1-1-1978

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AN ANALYSIS OF THE IMPACT OF THE
FEDERAL ELECTION CAMPAIGN ACT ON THE
1976 DEMOCRATIC PRESIDENTIAL PRIMARY

David Ifshin*

"And so, as 1976 approached... [t]he prospect was for chaos; a chaos compounded by the new campaign-finance law—untested, its provisions not well understood by an electorate that had in any case apparently tuned out, its effect uncertain, its meaning unclear even among scholars who examined it and politicians who tried to make the most of it or, at the very least, to survive under it."

Jules Witcover

"The 1976 Presidential election proved that the concept of public financing works, and that it works for both primaries and general elections. Now, the time has come to extend this basic reform of the political process for the Senate and House of Representatives."

Senator Richard Clark (D-Iowa)

TABLE OF CONTENTS

I. INTRODUCTION .............................................. 3

II. PART ONE: THE STATUTORY ENACTMENTS AND
THE SUPREME COURT RESPONSE .......................... 5

A. The 1971 Enactments ..................................... 5

 a. The Federal Election Campaign Act of 1971 ....... 5

 b. Presidential Election Campaign Fund Act ........ 7

 c. The 1971 enactments and the 1972 election ....... 8

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B. The 1974 Amendments .................................................. 9
   a. The establishment of a federal election commission ................. 9
   b. Limits on contributions by individuals .................................. 10
   c. Expenditure limitations .................................................. 11
   d. Political committees .................................................... 11
   e. Public financing of presidential election campaigns ................. 12
   f. Disclosure and reporting requirements .................................. 13
C. Buckley v. Valeo: The Constitutionality of the Reforms ............... 14
   a. The Federal Election Commission ........................................ 15
   b. Contribution limits ...................................................... 15
   c. Expenditure limits ...................................................... 16
   d. Public financing of elections ............................................ 18
   e. Disclosure and reporting requirements .................................. 18
D. The 1976 Amendments .................................................. 19

III. PART TWO: THE ADMINISTRATION OF THE LAW ....................... 20
   A. Burdens of Compliance ................................................... 21
   B. Management of Disclosed Information ................................... 23
   C. Enforcement ................................................................... 26
IV. PART THREE: INITIAL STRATEGY FORMULATIONS ....................... 30
   A. Entry Problems ............................................................ 31
      a. Timing of entry into the campaign .................................... 31
      b. Initial funding .......................................................... 36
   B. Effect on Staying Power .................................................. 42
V. PART FOUR: THE ALLOCATION OF CAMPAIGN RESOURCES ............. 46
   A. Candidate’s Time ............................................................ 46
   B. Media v. Organization ..................................................... 49
   C. Use of Campaign Consultants ............................................. 53
VI. PART FIVE: POLITICAL ACTIVITIES CONDUCTED INDEPENDENTLY OF CAMPAIGNS ................................................. 55
   A. Labor Unions, Corporations, and Political Action Committees .......... 55
   B. Independent Expenditures ................................................. 59
   C. Persons Seeking Election as Delegates .................................. 61
   D. Draft Committees ......................................................... 65
   E. The Role of Political Parties ............................................. 67
VII. CONCLUSION .................................................................. 71
INTRODUCTION

The history of political campaign reform in this country prior to 1971 had been dismal. The sporadic attempts to curb some of the more blatant excesses and abuses had been ineffective. Although the spectacular revelation of corrupt activities in the 1972 elections pushed the issue of campaign reform to the center of national attention, the need for a comprehensive overhaul of the electoral system had been perceived by many commentators long before. In 1962 the President’s Commission on Campaign Costs reported that “[n]o problem . . . has become more troublesome than that of providing adequate financial support for campaigns.” The Commission noted the chronic “lurking suspicion that contributing to political parties is somehow a shoddy business.”

The core of the problem was the use of money in political activities. Herbert Alexander, the leading commentator in the field of political reform, estimated that in 1972 over $400 million was spent on federal elections. Despite the staggering size of this figure, the source and use of these funds was shrouded in a cloak of secrecy that was only removed through a series of fortuitous events and even then, not until after the election. Suspicions about the influence of these unknown sources of funds cast doubt on the processes through which the nation’s political leaders and lawmakers are chosen.

Even before the Watergate scandal, Congress had moved to reform federal campaign practices. In 1971 Congress passed two major enactments: the Federal Election Campaign Act of 1971 and the Presidential Election Campaign Fund Act. They

3. H. ALEXANDER, REGULATION OF POLITICAL FINANCE 3-6 (1966); M. McCARTHY, ELECTIONS FOR SALE (1972).
5. Id.
were the first significant reforms of campaign practices in almost fifty years.\textsuperscript{10}

Before these changes were put into practice in a presidential election,\textsuperscript{11} however, Congress substantially revised them when it passed the Federal Election Campaign Act Amendments of 1974.\textsuperscript{12} These amendments instituted far reaching changes in the process by which federal officials were elected, particularly the president and vice-president of the United States. As a result, the 1976 presidential election operated under revised rules and procedures dramatically different from those that had previously governed the electoral system. Moreover, during the course of the campaign the Supreme Court, in response to a challenge to the Campaign Act,\textsuperscript{13} handed down its most comprehensive decision on governmental power to regulate the political process.\textsuperscript{14} Following the Court’s decision declaring parts of the Campaign Act unconstitutional, Congress amended the law in the middle of the campaign, enacting the Federal Election Campaign Act Amendments of 1976.\textsuperscript{15} Additionally, after the 1976 experience under the Campaign Act, legislation was introduced in Congress to extend the systems of public financing to House and Senate campaigns.\textsuperscript{16}

This article considers the impact of these unprecedented


\textsuperscript{11} The disclosure and reporting requirements of the 1971 Act were effective after April 7, 1972 and applied to both presidential and congressional campaigns held that year. The April 7th effective date rendered the law largely impotent. See text accompanying notes 34-37 infra. The 1971 Act did govern the 1974 congressional elections. Since the Federal Election Commission (FEC) had yet to be established, reports for House races were filed with the Clerk of the House of Representatives and reports for Senate campaigns were filed with the Secretary of the Senate. The subsequent creation of the FEC did not remove the requirement that reports be filed with these officers, thus establishing a dual point of entry into the supervisory mechanism.


\textsuperscript{13} The designation "Campaign Act" refers collectively to those campaign financing acts in force during the relevant time period under discussion. They include the following: the Federal Election Campaign Act of 1971, its 1974 and 1976 amendments, and the Presidential Election Campaign Fund Act.

\textsuperscript{14} See Buckley v. Valeo, 424 U.S. 1 (1976).


changes in the election laws on the 1976 Democratic presidential primary campaigns, particularly on managerial decisions. In exploring the practical effects of this new area of federal regulation, this article considers its strengths and weaknesses and offers proposals for further amendments or extensions of the election laws.

Part One of the article examines the various congressional election laws, and the response of the Supreme Court on their constitutionality. Part Two looks at the administration of the law by the newly established Federal Election Commission (FEC) and the burdens compliance with its detailed reporting requirements placed on campaigns. Part Three analyzes the changes in strategy formulation candidates for president must make under the new law. Specifically considered are: the timing of entry into the race, the screening effect of the crucial "seed money" stage, and the ability of a candidate to raise enough money to remain in the race throughout a long primary period. Part Four examines the impact of the reduction of available campaign funds on the allocation of campaign resources. Finally, Part Five analyzes the effect of the Campaign Act on activities conducted independent of campaigns.

PART ONE: THE STATUTORY ENACTMENTS AND THE SUPREME COURT RESPONSE

In order to appreciate the impact of the federal election laws, it is essential to examine their regulatory framework as enacted by Congress and refined by the Supreme Court. The Campaign Act embodies four congressional enactments: (1) the Federal Election Campaign Act of 1971 (hereinafter 1971 Act); (2) the Presidential Election Campaign Fund Act; (3) the Federal Election Campaign Act Amendments of 1974; and (4) the Federal Election Campaign Act Amendments of 1976. Portions of each reform survive, with the 1976 amendments correcting the unconstitutional elements of the earlier proposals.

