagation of the views accompanied by the expenditure of money.⁶² The Court held, however, that Congress' attempt to restrict PAC expen-

engaging in protected activity which the statute outlaws. As the Court explained in *NAACP v. Button*:

[T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

371 U.S. 415, 432 (1963).

The Supreme Court limited the application of the overbreadth doctrine in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), when it ruled that substantial overbreadth may be required to invoke the doctrine, particularly when the speech is joined with conduct:

[The function of the overbreadth doctrine is] a limited one at the outset, [and] attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

413 U.S. at 615.

In adding a higher degree of certainty to the test, the Court said that it would only invalidate a statute on overbreadth grounds if "the flaw is a substantial concern in the context of the statute as a whole." *Id.* at 616.

57. 470 U.S. at 498.

58. Various candidates for federal office and political parties challenged the constitutionality of the FECA of 1974 (2 U.S.C. §§ 1501-03, 18 U.S.C. §§ 591, 608, 611, 613-17, 26 U.S.C. §§ 276, 6012, 9002-12, 9031-42, 47 U.S.C. § 315 (1982)). The FECA of 1974 imposed a \$5,000 limitation on PAC contributions to candidates for federal office per election. The amendments limited contributions by individuals and other organizations to \$1,000 per election. Individuals faced a \$25,000 total contribution limitation; PACs faced no corresponding limit. The amendments also placed a \$1,000 per election limitation on independent expenditures by individuals and groups on behalf of a clearly identified candidate. Amendments also placed various limitations on personal expenditures by the candidate and on total campaign spending. The Court upheld the contribution limits, but invalidated the expenditure limitations. 424 U.S. 1 (1976) (per curiam).

59. 470 U.S. at 493 (quoting *Buckley v. Valeo*, 424 U.S. at 14) ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.")

60. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. at 14 quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people' "

61. *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

62. The Court noted that allowing a group to present its views while forbidding it to spend more than \$1,000 to present them is "much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.*

ditures unjustifiably restricted the ability of PACs to propagate their views.⁶³ Congress also placed an undesired restriction upon the quality of the ensuing debate.⁶⁴ The Court refused to accept the argument that the PACs form of organization or method of solicitation diminished their entitlement to first amendment protection. The Court rejected the FEC's argument that individual contributions to PACs contribute "speech by proxy"⁶⁵ rather than individual speech.⁶⁶ The Court held the speech-by-proxy argument inadequate because contributors implicitly approve of the PAC's message or they would not contribute to the PAC.⁶⁷ Denying PACs full first amendment protection, the Court reasoned, would subordinate the voices of those of modest means to the voices of those sufficiently wealthy to buy their own advertisements.⁶⁸

In *Buckley*, the Court recognized the prevention of corruption, or the appearance thereof, as the only legitimate and compelling governmental interest justifying restriction of campaign expenditures.⁶⁹ The Court expressed concern that a system of private election financing makes a candidate lacking immense wealth dependent upon private financing.⁷⁰ Fur-

63. The Court noted:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 493-94 (quoting *Buckley v. Valeo*, 424 U.S. at 19).

64. In the Court's view NCPAC and the Fund for a Conservative Majority serve as organizations through which thousands of people of modest means can join together to amplify their views *Id.* at 494. In espousing this view, the Court ignored the organizational framework of NCPAC and FCM. Both are governed by three-member boards of directors elected annually by the existing board. Each of the respective boards make all decisions concerning support and opposition of candidates, strategy and expenditures. Contributors have no role in these decisions. *Id.* at 490. Contributors to NCPAC and FCM do not have a direct say in, nor any way to register their disapproval of, the organization stands on specific candidates or campaign tactics. Thus, the contributors themselves do not engage in speech to any greater extent than those who contribute directly to political campaigns. *See id.* at 513 (White, J., dissenting). *Buckley* and, in compliance, *NCPAC*, however, distinguish between the two.

65. *Cal. Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 196 (1981) (Marshall, J.) (plurality opinion) (in upholding the \$5,000 limit on contributions in FECA of 74, 2 U.S.C. § 441a(a)(1)(C), the Court viewed "speech by proxy" as speech by somebody other than the contributor).