The 1971 Enactments

The Federal Election Campaign Act of 1971. This act was composed of four titles. Title I required the broadcast media

to make advertising time available to candidates for federal office at the station's lowest unit rate within specified periods prior to primary and general elections. It also established overall spending limits on the use of the communications media. Title II amended earlier campaign laws which had proved ineffective in regulating individual contribution limits, use of a candidate's personal funds, and use of corporate and union funds. It further redefined certain terms used in earlier laws. Subsequent amendments of the 1971 Act, discussed below, caused much of Title II to be stillborn.

Title III constituted the heart of the 1971 Act. It provided for compulsory disclosure of a candidate's financial information in an official report. In the pre-Watergate era, commentators on campaign practices had urged disclosures as the vital reform. Without disclosure, enforcement of any other element of campaign regulatory law becomes exceedingly difficult and its absence contributed to the failure of earlier reform efforts. Title III required that "political committees" be formed for the receipt and disbursement of campaign funds by candidates for federal office, and that the committees designate a chairman and treasurer. The officers of the committee were required

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24. "Political committees" were defined as "any committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1000." See 2 U.S.C. § 431 (Supp. II 1972) (amended 1974, 1976). "Contribution" and "expenditure" are defined to essentially include transfers of money or its equivalent:

for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States.

Id.
to register with a "supervisory officer" and to file periodic reports disclosing specific financial information. The 1971 Act's final title contained certain general provisions, the most significant of which repealed the Federal Corrupt Practices Act.

Presidential Election Campaign Fund Act. A subsidy for presidential candidates was first enacted into law by Congress when it adopted a proposal offered by Senator Russell Long (D-La.) in 1966. Although later repealed, it established the framework for the Presidential Election Campaign Fund (hereinafter Tax Checkoff). The Tax Checkoff permitted taxpayers to earmark one dollar on their returns (two dollars on joint returns) for the Presidential Election Campaign Fund. Candidates of "major parties" were eligible to receive subsidies for use in the general election, up to a sum equal to fifteen cents for each eligible voter in the United States on June 1 of the year prior to the presidential election. Nominees of "minor parties" were to receive a proportionately similar
amount based on the number of votes received by their candidates in the last presidential election.\footnote{34. \textit{Id.} § 9004(a)(2). Tax credits and deductions for political contributions were also enacted. See Revenue Act of 1971, §§ 701-702, I.R.C. §§ 41, 218, 219, 642 (amended 1974, 1976).}

\textit{The 1971 enactments and the 1972 election.} The repeal of the Long Plan and its replacement by the Tax Checkoff delayed the implementation of public subsidies until after the 1972 elections. Similarly, the 1971 Act did not take effect until April 7, 1972, which substantially limited its effect on the elections held that year.\footnote{35. S. Rep. No. 689, 93d Cong., 2d Sess. 4-5, \textit{reprinted in} [1974] U.S. \textit{Code} \textit{Cong.} \& \textit{Ad. News} 5587, 5588 [hereinafter cited without parallel citation as \textit{Senate Report}].} Although many candidates voluntarily disclosed the identity of their contributors, others refused on the ground that there had been an understanding of confidentiality between the campaign and the funding source which could not be unilaterally breached.\footnote{36. In testimony before the Select Committee on Presidential Campaign Activities, the head of the Finance Committee of the Committee to Re-Elect the President, Maurice Stans, outlined this rationale: “[W]ith respect to people who contributed before April 7 there were two parties in interest: there was our committee and there was the contributor. Our committee did not care whether those names were disclosed or not, but we felt that we did not have the right to waive the contributor’s privacy.” \textit{Hearings before the Select Comm. on Presidential Campaign Activities of the U.S. Senate,} 93rd Cong., 1st Sess. 754 (1973). In a subsequent commentary on the Watergate scandals, the director of Senator McGovern’s campaign for the presidency in 1972 offered another view of the Committee to Re-Elect the President’s refusal to disclose the names of its contributors: 

\textbf{[T]he Corrupt Practices Act, passed in 1925, had always forbidden corporate contributions to a campaign. When Maurice Stans and Herbert Kalmbach and the other Nixon fund-raisers were out talking to corporate executives about the advantages that would flow to their companies from “four more years,” they were not confused by any late change in the law; they knew corporate contributions were illegal even as they were being solicited.}

The 1974 Amendments

The Watergate scandal and the nationally televised hearings of the Senate Select Committee on Presidential Campaigns contributed to increased public pressures for reform of campaign practices. On October 15, 1974 Congress passed the Federal Election Campaign Act Amendments of 1974 (hereinafter 1974 Amendments), amending the Federal Election Campaign Act of 1971. The 1974 Amendments dramatically altered the financial framework of presidential campaigns. While the 1971 Act sought to open the funding process to public scrutiny, the 1974 Amendments revised the fundamental premises on which the electoral system in this country had rested. Their key elements were the creation of a federal election commission, imposition of limits on contributions by individuals to political campaigns, limitation on expenditures by campaigns, restrictions on the activities of political committees, revisions of the 1971 program for subsidizing presidential campaigns, and minor amendment of reporting and disclosure requirements.

The establishment of a federal election commission. Under the 1971 Act, disclosure of financial information was to be administered by the filing of periodic reports with designated supervisory officers. The 1974 Amendments expanded this governmental regulatory function with the creation of a new federal election commission. The Federal Election Commission as originally constituted by the 1974 Amendments was composed of six voting members. Two were to be appointed by the President pro tempore of the Senate, two by the Speaker of the House of Representatives, and two by the

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38. See, e.g., D. ADAMANY & G. AGEE, supra note 7, at 5; Ervin, supra note 7, at 7-8.
40. Senate Report, supra note 35, at 4-5.
41. See note 25 supra.
President of the United States. Additionally, the Secretary of the Senate and the Clerk of the House of Representatives were to sit on the FEC ex officio without the right to vote. The FEC was empowered by the 1974 Amendments to "formulate general policy" with respect to the Federal Election Campaign Act, to issue advisory opinions, to conduct investigations and hearings, to commence and prosecute civil actions to enforce the Act, to refer suspected criminal violations to the appropriate law enforcement authorities, and to issue reports on FEC activities.

Limits on contributions by individuals. The 1974 Amendments prohibited individuals from contributing more than $1000 to any candidate or campaign for federal office. However, individuals were permitted to aggregate $500 in certain personal expenses and to contribute an unlimited amount in personal services without having the value of those services and expenses charged against their individual contribution limits. Moreover, individuals were limited to an aggregate of $25,000 in contributions in a single year to all federal election campaigns.

The 1974 Amendments also imposed limitations on the amount a candidate for federal office could contribute to his own election. The limit was $50,000 for candidates for presi-
dent or vice-president, $35,000 for candidates for the United States Senate, and $25,000 for candidates for the United States House of Representatives.

**Expenditure limitations.** Candidates for federal office were similarly prohibited under the revised law from spending more than a fixed sum, periodically adjusted for inflation. Candidates for president were limited to aggregate expenditures of $10 million during the primaries and $20 million for the general election. Candidates for the United States Senate were limited to the greater of $100,000 or a sum equal to eight cents multiplied by the voting age population (hereinafter VAP) of the state in the primaries, and the greater of $150,000 or twelve cents multiplied by the VAP of the state in the general elections. Candidates for House of Representatives were limited to $70,000 of expenditures in each election.

In addition, candidates for all of the above offices could spend an additional twenty percent over the limit for fundraising purposes. Moreover, candidates for the presidential nomination could not spend in any one state more than twice what a candidate for nomination to the United States Senate might spend in that state.

**Political committees.** Committees or other organizations and associations who had registered with the FEC for more than six months, received contributions from more than fifty persons, and made contributions to five or more candidates for federal office were permitted under the law to give up to $5,000 to a candidate or his campaign. No limitations were imposed
on the aggregate amount any committee might contribute during any period.45

Public financing of presidential election campaigns. The 1974 Amendments revised the method of allocating funds to presidential candidates adopted by the Tax Checkoff plan of 1971. During the primaries candidates for president were permitted to elect to receive matching federal funds for each individual private contribution of $250 or less.66 These funds became available once the candidate had been certified by the FEC as having received a threshold amount of $5,000 of matchable contributions ($250 or less) in each of twenty states.67 The election to receive the matching funds committed the candidate to the overall expenditure limitations of the Campaign Act.68 Nominees of major parties69 were each entitled to receive public funds for use in the general election.70 Nominees of minor parties71 were eligible to receive the same ratio of monies allocated to major party nominees as the ratio their performance (based on votes received) in the previous presidential election bore to major party candidates.72 New parties73 could receive post-election reimbursement of expenses if they garnered more than five percent of the popular vote based on the same formula used for minor parties.74 Major parties were further eligible to receive $2 million to pay for their national nominat-
ing conventions. Minor parties were eligible for a pro rata amount for convention expenses based on past performance in presidential elections.

Additionally, the 1974 Amendments provided that the funds for these payments to candidates and political parties were to be appropriated by Congress from revenues designated for this purpose by individuals on their tax returns.

Disclosure and reporting requirements. The 1974 Amendments made no substantial changes in the disclosure requirements established by the 1971 Act. Under the 1971 Act, candidates were required to disclose the name, address, occupation, and principal place of business, if any, of each contributor of more than $100. This threshold was retained by the 1974 Amendments. With the establishment of the FEC, however, certain administrative changes were made in reporting procedures.

More significantly, the 1974 Amendments required individuals, who in a calendar year made independent expenditures exceeding $100 in connection with a campaign for federal office, other than through a contribution to a campaign committee, to file a report with the FEC. Similarly, political com-

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75. As of March 18, 1977, the FEC had certified $2,010,780 (including a $170,085 “payback” under IRC § 9008(h)) to the Democratic National Committee for its convention costs and $1,581,664 to the Republican National Committee (including a $382,136 “payback”). See FEC Record, supra note 67.
76. I.R.C. § 9008(b)(2).
77. Id. § 6096. Individual taxpayers may designate $1 and taxpayers filing joint returns may designate $2 which is to be paid into the Presidential Election Campaign Fund. See id. § 9006. The designation neither increases the amount of taxes owed nor reduced any refund due the taxpayer.
78. See text accompanying notes 17-27 supra.
81. One of the more significant administrative changes requires political committees making contributions or expenditures on behalf of a candidate to report such transactions to the candidate's principal campaign committee, 2 U.S.C. § 432(f) (Supp. V 1975) (repealed 1976; reenacted in 2 U.S.C.A. § 432(a) (West Cum. Supp. 1977)).
mittees receiving or expending more than $1000 in a calendar year were required to register with the FEC and file reports which identified the source of contributions of $100 or more.

Buckley v. Valeo: The Constitutionality of the Reforms

The 1974 Amendments went into effect on January 1, 1975. On January 2 opponents of the measure, led by Senator James Buckley (Conservative-N.Y.) and former Senator Eugene McCarthy (D-Minn.), filed suit in the United States District Court for the District of Columbia, charging the law was unconstitutional. The district court directed that the case be transmitted to the court of appeals. After permitting intervention by various groups and individuals, the case was remanded to the district court for certain determinations of matters of fact and law. Subsequently on plenary review, the court of appeals “rejected, for the most part, appellants’ constitutional attacks.” Contemporaneous with this ruling, most of the candidates for the nomination of the Democratic Party had formally commenced their campaigns. Against this backdrop, the Supreme Court handed down its most comprehensive decision on the constitutionality of regulation of federal elections. Not surprisingly, the opinion affected

83. Id. §§ 433, 434 (amended 1976). Political committees were further required to record the identity of each contributor who gave more than $10. Id. § 432(c)(2) (amended 1976) (currently $50 threshold).
85. Other plaintiffs included the New York Civil Liberties Union, Human Events (a conservative magazine), the Committee for a Constitutional Presidency—McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the American Conservative Union, the Conservative Victory Fund, and General Motors heir, Stewart Mott.
87. Buckley v. Valeo, 424 U.S. 1, 10 (1976). The Supreme Court heard oral argument in Buckley on November 10, 1975. After this, and prior to its decision on the law's constitutionality, the Court permitted interim federal matching monies to be authorized by the FEC. [1975] U.S. S. Ct. Bull. B355 (Nov. 22, 1975). Many of the interviews for this article were conducted while this question of interim funding was before the Court. Its presence as an issue contributed to some of the uncertainty and frustration expressed by a number of interviewees, particularly campaign managers, since the absence of these interim subsidies would have created serious cash flow problems for most campaigns.
virtually all of the component parts of the Campaign Act.

The Federal Election Commission. With respect to the FEC, the Court held that the manner in which the members of the Commission were appointed under the 1974 Amendments violated the principle of separation of powers.\footnote{9} This conflict arose because four of the Commission’s six voting members were appointed by members of the legislative branch, yet the Commission was charged with enforcement and rule-making authority, which is the domain of the executive branch.\footnote{90} The Court gave those past acts of the FEC, which previously had been confined to “Officers of the United States,” de facto validity\footnote{91} and granted a thirty day stay of judgment to “afford Congress an opportunity to reconstitute the Commission.”\footnote{92}

\textit{Contribution limits.} In its per curiam opinion,\footnote{93} the Court affirmed the power of Congress to impose limitations on individual contributions to campaigns for federal office.\footnote{94} It held that the limited effect upon first amendment freedoms was sufficiently justified by the need to protect federal elections from corruption and to prevent real or imagined coercion of candidates after their election to governmental offices.\footnote{95} Simi-

\footnote{89. Buckley v. Valeo, 424 U.S. 1, 134-35 (1976).}
\footnote{90. Id. at 118-19.}
\footnote{91. See id. at 142.}
\footnote{92. Id. at 143. The Court issued an additional 20 day stay of judgment the day before the original 30 days was to expire. The Commission’s powers expired on March 22, 1976, see N.Y. Times, March 23, 1976, at 20, col. 3, and were not restored until the President reappointed the Commissioners under the 1976 Amendments on May 21, 1976. See N.Y. Times, May 22, 1976, at 1, col. 6. The result of this interruption in the Commission’s powers meant that during a crucial point in the 1976 primaries candidates were unable to receive federal matching funds or receive definitive interpretations of the law in the form of advisory opinions. See J. Witcover, supra note 1, at 219-21.}
\footnote{93. The Court’s per curiam opinion reflected the diversity of views among the Justices on the constitutionality of the various provisions of the law. The opinion was joined by Justices Brennan, Stewart, and Powell. Justice Marshall joined except for the decision to hold limitations on the use of personal funds unconstitutional. Justice Rehnquist joined except for the decision to allow public financing of elections. Justice Blackmun joined except for the portion of the decision covering contribution limitations. Chief Justice Burger joined only those portions striking down expenditure limits and ordering reconstitution of the FEC. Justice White joined the decision only in the portion covering public financing. Justice Stevens was not yet a member of the Court during the argument and took no part.}
\footnote{94. Buckley v. Valeo, 424 U.S. 1, 23-25 (1976). The Court noted, moreover, that arguments going to the exact size of contribution limitations were questions of “fine tuning” for legislative rather than judicial scrutiny. Id. at 30.}
\footnote{95. Id. at 25-29. Two alternative justifications were also advanced by appellees:
larly, the Court upheld the constitutionality of the $5000 limitation on contributions by political committees as both enhancing the ability of organizations and groups to participate in the electoral process and preventing evasion of limitations on individual contributions. The limits placed on expenses incurred by volunteers in assisting candidates were also upheld as a logical extension of limits on monetary donations by individuals. The Court also affirmed the constitutionality of the $25,000 limitation on total contributions by an individual in a calendar year.