66. The FEC argued that individual contributions do not constitute individual speech, but merely speech by proxy because contributors do not control the use of the funds by the PACs or the specific content of their advertisements. 470 U.S. at 494.

67. *Id.* at 495.

68. *Id.*

69. The Court found it "unnecessary to look beyond [FECA's] primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the . . . contribution limitation." *Buckley*, 424 U.S. at 26.

70. *Id.*

thermore, the increased importance of media advertisements, mass mailings, and public opinion polling has increased the importance of fund raising in an effective candidacy.⁷¹ The Court noted that, since PACs or individuals frequently contribute large sums of money to secure a political *quid pro quo* from current and potential officeholders, these large contributions undermine the integrity of our system of representative democracy.⁷² *Buckley* further acknowledged that one can never fully ascertain the scope of these harms.⁷³ Nevertheless, *NCPAC* failed to recognize the existence of convincing evidence of corruption or the appearance thereof.⁷⁴ In its absence, the Court found no compelling governmental interest justifying the restrictions imposed by Section 9012(f).⁷⁵

The Court found Section 9012(f) overbroad because it applied equally to informal neighborhood discussion groups as well as multimillion dollar PACs.⁷⁶ The Court stated that it could not save Section 9012(f) by isolating wealthy PACs because, based upon the wording of the statute, Congress clearly intended to include all political committees, large and small.⁷⁷

NCPAC's Application of Buckley

In reaching its decision in *NCPAC*, the Court drew upon the distinction between expenditures⁷⁸ and contributions,⁷⁹ first delineated in *Buckley*

71. *Id.*

72. *Id.* at 26-27.

73. *Id.* at 27.

74. The Court stated, "On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." 470 U.S. at 498.

75. *Id.* at 497.

76. *Id.* at 498.

77. The Court gave three reasons for this decision:

First, Congress plainly intended to prohibit just what § 9012(f) prohibits—independent expenditures over \$1000 by all political committees, large and small. . . . Secondly, we cannot distinguish in principle between a PAC that has solicited 1000 \$25 contributions and one that has solicited 100,000 \$25 contributions. Finally, it has been suggested that § 9012(f) could be narrowed by limiting its prohibition to political committees in which contributors have no voice in the use to which the contributions are put. Again, there is no indication in the status or the legislative history the Congress would be content with such a construction.

Id. at 498-99.

78. The term "expenditure" is defined to include

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. § 431a(9)(A) (1982).

79. The term "contribution" is defined to include

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. § 431a(8)(A) (1982).

v. *Valeo*.⁸⁰ *Buckley* also upheld Congress' ability to limit campaign contributions.⁸¹ It did not, however, allow Congress to limit expenditures either by an official campaign committee,⁸² the candidate himself⁸³ or an individual acting independently.⁸⁴ In *NCPAC*, the Court misapplied *Buckley's* distinction between expenditures and contributions.⁸⁵

In applying *Buckley*, the *NCPAC* Court took a very narrow view of the expenditure-contribution distinction.⁸⁶ Since *NCPAC* and the Fund

80. 424 U.S. 1 (1976).

81. The Court held:

It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1000 contribution limitation. . . .

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26-27.

82. The Court held:

No governmental interest that has been suggested is sufficient to justify the restriction of the quality of political expression imposed by [FECA's] campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contributions limitations and disclosure provisions rather than by [the] campaign expenditure ceilings.

Id. at 55.

83. The Court held:

The primary governmental interest served by [FECA]—the prevention of actual and apparent corruption of the political process—does not support the limitation on the candidate's expenditure of his own personal funds. . . . Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which [FECA's] contribution limitations are directed.

The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for [the] expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. First, the limitation may fail to promote financial equality among candidates. . . . Second, and more fundamentally, the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limits on behalf of his own candidacy.

Id. at 53-54.

84. The Court held, "While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression." *Id.* at 47-48.

85. *NCPAC* did not address the constitutionality of public financing because *Buckley* recognized public financing as a constitutional means of eliminating improper influences from presidential elections. *Buckley* recognized public financing as "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. *Buckley* also acknowledged public financing as furthering a significant governmental interest in that it relieves: "major-party Presidential candidates from the rigors of soliciting private contributions." *Id.* at 96.

86. Although *Buckley* recognized the government's interest in preventing the actuality or appearance of corruption as a valid justification for limits on contributions, it did not justify the FECA of 74 limits on independent expenditures. The Court held:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of

for a Conservative Majority planned to spend the money themselves, the Court viewed these as planned expenditures. In adopting this approach, the Court focused too narrowly. Instead of inquiring into whether *Buckley* rendered the Fund Act's \$1,000 expenditure limitation unconstitutional, the Court should have preliminarily determined whether PAC campaigns are most accurately viewed as expenditures or contributions.

While money technically never passes hands between the PAC and the official campaign, PAC expenditures, for all practical purposes, amount to contributions. PAC expenditures benefit the official campaign by alleviating the need to divert money from other areas. Realistically, such expenditures should be viewed as contributions. While not controlled by the official campaign, PACs seldom deliver a message inconsistent with that of the official campaign.⁸⁷

Voters do not discriminate between advertisements paid for by official versus unofficial sources; they discriminate only between the messages carried by the ads themselves. Quite simply, more money spent on behalf of a candidate translates into more information conveyed to the public.⁸⁸ This, in turn, may determine who wins and loses. It also forces candidates to please advertising donors rather than voters. The two groups are not necessarily the same.⁸⁹

In a presidential campaign, each of the major-party candidates has a campaign committee and staff that operates with the clear goal of putting their candidate in the White House. If that candidate qualifies for⁹⁰ and accepts⁹¹ funds under the Fund Act, he agrees not to accept contributions from outside sources.⁹² When a PAC undertakes an independent campaign on behalf of a qualified candidate, it, too, has a clear goal. Like the official campaign committee, the PAC wants to elect its preferred candidate. Despite the Court's adherence to the legal fiction that PAC efforts are expenditures, they are, in reality, contributions to an overall effort of getting one candidate elected.

prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments to the candidate. Rather than preventing circumvention of the contribution limitations, [FECA] severely restricts all independent advocacy despite its substantially diminished potential for abuse.

Id. at 47.

87. See *infra* notes 112-116 and accompanying text.

88. Richard Wirthlin, President Reagan's 1980 pollster stated, "Money not only can make a difference, but can make a huge difference. . . . People make decisions based on the way they see the world, and the way they see the world is conditioned by the information they have, and therefore influences who wins and loses." Drew, *Politics and Money—II*, NEW YORKER, Dec. 13, 1983, at 101-02.

89. See *supra* notes 40-42 and accompanying text.

90. 26 U.S.C. § 9002(6) (1982).

91. 26 U.S.C. § 9004(a)(1) (1982). The Fund Act provides, "The eligible candidates of each major party in a presidential election shall be entitled to equal payments . . . which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates."

92. 26 U.S.C. § 9003(b)(2) (1982).

This double-barrelled campaigning directly contradicts the spirit, if not the letter, of the Fund Act. The Act prohibits eligible candidates from incurring campaign expenses in excess of their allotted funds.⁹³ Viewed as part of an overall effort, as Congress clearly viewed them,⁹⁴ PAC expenditures boost campaign expenses over the Fund Act's limitations. By allowing these expenditures, *NCPAC* impedes the Fund Act's goal of preventing public funding from being merely an additional level of financing on top of existing expenditure levels.⁹⁵

Equalizing the financial resources of the major-party candidates is essential to reducing the influence of special interest groups. As long as these groups can inject money into the race, presidential candidates will have to cater to them. A candidate cannot afford to alienate these groups. Alienation could cause a PAC to cancel plans to assist one's campaign or, worse still, cause the PAC to campaign on behalf of the opposition. In a close race, any significant injection of funds into the race and the ensuing increase in exposure on behalf of either campaign may determine the outcome.