Expenditure limits. The Court drew a fundamental distinction between contributions and expenditures. The Court observed that contributions affect speech only through their transformation into the speech of another. In the Court's view, restrictions on the amount of contribution did not affect the quantity of communication permitted, but rather "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." In contrast, a restriction on campaign expenditures "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." On the basis of this distinction the Court held that the governmental interests which had been sufficient to warrant limitations on contributions were inadequate to justify the 1974 Amendments' $1000 limitation on individual expenditures "relative to a clearly first, the law was necessary to "mute the voices of affluent persons and groups," and "equalize" the voices of all citizens in affecting elections, and second, it was necessary to help slow the "skyrocketing cost of political campaigns." Id. at 25-26. The Court found it unnecessary to look past the need to prevent corruption, since that justification alone was held sufficient to sustain the law. Id. at 26.

96. Id. at 35-36.
97. Id. at 36.
98. Id. at 38. The Court noted that the question had not been separately addressed by the parties at length, but concluded that the quite modest restraint prevented evasion of individual contribution limits by numerous contributions to political committees or parties. Id.
99. See Campaign Reform, supra note 84, at 858-61. See also Clagett & Bolton, supra note 88, at 1038.
101. Id. at 21. But see Wright, Politics and the Constitution: Is Money Speech?
103. See text accompanying note 95 supra.
identified candidate." Thus, the Court held that, while restrictions on the amount an individual could contribute to a candidate or a political committee were permissible, restrictions on the amount an individual could independently expend advocating the election or defeat of a candidate were not.

The Court similarly held unconstitutional restrictions on the amount of personal funds a candidate could use in his own campaign. The Court observed that the governmental interest in preventing corruption did not extend to expenditures from a candidate's personal or family resources. Thus, the Court classified a candidate's use of his own personal wealth as an "expenditure" rather than a "contribution," exempting it from limitation. The possibility that a restraint on the use of personal funds would equalize the opportunities of citizens to pursue public office was dismissed as "not sufficient to justify the provision's infringement of fundamental First Amendment rights." Moreover, such inequities could be minimized by the superior fundraising efforts of candidates with less personal wealth.

Finally, the Court held the limitations on overall campaign expenditures unconstitutional. The Court noted that the "major evil" associated with escalating campaign costs was the improper influence of large contributions and found that this had been alleviated by the Act's restrictions on the amount of individual contributions. However, the Court concluded that Congress could condition the receipt of public funds for use in campaigns on the agreement by the candidate to abide by specified limitations on expenditures.

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105. Buckley v. Valeo, 424 U.S. 1, 42 (1976). The Court had initially been troubled by the vagueness of the term "relative" to a candidate, but held that it must be read in context with other language in the statute giving it the meaning "advocating the election or defeat of such candidate." Id. Even this narrow reading, however, did not save the prohibition.

106. Id. at 52-54. See notes 54-57 and accompanying text supra. The 1976 Amendments reinstated the limitation on personal expenditures by candidates accepting federal subsidies.


108. Id. at 54.

109. Id.

110. Id. at 55-58. The limitations on overall expenditures were repealed by the 1976 Amendments and reenacted in a form that applies only to candidates accepting federal funds. See 2 U.S.C.A. § 441a(b) (West Supp. 1977).


112. Id. at 57 n.65. In a subsequent article, the attorneys for the appellants in
Public financing of elections. In this area, the Court upheld all the provisions for public financing of campaigns over arguments that the resultant system was unduly restrictive of minor party candidates' participation in the electoral process, "contrary to the general welfare," and "inconsistent with the First Amendment." The Court found earlier ballot-access cases which employed an "alternative-means" analysis inapposite since campaigns can be carried out without public financing under the Act. Appellants' arguments against public financing of nominating conventions were rejected on similar grounds. Finally, the Court approved the system of primary election financing of candidates through the use of matching funds, concluding that it did not discriminate against candidates not running in primaries or improperly increase the influence of individuals able to contribute matchable sums while deducting part of their contribution from their tax liability.

Disclosure and reporting requirements. The Court also upheld the constitutionality of these requirements since the governmental interests in providing the voters with information on how campaign money is raised and spent were sufficient to outweigh the possibility of infringement on the exercise of first amendment rights. The Court reasoned that this information enabled the voter "to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." The Court saw additional justification for any infringement in the fact that these requirements operated to deter and expose corruption as

Buckley contended that the decision of the Court to allow otherwise unconstitutional limits on expenditures by candidates choosing to accept government subsidies would further inject the government into the political process. See Clagett & Bolton, supra note 88, at 1336-37.

116. Id. at 104. Funding of nominating conventions is provided for in I.R.C. § 9008. See supra note 75.
117. See notes 66-76 and accompanying text supra.
119. Id. at 107-08 & n.146.
120. Id. at 66 (quoting H.R. REP. No. 92-564, 92d Cong., 1st Sess. 4 (1971)). See also CAMPAIGN PRACS. REPS., Dec. 12, 1977, at 6-7.
121. Id. at 67.
well as accumulate data for enforcing other valid provisions of the law.\textsuperscript{122}

In the wake of Buckley, major adjustments needed to be made in the election laws. The congressional response was the Federal Election Campaign Act Amendments of 1976.

**The 1976 Amendments**

After Buckley, Congress enacted the Federal Election Campaign Act Amendments of 1976 (hereinafter 1976 Amendments).\textsuperscript{123} The most significant change these amendments produced, was the reconstitution of the FEC along the lines articulated by the Court in Buckley. Under the 1976 Amendments, all six voting members are appointed by the President of the United States.\textsuperscript{124} The Secretary of the Senate and the Clerk of the House of Representatives continue to sit ex officio.\textsuperscript{125}

In response to the portion of Buckley which held limitations on independent expenditures unconstitutional, Congress tightened the reporting rules on such expenditures by requiring that the reports include a notarized statement that they were in fact made without consultation with the campaign.\textsuperscript{126} Similarly, these amendments more clearly defined what constitutes an independent expenditure.\textsuperscript{127}

Also, the 1976 Amendments added a $5000 limit on contributions by individuals to political committees,\textsuperscript{128} and a $20,000 aggregate limit on contributions to national political parties.\textsuperscript{129}

\begin{itemize}
  \item \textsuperscript{122} Id.
  \item \textsuperscript{124} 2 U.S.C.A. § 437c(a)(1) (West Cum. Supp. 1977). The Amendments also recodified under Title 2 those sections of the Campaign Act formerly in Title 18. Additionally, they gave the FEC exclusive civil jurisdiction in enforcement proceedings under the Campaign Act. Id. §§ 437c(b)(1), 437d(a)(6), (e), and spelled out more closely procedures for enforcement, including intermediate conciliation steps. Id. § 437g.
  \item \textsuperscript{125} Id. § 437c(a)(1).
  \item \textsuperscript{126} Id. § 434(e).
  \item \textsuperscript{127} Independent expenditures were defined in the 1974 Amendments as: "relative to a clearly identified candidate . . . advocating the election or defeat of a clearly identified candidate." This language was changed in the 1976 Amendments to expenditures "expressly" advocating a candidate and required that to be independent the expenditures not be "made in concert with or at the request or suggestion" of the candidate or his agents and that they be made "without [the] cooperation or consultation" of the candidate. Id. § 431(p).
  \item \textsuperscript{128} Id. § 441a(a)(1)(C).
  \item \textsuperscript{129} Id. § 441a(a)(1)(B).
\end{itemize}
Multicandidate committees were limited to $15,000 in contributions to parties. The amendments also retained the overall expenditure limitations on presidential candidates accepting federal funds. Similarly, they limited the use of personal funds by a candidate accepting federal monies. Finally, they provided new guidelines for both corporate and union segregated funds and internal communications advocating the election or defeat of a candidate.