Political success is more easily attained with money.⁹⁶ Unlike other resources available to political campaigns, money can easily be converted into other resources.⁹⁷ This is especially true regarding money's convertibility into mass media and personal communications outlays, and direct mailings, which can have a crucial effect upon a candidate's electability.⁹⁸

Issue-oriented voting has become increasingly rare.⁹⁹ The candidate's image is the most important factor in a presidential race.¹⁰⁰ Despite their protestations,¹⁰¹ presidential candidates market themselves like bars of soap.¹⁰² Thirty-second television ads create a positive impression on the voting public by stressing image rather than substance. In sociopsychological terms, the voter has a temporary set of predispositions guiding his or her electoral choice.¹⁰³ These predispositions stem from the voter's psychological make-up, political beliefs, and socioeconomic characteristics.¹⁰⁴

93. 26 U.S.C. § 9003(b)(1) (1982).

94. 117 CONG. REC. 42,398 (daily ed. Nov. 19, 1971) (statement of Sen. Taft that the purpose of § 9012(f) was to place a "limitation . . . on expenditures *on behalf of* a particular candidate" (emphasis added)).

95. See *supra* note 38 and accompanying text.

96. Palda, *The Effect of Expenditures on Political Success*, 18 J. L. & ECON. 745, 746 (1975).

97. See Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569 (1980).

98. See *id.* at 596.

99. See Palda, *supra* note 96, at 770.

100. See Verba & Nie, *supra* note 1, at 49. The candidate's image effects electability more than the issues or his party affiliation. See RePass, *supra* note 3, at 400.

101. See Verba & Nie, *supra* note 1 at 47.

102. Most political candidates refuse to view themselves as common commercial products. Politicians see their purposes and messages as high-minded and serious. It would be as wrong, they argue, as it would be undignified to compare the quest for the White House, or any political office, with what goes on at a supermarket checkout counter. See R. Spero, *THE DUPING OF THE AMERICAN VOTER*, 2 (1980).

103. See *id.*

104. See Palda, *supra* note 96, at 748.

The voter judges the candidates by sifting his or her perceptions of the candidate through these predispositions.¹⁰⁵ The voter then casts a ballot for the candidate who most closely complies with his or her view of a good president.¹⁰⁶ In the end, the voting public has strong emotional feelings about the candidates and a superficial, at best, understanding of their relative positions on the important issues of the campaign.

A candidate's fully developed political image cannot be easily changed or modified.¹⁰⁷ To prevent any potential problems from arising, the candidate carefully tailors that image by bombarding the electorate with positive impressions over an extended period of time.¹⁰⁸ Polling and other forms of market analysis allow a candidate to isolate those attributes with which the voting public identifies him or her.¹⁰⁹ On the basis of this information, the candidate analyzes his or her potential constituency and evaluates the relative importance of each of these attributes.¹¹⁰ Then those segments sympathetic to the candidacy are focused on or the campaign is modified to appeal to a wider range of voters.¹¹¹

This process does not just occur within the official campaign. PACs, in running "independent" campaigns, engage in the same process of evaluating candidate attributes and accenting or modifying them to appeal to the widest possible audience. Given the sophistication of the men and women running political campaigns, both independent and official, the true independence of independent and uncoordinated expenditures by PACs can be questioned. Through third parties,¹¹² media reports,¹¹³ and leaks from official campaign sources,¹¹⁴ these groups can run carefully planned

105. *See id.*

106. *See id.* at 748-49.

107. *Id.* at 749.

108. *See* Jordan, *Strategies and Tactics: Issues, Themes, and Images*, in *PRESIDENTIAL POLITICS*, 458 (J. Lingle & B. Shafer eds. 1980).

109. *Id.*

110. *See* Palda, *supra* note 96, at 749.

111. *Id.*

112. Lyn Nofziger, former assistant to the President for political affairs and a Reagan campaign official in 1980, described how the head of a PAC could have found how to aid the Reagan campaign in 1980:

I wouldn't have to talk to Bill Casey (Reagan's 1980 campaign director). I'd have a friend of mine talk to Bill Casey. I wouldn't have any problem getting that done. There's no way in the world that if I'm running an independent campaign I'm not going to get the information I need, or Dick Wirthlin's (Reagan's pollster) data, or talk to the chairman of the Republican National Committee or whatever.

Id. at 91-92.