With the legal framework of the Campaign Act in mind, it is important to explore how this new structure functions as a regulatory device. By focusing on how the law is administered one is better able to evaluate whether or not the Act has been successful in the attainment of its objectives.

PART TWO: THE ADMINISTRATION OF THE LAW

Campaigns traditionally have been loosely administered relative to the vast sums of money involved. Responsibilities for handling finances, donations, and expenditures were generally distributed among so many committees and organizations, both nationally and locally, that centralized control seemed a rather unworkable proposition. The most immediate and dramatic effect of the 1971 Act and the 1974 Amendments was to draw all these disparate committees and organizations under one centralized framework. This was accomplished by compelling campaigns to institute more businesslike procedures and by creating a federal regulatory agency to administer and enforce the law. The burden of complying with these new regulatory procedures falls squarely on the campaigns who must submit the data required by the FEC. In turn, the FEC must collect, digest, and disseminate the data collected so that it can detect violations of the law and the public can monitor campaign contributions.

130. Id. § 441a(a)(2)(B).
131. Id. § 441a(b)(1).
134. Id. § 431(f)(4)(C). What constitutes an internal communication, however, can be very broad in scope. In 1976, for example, unions expended vast sums of money on communications to their memberships urging the election of various candidates. See Malbin, Labor Business and Money—A Post-Election Analysis, 9 Nat’l J. 412 (1977).
Burdens of Compliance

One serious criticism leveled at the new law arises out of the administrative burdens it places on campaigns.\(^{137}\) While the new regulatory procedures might make accountants more comfortable, they are the most persistent target of complaints by campaign managers. The most frequently raised concern is the amount of time and other office resources expended on compliance. The campaign manager for Senator Henry Jackson (D-Wash.) pointed to the large amounts of volunteer time spent photocopying each contribution check and recording the requisite information for reporting purposes.\(^{138}\) Another time consuming requirement of the new law is the periodic audit conducted by the FEC. A visit to the Shriver headquarters shortly before an impending audit disclosed detailed instructions to the staff on how to assist the FEC auditors. At the headquarters of the Harris campaign, an inspection of the offices revealed a disproportionate number of staff members involved in bookkeeping and the recording of data required by the Act in comparison to those involved in campaign efforts not governed by these technical requirements. Moreover, the reporting requirements may have an adverse effect on the spontaneous campaign for federal office as noted by Robert Moss, General Counsel to the Clerk of the United States House of Representatives:

The administrative aspects of the law tend to discourage the citizen candidate from participation. The election reforms are like the Democratic delegate selection reforms—we've reformed ourselves right back into the back-rooms. It ends up in the hands of people who have specialized expertise . . . . The citizen who gets angry enough about something to want to run [for office] gets hit with a package of forms and rulings by the FEC that he can't even read.\(^{139}\)

Despite these burdens, the campaign officials generally

\(^{137}\) See Malbin, After Surviving Its First Election Year, FEC is Wary of the Future, 9 NAT'L J. 469 (1977).


\(^{139}\) Interview with Robert Moss, General Counsel to the Clerk of the House of Representatives, in Washington, D.C. (Dec. 19, 1975). This fear of deterrence of participation by the nonprofessional was also expressed by Mike Wetherall of Senator Church's staff: "Even if he never exercises it, the fact that a farmer in Idaho feels that he can run if he wants to is an important safety valve. The problems of compliance with the FEC may make that feeling even less real." Interview with Mike Wetherall, Senate staff of Senator Frank Church (D-Idaho), in Washington, D.C. (Dec. 22, 1975).
recognized the need for the regulations. The criticisms focused on how the system could be improved and did not attack the need for reporting itself. The campaign manager for Sargent Shriver, expressed what appeared to be the consensus:

I philosophically agree completely with the need for the reporting and disclosure requirements, but it costs us money and time in a situation in which those are even more precious commodities than before. We have to photograph each check, go through detailed recording of the occupation and address . . . but I guess it is justified in the public interest.140

The FEC recognized the problems generated by compliance with the new law. In its 1976 annual report, the Commission noted that “[b]urdensome and cumbersome requirements and procedures only blunt the impact of reform legislation and discourage honest people from entering politics.”141 Accordingly, approximately half of the legislative recommendations made to Congress by the Commission were aimed at simplifying the administrative procedures necessary for compliance with the law.142

One approach taken by the FEC to reduce the burdens of compliance has been to relax the reporting requirements. When the FEC began administering the Act, it demanded strict compliance with these requirements. An examination of the files in the Commission’s Public Records Office143 indicated numerous instances in which a candidate’s report was returned to the campaign on the grounds that some details had been omitted despite the fact that the identity of a contributor was readily discernable.144 This strict interpretation of the Act’s reporting requirements resulted in thirty percent of the reports filed with the FEC being deemed “inadequate.”145 As a result, the Commission adopted a “substantial compliance” approach, with guidelines which provided that if eighty percent of the required

141. 1976 FEC REPORT, supra note 42, at 61.
142. Id.
143. The examination of the records was made during a visit to the FEC Public Records Office on Dec. 18, 1975.
144. For example, a contribution to Senator Bentsen was listed by name, home address, home telephone, and occupation, which in that instance was farmer. Presumably because it was the same as his home address, his business address was not listed. The report was returned to the Bentsen campaign with a stern letter ordering compliance, a copy of which was placed in files available to the public.
145. 1976 FEC REPORT, supra note 42, at 61.
information in a given category was present the report would be accepted. If the report fell below this standard, a "Request for Additional Information" was sent to the campaign. If compliance was still not forthcoming, enforcement remedies were considered.

The FEC has also recognized that another way to reduce the burdens of compliance would be to eliminate audits during the campaign itself, and rely instead on strict enforcement of the law where individuals have filed complaints with the Commission alleging that violations actually occurred. To accomplish this the FEC established a new audit policy after the 1976 elections. The new policy provides that audits for House and Senate races will not be conducted during the campaign period. However, presidential campaigns receiving matching funds will continue to be treated separately based on their receipt of federal funds and will continue to be subject to audits during the course of the campaign.

Management of Disclosed Information

One point of general agreement about the new reforms, is the necessity for the disclosure provisions. Even the strongest opponents of campaign reform concede the need for mandatory reporting of the sources of campaign funds. Despite this consensus there remains some question as to how this contribution information will be digested and used by the voting public. It is the sheer volume of raw data collected by the FEC that makes disclosure less than the panacea its proponents envisioned. In 1976 alone, the FEC received reports from 9000 persons and committees required to file with it. Additionally, it

146. Id. at 21-22. Strict requirements of full disclosure were retained for large contributions or expenditures. The Commission's adoption of substantial compliance guidelines were motivated in large measure by its own difficulties in reviewing all of the reports generated by the strict compliance approach.

147. See id. at 52.

148. Congressman Frank Thompson, Jr. (D-N.J.), chairman of the House Administration Committee, has recently proposed an amendment to the Campaign Act which would allow the FEC to conduct audits of campaigns only in connection with possible violations of the Act. CAMPAIGN PRACTS. REPS., Nov. 28, 1977, at 1-2.

149. The FEC has discretionary power to select which campaigns to audit and when, except for presidential campaigns which are subject to mandatory audits after each presidential election. See IRC § 9007(a).

150. See Supreme Court Proceedings, Arguments Before the Court, 44 U.S.L.W. 3289 (Nov. 18, 1975); SENATE REPORT, supra note 35, at 5-b. See also Clagett & Bolton, supra note 88, at 1358.

estimates that each reporting entity can be expected to file twelve to fifteen sets of documents each election year, placing the total at around 100,000 reports. This has resulted in over 1.1 million pages of reports being made available to the public, over half of which were 1976 filings.

The Commission has acknowledged a need for wider dissemination of this data. Its 1976 annual report noted that the “primary obstacle to fuller disclosure . . . is the need to get the data out of Washington to the local level where the campaign is conducted.” The Commission initially tried to accomplish this by making microfilm copies of reports available to the public in its Public Records Office in Washington. In early 1976, however, the Commission instituted a computer system for its own use in reviewing documents and for public review “where appropriate.” Although the newly established FEC Office of Data Systems and Development began operation in August, 1976, initial programming and processing of back documents made its first months “considerably more difficult than envisioned.” Ultimately, the computer is expected to facilitate a number of functions, particularly the preparation of indexes that will make reported data easier to retrieve and more useful.

Whatever the mechanisms established for retrieval of this information, its ultimate value depends on close monitoring by private groups equipped to handle the task. Three groups were pointed to as the primary sources of monitoring the disclosed data: the press, independent organizations, and the campaigns themselves. Each of the three, however, seemed confident one of the other two would carry the burden. Inquiries to the Jackson, Harris, Shriver, and Church campaigns revealed that no clear procedure was established, or even contemplated to check the disclosed information emanating from the campaigns of their opponents. One campaign manager stated the general
assumption: "Common Cause and the New York Times will take care of it." Yet, discussions with representatives of those organizations revealed a different situation. Warren Weaver of the New York Times stated:

I guess it is assumed that [the effectiveness of disclosure] depends on guys like me being willing to go over and slug our way through. But frankly, we have no plans to do that. I have gone over there once just to look at the operation, but once you've limited the contributions to one thousand dollars, there aren't going to be any newsworthy stories, although there may be some interest in which committees are giving what to whom. We'll probably just wait for the Common Cause report.¹⁶¹

Completing the circle, Fred Wertheimer of Common Cause asserted that the campaign organizations would be the principal group monitoring disclosure in an effort to discover information damaging to their opponents. Common Cause's own experience in 1974 led to the abandonment of much of its monitoring project, primarily because of the expense involved and the complexity of the operation. "The [computer] programming problems are murder," Mr. Wertheimer explained, "and we just don't have the money to pursue it."¹⁶² Other independent organizations, in addition to Common Cause, may potentially play an important role in monitoring reported information. For example, Bill Dodds, political director of the United Auto Workers, stated emphatically: "We read closely what came out in the papers [in earlier elections] and then alerted people as to who was getting what. We have people who regularly follow the reports and other organizations do the same thing . . . . And I would think that any serious campaign had better do it."¹⁶³ Mr. Dodds sees the monitoring of such reports as an important activity which can be carried on independent of campaigns and thus, would not be subject to contribution limitations.¹⁶⁴

¹⁶⁰. Interview with Carole Cullum, campaign manager, Tom Hayden for U.S. Senate, in Palo Alto, Cal. (Feb. 3, 1976).
¹⁶¹. Interview with Dick Murphy, supra note 140.
¹⁶⁴. Id.
As the Supreme Court observed in *Buckley*, disclosure is the key to enforcement of most of the other aspects of the law, particularly the aggregate individual contribution limits.\(^{165}\) In light of the difficulties inherent in monitoring the collected data, it appears that the most significant benefit of disclosure will be its possible deterrent effect on potential contributors who might prefer to remain in the background. Unless effective procedures are established which facilitate the prompt disclosure of the sources of campaign funds, campaigns will lose the incentive to fashion tight internal control of these sources. This will ultimately reduce the deterrent effect of the law and create a situation where the spirit of the campaign reform measures can be easily evaded.

**Enforcement**

The passage of campaign finance reform legislation was largely the result of the public outrage that grew out of the scandals subsequent to the 1972 presidential election. As that pressure subsides, continued adherence to the new procedures will become primarily dependent upon the enforcement mechanisms established during the periods of high public interest in campaign reform. Although some elements of the law are theoretically self enforcing, such as the disclosure provisions and contribution limits, it may be assumed from past experience that as public attention shifts, traditional campaign pressures will inexorably resume their paramount position and violations will occur.\(^{166}\)

The establishment of the FEC as an administrative and enforcement mechanism was seen as the solution to this problem.\(^{167}\) However, since its creation, the Commission has been among the most controversial aspects of the new system despite its relatively low public profile. Much of the early opposition to the FEC was spearheaded by then Congressman Wayne Hays (D-Ohio). While the bill creating the FEC was in the House Administration Committee, Hays repeatedly sought to add amendments which would have shifted many of the functions and powers essential to the FEC’s operation to other governmental organs.\(^{168}\) Although this effort failed, the estab-

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166. See Fleishman, *supra* note 37, at 861-62.
168. Although many important reforms were eliminated in the House Commit-
lishment of the FEC was followed by several skirmishes between it and House foes over the Commission's operations. Generally, the Commission lost most of these early feuds.169

These battles over the powers of the Commission are indicative of the importance placed, by both proponents and foes of election reform, on the need for an effective enforcement mechanism. Such a need was illustrated by Mr. Moss,170 who as counsel to the Clerk of the House of Representatives was charged with discovering violations of the 1971 Act prior to the FEC being impaneled. During that period, Mr. Moss noted that his office referred over 14,000 violations of the Act to the Justice Department, of which he estimated forty to fifty percent involved incumbent members of the House. Nevertheless, Mr. Moss stated that to his knowledge the Justice Department...
had not acted on a single violation and he expected none to occur.\textsuperscript{171}

David Fiske, press spokesman for the FEC, agreed with the accuracy of this report, and remarked that it lay at the foundation of the need for the FEC:

The only way a law like this can work effectively is through voluntary compliance—and there will be voluntary compliance only so long as all those affected by [the law] are convinced it is being equitably enforced as to everyone . . . without an independent administrative agency charged with such a responsibility, that confidence will break down sooner or later.\textsuperscript{172}

Despite the tension between Congress and the FEC, the 1976 Amendments resulted in an expansion of its enforcement powers. They gave the Commission exclusive jurisdiction over civil enforcement proceedings,\textsuperscript{173} and spelled out more clearly the intermediate conciliatory steps to be taken by it before formally instituting such action.\textsuperscript{174} This shifting of responsibility for enforcement to the Commission is an essential step in preventing the Campaign Act from becoming as ineffective as its predecessors.

Although a strong Commission is essential to effective regulation of elections, it nonetheless must operate in an area of sensitive constitutionally protected liberties. The Commission, while giving due regard to the powers that Congress and the courts traditionally exercise over independent regulatory agencies, must develop procedures for effective enforcement that do not unduly intrude upon the electoral process. Critics of the Campaign Act and the Commission have been quick to point out the potential for abuse if the FEC is permitted to exercise the traditional prerogatives\textsuperscript{175} of administrative agencies in this area:

[T]he election law is both highly complex and in many respects vague. In these circumstances, the power to

\textsuperscript{171} Interview with Robert Moss, supra note 139. The FEC had 319 enforcement cases in 1975-76, of which 22 led to civil action.


\textsuperscript{174} See id. § 437g. As of April 1, 1977, the Commission had instituted 28 civil suits in federal district courts. Each of these suits involved failure of candidates to file reports required by the Campaign Act, and was preceded by at least two notices of delinquency. FEC RECORD, supra note 67, no. 5, at 3.

interpret the law is largely the power to make new law. An agency with this kind of power has vast influence over the political process, including the power to determine the results of particular elections. The Commission has used these powers with a vengeance. The Commission's pronouncements make new law—sometimes in areas in which the statute as enacted by the Congress was silent and sometimes in rather striking disregard of what the statute did say . . . .

The 1976 elections gave some indication of the difficulties that will be encountered in trying to strike a proper balance. The impact of even rumors of impropriety by a candidate was illustrated in the campaign for the United States Senate in Tennessee. In the final week of that campaign, local newspapers reported that the FEC had subpoenaed campaign records of one of the candidates. The report was based on a leak later traced to the chairman of the FEC and a staff member. Although the candidate against whom the allegation was made ultimately won the election, the danger of improper interference in elections was demonstrated.