113. Paul Dietrich, former executive director of the Fund for a Conservative Majority, who worked for Reagan in 1980 and also headed the Republican National Committee's State Fund Operation in Missouri in 1980, stated:

[T]here is no way to enforce independence as long as there is a press corps giving us information and as long as one group puts out information and gets it to others
• If I really want a poll from the Republican National Committee or a campaign, I can get it. They'll leak it.

Id. at 91.

114. *See* Drew, *supra* note 89, at 90-91. Sen. Helms, honorary chairman of the National Congressional Club said, "I've had to . . . talk indirectly with (Sen.) Paul Laxalt (Reagan's 1980 campaign chairman)" to avoid a direct consultation with then-candidate Reagan.

campaigns complementing the strengths and counteracting the weaknesses of the official campaign without directly contacting the official campaign itself. PAC officials know which states are targeted, which are not, and which issues are being stressed.¹¹⁵ These efforts can benefit the official campaign enormously.¹¹⁶

Congress enacted the Fund Act in order to prevent money from becoming the deciding factor in presidential elections.¹¹⁷ Congress included Section 9012(f) to enforce this goal.¹¹⁸ In analyzing the section under *Buckley*, the Court took a very narrow and simplistic view of PAC advertising campaigns and treated them as expenditures.¹¹⁹ Had the Court examined the true impact of these campaigns, however, it would have found them to be contributions to the overall effort to elect one candidate or the other.¹²⁰ In striking Section 9012(f), the Court has emasculated the Fund Act. As a result, presidential politics have been thrown back to the pre-Fund period when the ability to draw financial support from the private sector often determined political success. For all practical purposes, the remainder of the Fund Act might as well not exist.¹²¹

A STATUTORY PROPOSAL TO COUNTERACT NCPAC

Congress must act to remove, or at least diminish, the increased influence of private funding in light of *NCPAC*. Congress should amend the Fund Act to compensate qualified candidates for funds independently expended on behalf of any opponents also receiving federal funds. This proposed amendment allows Congress to promote its original goals. It would also respect the first amendment rights of those PACs engaging in independent activities on behalf of their favorite candidate.

115. Pat Caddell, a Democratic pollster stated:

The principals in a campaign may never speak, but through reading the press and other things they can know as well as if they were sitting in the same room what states are being stressed, where you need help, where you don't want it, what your issues are. . . . Indirect collusion will work just fine if you have professional people who can read and write.

Id. at 93.

116. For example, if a campaign is having trouble in the polls in one particular region of the country, e.g., the South, PACs may spend money on the candidate's behalf there. Without PAC spending, the official campaign committee would have to divert scarce financial resources from another region to boost efforts in the South. Diminished exposure elsewhere might detract from the campaign's chances for success in those regions. Alternatively, the candidate could write off the South and concentrate on regions more receptive to the candidate's attributes, thereby risking the loss of a significant number of electoral votes. A third option would have the campaign stick with its original budgetary projections and hope that the polls reverse themselves by election day. Independent PAC expenditures can provide the extra funding necessary to adequately cover the rest of the country while paying special attention to areas in which a candidate is weak.

117. See *supra* notes 32-35 and accompanying text.

118. See *supra* notes 36-38 and accompanying text.

119. See *supra* notes 55-61 and accompanying text.

120. See *supra* notes 34, 87-94 and accompanying text.

121. Richard Wirthlin, President Reagan's 1980 pollster, stated, "My own feeling is that the law hasn't changed the access to resources: it's simply changed the channels that are used to get those resources into the campaign." See Drew, *supra* note 89, at 57.

Under this proposal all PACs or individuals¹²² spending more than \$1,000 on print or electronic media advertisements on behalf of a readily identifiable presidential candidate receiving federal funds must register their expenditures with the FEC. The registration date must be early enough to allow the FEC to tally the expenditures on behalf of and in opposition to each candidate. The FEC would then distribute funds to compensate for any discrepancy.¹²³

The amendment also requires all PACs and individuals engaging in media advertising to reserve time or space before filing with the FEC.¹²⁴ Such PACs and individuals would have to determine which advertisements would specifically advocate the election or defeat of a candidate receiving public funds.¹²⁵ Advertising decisions regarding the timing and placement of media ads could not be altered after the registration deadline.¹²⁶ Thus, if a PAC raised more funds than anticipated, it could not buy additional advertising for its preferred candidate.¹²⁷ Likewise, if a PAC did not raise enough money to pay for all of its reserved advertisements, the opposition candidate would still be compensated for the ad under the amendment.¹²⁸

This would dramatically reduce the impact of independent expenditures.