The functioning of the enforcement apparatus of the FEC came into play most dramatically in the case of Governor Milton Shapp of Pennsylvania. The Shapp campaign as of April 14, 1977 had been certified by the FEC to receive $299,066.21 in federal matching funds. On May 12, 1977, however, the Commission ordered Shapp to return the funds on the grounds that records had been falsified as to the true source of contributions in order to qualify for matching funds.

The Shapp development demonstrates that the FEC staff can effectively monitor campaigns and detect violations. However, the Shapp case raises the additional problem of the tim-

An FEC staff report was sent to the Department of Justice naming Vernon E. Thomson, chairman of the FEC, and Victoria Ann Tigwell, an FEC staff member, as responsible for the leak of an FEC investigation of James Sasser, then Democratic nominee for the U.S. Senate. The Justice Department decided against prosecution and the Commission, with Thomson abstaining, accepted the recommendation. Id.
ing of the discovery. In this instance the evidence was not disclosed until after the campaign, too late to influence the electorate. If the FEC becomes aware of fraudulent practices during the course of the campaign it has a number of options. It can initiate proceedings early enough to halt the violations; disclose the violations perhaps affecting the election's outcome; or rely solely on the post-election remedies such as restitution or imposition of penalties under the Act. If primary reliance is placed on this final option, serious political and constitutional crises may result if the Commission seeks to impose civil or even criminal penalties on an elected official. 181

The Campaign Act and its administrative aspects provides a new backdrop for political campaigns. This new backdrop is designed to foster widespread participation in the political process so that the will of the people and not financial backing plays the decisive role. It becomes important to explore whether this goal has been achieved.

PART THREE: INITIAL STRATEGY FORMULATIONS

The Federal Election Campaign Act and its amendments established a new framework for presidential elections. Candidates for major party nominations were confronted in late 1975 and early 1976 with an entirely new calculus of considerations in developing their campaign strategies. Behind all of these considerations, however, the basic inquiry still persists: Does the financial screening process under the new law genuinely institute a more democratic and equitable system which allows the candidates who are best qualified and most reflective of the

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181. The ability of the FEC to effectively detect violations of the Act will be hindered by the expansion of public financing to include campaigns for congressional races. See text accompanying note 15 supra. In a statement before the U.S. Senate Committee on Rules and Administration, the Commission offered specific estimates of the necessary expansion of the staff and support services of the FEC to effectively administer an expanded public financing system. See Federal Election Reform Proposals of 1977: Hearings on S. 1072, S. 926, S. 15, S. 16, S. 105, S. 962, S. 966, S. 1320, S. 1344 Before the Senate Comm. on Rules and Administration, 95th Cong., 1st Sess. 431 (1977) (statement of FEC on S. 926, app. D). While the size of appropriations needed to support such an expansion is relatively modest in proportion to other federal expenditures, the growth of a powerful bureaucracy empowered to oversee the political process should be undertaken only after careful consideration of the proper role of governmental regulation of politics.

An amendment to the Campaign Act recently proposed by Congressman Frank Thompson, Jr. (D-N. J.), chairman of the House Administration Committee, would limit the Justice Department's ability to prosecute Campaign Act violations to only those cases where the FEC has itself referred the case. CAMPAIGN PRAC. REP'S., Nov. 28, 1977, at 2.
national will to move to the fore? This Part examines the factors that candidates and their campaign managers took into account in formulating their initial strategies under this new system and the conclusions they reached on the effectiveness of these strategies. These conclusions, in turn, reveal whether or not the financial screening process achieved its purpose.

Entry Problems

Timing of entry into the campaign. One of the earliest effects of the new law was its role in the crucial decision by each candidate on the proper time to enter the race for the nomination.\(^{182}\) The strategists for some candidates such as former Governor Jimmy Carter, Senators Bentsen and Jackson, or former Senator Fred Harris (D-Okla.) recommended entry long in advance of the first primary in order to secure two important advantages. First, early entry would enable the candidate to gradually build a large war chest which could be augmented later by federal matching funds and additional private contributions. Second, early entry would afford greater exposure to the public for candidates who were not particularly well known, thus enabling them to gradually build voter recognition.

For other candidates, however, the entry decision under the new law created severe problems. The most debated unknown was the amount of time which would be required to raise the money necessary to qualify for federal matching funds.\(^{183}\) This factor played a decisive role in the timing and method of Senator Frank Church's (D-Idaho) decision to enter the race. Although he had not formally declared his candidacy, Senator Church formed a campaign committee in early December of 1975 which filed with the FEC. The committee was certified by the Commission on February 26, 1976, but the Senator still had not formally announced his intention to run. A member of his Senate staff made it clear that Senator Church would have greatly preferred to wait until much later to declare, at least until the conclusion of the activities of the Senate committee which he chaired:

What he had to consider were the activities of many of his supporters who were out working for him and the strictures on them. They could take no pledges without a commitment from us, they couldn't raise money until the papers

\(^{182}\) See generally J. Witcover, \textit{supra} note 1.

\(^{183}\) See notes 66-71 and accompanying text \textit{supra}.
were filed, and so on. We were concerned that some of these people might inadvertently cross the line and violate the law. The problem of the timing of entry as keyed to the raising of federal funds created a different dilemma for Senator Birch Bayh (D-Ind.). At the end of 1975, when the last of the candidates for the Democratic nomination had declared their intentions, there was considerable speculation concerning whether or not the late entry of Senator Bayh would significantly impede his ability to quickly qualify for matching funds. It was often mentioned that significant delay in qualifying might be interpreted by the press and other observers as a sign of weakness which could damage the image he sought to project as a candidate with a wide base of support.

The new law does give the candidate who enters early a clear advantage in the early primaries. This result may be attributed to the fact that many of the late-declaring candidates are compelled to spend much of their time travelling outside New Hampshire, Maine and Florida where the first primaries are held in order to raise the $5000 in twenty states necessary to be certified. The January reports to the FEC revealed that all of the late-declaring candidates were having definite financial difficulties at the end of 1975, while many of those who had entered early were in good financial shape. The most notable was the campaign of former Georgia Governor Jimmy Carter who, through December of 1975, had raised $1,213,959

184. Interview with Mike Wetherall, supra note 139. Mr. Wetherall expressed the opinion of the Church campaign at that time that candidates who enter the race earliest enjoy a substantial advantage in accumulating money, attracting volunteers, and qualifying for matching funds. Id.

Moreover, the earlier each of these preliminary activities can be undertaken, the more time is left for actual campaign activities when the actual race gets under way.

185. A side effect of the pressure to quickly qualify for matching funds may be the fraudulent channelling of campaign contributions from one state to another or from the principal campaign committee itself in order to reach the $5000 minimum in a state where the candidate's financial support is weak. Allegations that this practice was used by Governor Shapp's campaign led to an FEC order that he return all of the federal funds he received for his campaign. Shapp attributed his withdrawal from the race to his late entry and a consequent inability to become well enough known to generate support. See Politics: Shapp Rapped on Election Funds, S.F. Chron., May 22, 1977, "This World," at 11, col. 1.