122. This proposal goes beyond the scope of § 9012(f) to cover expenditures by individuals as well as political committees. This proposal strives to equate the expenditures made on mass media expenditures by *all* sources. Otherwise, wealthy individuals or nonpolitical committees could spend money on behalf of a chosen candidate, thereby negating the effect of the proposal.

123. For instance, if \$10 million is spent on behalf of candidate *X* while only \$3 million is spent on candidate *Y*'s behalf, this proposal would give candidate *Y* an additional \$7 million in federal funding. Qualified minor-party candidates would be compensated in proportion to their original allotment under the Fund Act. For example, if a minor-party candidate received 25% of the allotment of the major-party candidates, he would also receive 25% of the amount given to the compensated major-party candidate.

124. This requirement is necessary if the FEC is to have an opportunity to accurately tally the amount spent on behalf of each candidate and determine any discrepancy. This must be early enough to allow the compensated candidates to effectively use the funds to counteract PAC advertisements.

125. Negative advertisements targeted against the opponent of the candidate would be counted as expenditures on behalf of the candidate supported by the PAC. This would remain true even if the candidate supported by the PAC were not referred to in any explicit manner.

126. If an individual or PAC covered by the amendment withdrew or switched support after the FEC distributed the additional funds, the opponent's additional entitlement would not change. Equity dictates this result. Upon receipt of the additional funds, the candidate will likely alter his or her budget to reflect the influx. Removal of the funds after he or she had acted in reliance upon their receipt would penalize the campaign for acts beyond the candidate's control.

The amendment includes an anti-fraud provision to prevent a PAC or individual from announcing plans to run ads in support of one candidate while intending to withdraw support once their preferred candidate has received the additional funds.

127. This proposal covers only advertisements supporting or opposing a readily identifiable candidate. This does not cover advertisements advocating a particular position on an issue without alluding to any readily identifiable candidate. Such advertisements would not be registered with the FEC and would not be counted when determining compensation. Accordingly, PACs could spend unlimited amounts on issue-oriented ads. Such ads would grant PACs a certain amount of leverage over the candidates. PACs' election influence, however, would greatly diminish because candidates would be less likely to enter into *quid pro quo* arrangements with PACs that support their positions on certain issues if PAC-funded advertisements did not mention the candidate by name.

Candidates would no longer feel compelled to cultivate independent expenditure groups but would know that regardless of the funds spent for or against them, the totals spent on behalf of each candidate would remain equal. This proposal would also reduce the potential for corruption in the presidential electoral system¹²⁹ by eliminating the incentive to cater to groups engaging in independent expenditure campaigns. Candidates would know that any money spent on advertisements on their behalf could result in additional funds for their opponents. As a result, candidates will feel compelled to distance themselves from these groups.

By reducing the influence of PACs and individuals engaging in independent campaigns, this amendment will probably face a constitutional challenge as a prior restraint on free speech. The proposal should withstand the first amendment challenge. The amendment only restricts speech by requiring the PAC to designate the amount of funds spent on behalf of a particular candidate by a specified date. The proposal does not restrict the time, space, or placement of the ads. Most importantly, it does not restrict content.¹³⁰ Furthermore, given the Court's insistence upon equating money with speech,¹³¹ this proposal should survive constitutional scrutiny. Unlike Section 9012(f), which restricted the amount spent by PACs, this proposal does not place any restrictions, either monetary or content-based, upon PAC activities. Therefore, a prior-restraint attack should fail.

CONCLUSION

Intimately involved in the electoral process, Congress understands far better than the Court the significant, yet often subtle, influence money has on the electoral process. By allowing private money back into presidential elections, *NCPAC* forces presidential candidates to cater to the interests of political committees, rather than the voters. These two groups are not the same. Allowing special interests to dominate presidential policies, in effect, creates an electoral system in which money determines whose voice is heard and whose is not. This notion offends the first amendment as egregiously as those cited by the Court in *NCPAC*.

128. While this result might appear inequitable, time concerns proscribe a more equitable result. If a PAC's treasury runs dry, preventing it from paying for advertisements scheduled for the weekend directly preceding the election and the ads do not run, the FEC would have no time to ascertain the worth of the ads and, in turn, require the compensated candidates to repay the money. In fact, requiring repayment may impose a hardship on the compensated candidate because the money may have already been spent.

129. This system will drive a wedge between candidates and PACs. Having money spent on one's behalf would become a liability rather than an asset because it would put additional funds under the direct control of one's opponent.

130. The FEC's sole concern under this proposal is the amount of money spent on ads. The proposal would not grant the FEC any regulatory authority over advertising content. The amendment would leave that decision to the group or individual sponsoring the ad.

131. See *supra* note 63 and accompanying text.

As public awareness of money's true impact upon the electoral process grows, public cynicism will deepen. Correspondingly, our political system will weaken until the basic idea supporting our democratic process—representative democracy—slips away.

In passing the Fund Act, Congress demonstrated its understanding of the truism that democracy is not an indestructible force. It needs input and participation to survive. A simple fine-tuning, however, will allow Congress to comply with its original goals while adhering to the Court's mandate in *NCPAC*. By adopting this proposal, Congress can achieve this fine-tuning while respecting the first amendment rights of those segments of our society that want to express their views. Given the growing strength and influence of both liberal and conservative special interest groups, these protections are even more necessary today than when the Fund Act was enacted in 1971.

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APPENDIX**A BILL**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Presidential Election Campaign Fund Act Amendments of 1987."

Sec. 2. Section 9012(f) of the Presidential Election Campaign Fund Act (26 U.S.C. 901 et seq. (1982 & Supp. III 1985)) is hereby amended to read as follows: Sec. 9012(f).

(1) The Commission shall require any political committee that is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election to register with the Commission by September 1 of the election year in question a statement noting the amount of money it plans to expend on behalf of the qualified candidates. The statement need give only a composite figure noting its total anticipated advertising expenditures on behalf of the qualified candidates. In reaching this total, the committee must include all funds that it plans to spend on advertising via television, radio, newspaper, magazines, handbills, posters, and billboards.

(2) In reaching this total, the committee must include only the amount of funds to be spent on advertising that supports or opposes a clearly identifiable candidate. The Commission will hold the advertisement to support or oppose a candidate if it uses the candidate's name, photograph, caricature or any other means of referring to a clearly identified candidate in the advertisement.

(3) In reaching this total, the Commission shall determine whether the funds expended by the unauthorized committee are, in fact, designed to support or oppose a clearly identifiable candidate. If the unauthorized committee announces its plans to spend funds in support of, or in opposition to a clearly identifiable candidate, as defined by subsection (2), and the Commission determines that the unauthorized committee is spending the money in order to increase the funding available to the other candidate, pursuant to subsection (4), then the Commission shall adjust the reported totals to reflect the intent of the unauthorized committee.

(4) Upon receipt of the expenditure reports by the unauthorized committees, the Commission shall total the sums to be expended in support of and in opposition to each candidate. The Commission shall view funds expended in opposition to one candidate as funds expended in support of his or her opposition. Upon compiling the funds to be expended by all unauthorized committees planning to make such expenditures, the Commission shall determine the total amount to be spent on behalf of all of the candidates receiving full public funding. In the event that the Commission finds a discrepancy between these expenditure levels, the Commission shall directly compensate the candidate(s) on whose behalf the lesser amount is being spent to the extent necessary to compensate for any discrepancy.

(5) Upon filing with the Commission, the unauthorized committees planning to spend funds in support of or in opposition to a clearly identifiable candidate must reserve the advertising time or space by the September 1 filing date. These specific times and places must be noted in the report filed with the Commission. These reports will be binding to the extent that only the reported time and space may be used. No additional time and space may be purchased, reserved, or used. Furthermore, no time or space changes will be allowed.