186. Bayh, Shriver, Udall, Harris and Shapp each ended January, 1976, heavily in debt, although each was eligible for immediate federal funds from the FEC. Only Jackson, Wallace and Bentsen, each of whom began their efforts at least a year before the first primary, were free of financial worries. Thus, while an early start was no guarantee of successful political results, any start after September of the preceding year seemed to involve a high certainty of financial difficulties.
in private funds which had been matched by $547,771.187 The Carter campaign put the money to profitable long range use building an effective organization in the early caucus and primary states which elevated their candidate into the position of front runner as early as the Iowa precinct caucuses. Similarly, Congressman Morris Udall’s (D-Ariz.) early declaration resulted in the building of a successful fundraising effort which lent credibility to a campaign which in earlier years would have undoubtedly been dismissed as frivolous. When the results of the 1976 Democratic primaries are analyzed from the perspective of the impact of the new law, however, the importance of the timing of the entry of the candidate diminishes. The concerns expressed by strategists for both Senators Bayh and Church were similar: their entry into the race was being forced at an inconvenient time due to the requirements of the new law. The political fortunes of each were nonetheless different. Although able to raise the threshold amounts requisite for matching federal funds, Senator Bayh’s campaign collapsed during the early primaries after a poor showing in Massachusetts. Although he blamed his weak performance on his late start, analysts pointed to other

187. 2 FEC Record, supra note 67, no. 2, at 6 (1976).
188. See J. Wittcover, supra note 1, at 225. The early organizing advantage gained by Carter was solidified by his subsequent primary victory in New Hampshire on Feb. 25, again attributable to an early start at building an organization and making extensive personal contacts. However, the image was just as quickly erased by his poor showing in Massachusetts the following week. It would seem then that this exposes the one inherent weakness in placing too great a reliance on long range strategy—lack of staying power. Nevertheless, a strategy similar to Carter’s had been utilized in 1972, when the McGovern campaign was based on building effective organizations in the key primary states as much as a year in advance. See R. Dougherty, Goodbye Mr. Christian: A Personal Account of McGovern’s Rise and Fall (1973); G. Hart, Right From the Start: A Chronicle of the McGovern Campaign 51 (1973).
189. Udall explained this advantage of the new law early in the campaign. See Udall, When Money Talks but Doesn’t Shout, N.Y. Times, Jan. 7, 1976, at 37, col. 2. Generally, the conventional political wisdom had been that members of the House could not seriously contend for the presidency. This was based on the fact that they lacked a large constituency and national name recognition. As a result, even Congressman Wilbur Mills (D-Ark.), then one of the single most powerful men in the government as Chairman of the House Ways and Means Committee was dismissed as a candidate when he entered the New Hampshire primary in 1972.
190. See notes 184 & 186 and accompanying text supra.
192. Senator Bayh received only 5% of the vote in Massachusetts despite repeated campaign appearances and a major effort in the state. N.Y. Times, March 3, 1976, at 1, col. 8.
more substantive shortcomings. Senator Bayh had the resources to spend $200,000 on a media campaign in the early primaries, but chose an anti-Carter, pro-establishment theme that his own strategists later concluded backfired. Senator Church, on the other hand, remained an active and viable candidate even after the actual primaries had ended. Despite his late entry, he was able to mount a credible effort in the later primaries against the substantial Carter momentum.

There remains, of course, another route available to candidates seeking to enter the field. Governor Edmund Brown, Jr. of California drew immediate attention late in the primaries by announcing his intention to mount a "stop Carter" effort. Since there was doubt whether he could qualify in time for matching funds, the prospect was raised of a candidate who would be able to campaign over a short period of time with private contributions from a coalition of those seeking to block the nomination of the front runner. Moreover, since expenditure limits may only constitutionally be imposed on candidates accepting public funds, Governor Brown's decision to use exclusively private money would have created the prospect of one candidate operating under federal restrictions inapplicable to another. Although Governor Brown did ultimately request and accept federal funds, the possibility remains that a situation

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194. Id. Another analyst, R.W. Apple, suggested that Bayh's inability to continue financing his campaign caused him to withdraw before the primaries in states where he might have fared better, such as New York. See Apple, Campaign Fund Dictates Tactics, N.Y. Times, March 12, 1976, at 16, col. 3.


197. An analogue to the late entry of Governor Brown was the last minute attempt to "draft" Senator Hubert Humphrey (D-Minn.) in a related "stop Carter" effort. As with Governor Brown, a considerable number of questions were raised about the proper procedures and practical possibilities of such a movement. See text accompanying notes 342-347 infra.

198. Governor Brown was ultimately certified as eligible to receive matching funds by the FEC on June 17, 1976, and was at that time authorized to receive the $100,000 threshold amount. Letter from FEC Press Office to David Ishin (Apr. 14, 1977) [on file at SANTA CLARA L. REV.]. The loose organizational structure of his late starting campaign, however, made it difficult for him to document many contributions in a manner sufficient to allow verification by the Commission. The use of ticket sales
could arise in a future election where two major candidates are
running against each other under totally different rules govern-
ing expenditure limits. While there are obvious potential in-
equities in this alternative, it is also a valuable offset to the
advantage enjoyed by a candidate who initiates campaign
fundraising early.

Thus, there remain numerous strategies available under
the new law, despite its significant changes. Decisions on when
to begin a campaign inevitably involve a balancing of innumer-
able intangibles, and it is not apparent from the 1976 experi-
ence that the new law has unduly handicapped or aided any
class of candidates. On the contrary, one analyst speculated
that one of the most significant results of the new law is that
it will give "basically unknown candidates or candidates with
only regional appeal an opportunity to get started earlier and
compete with the Hubert Humphreys and Ted Kennedys who
dominate the media." He attributed this to the fact that the
availability of federal money will keep such candidates in the
race when previously they never could have raised the start up
money to even become known. 199

However, one message of 1976 for candidates in 1980 may
well be that early entry into the race, perhaps as early as two
years in advance of the first primary, carries with it consid-
erable advantages under the new law. Thus, one of the least de-
sirable effects of the new campaign finance reforms might be
to further extend an election period that has already been
heavily criticized as too lengthy. 200 Whether the corresponding
advantage of giving a wider range of potential candidates a
chance at the nomination significantly offsets this effect re-
 mains to be seen. But there lies beneath this effect a deeper
process—the process by which an individual decides to seek
the nomination in the first place. One of the less visible and
yet most significant effects of the new law may be a profound

199. Interview with Warren Weaver, supra note 161.

200. See, e.g., Apple, Primaries: There Must Be a Much Better Way, N.Y.
Times, March 28, 1976, § 4, at 4, col. 3. A nationwide Gallup Poll indicated that 68%
of the voting public would prefer a nationwide presidential primary system. Only 21%
were opposed. S.F. Chron., Feb. 26, 1976, at 16, col. 2. Senator Lloyd Bentsen called
for such a consolidated selection process on his withdrawal from the race. S.F. Chroni-
cle, Feb. 11, 1976, at 12, col. 1. See also J. Wrtcover, supra note 1.
altering of the initial "screening process" through which candidates weigh their probabilities of election and thereby decide whether to run for the presidency.

Initial funding. The most frequent and perhaps most serious criticism of the pre-Act methods of financing presidential campaigns was that it placed too much power in the hands of a few wealthy individuals and organizations in determining who was able to run for president.201 It was this perception that was the impetus for much of the public demand for campaign finance reform.202 Similarly, it was the prevention of the corruption inherent in this method of financing that justified the first amendment intrusions in the new law.203 It remains an open question to what extent and to whom this power will shift under the current methods of campaign finance. The introduction of individual limits on contributions, public money into the process, and expenditure limits on those who accept such money will probably reduce the quantity of money involved and limit the influence of any one individual contributor.204 Nevertheless, the funding of primary campaigns still depends on the solicitation of private contributions.205 The matching funds concept requires candidates to show some basis of private support before being eligible to receive public funds.206 This requirement was approved in Buckley.207

Thus, an unchanged premise of presidential campaigning is that potential candidates must assess who will provide the money. The answer to this question evolves into a "screening process" which eliminates many of those who consider candidacy before the first vote is cast. Consequently, to mount a national campaign for the presidency, an organization must know who will provide the crucial flow of money.

An examination of the reports filed with the Commission and discussions with various campaign managers and other observers reveal that the Campaign Act's finance provisions may not have drastically altered the candidate's dependence on a small cadre of contributors. While it is clear that the

202. SENATE REPORT, supra note 35, at 4-6.
203. See notes 91-122 and accompanying text supra.
204. But see text accompanying notes 309-323 infra.
205. See text accompanying notes 66-76 supra.
206. SENATE REPORT, supra note 35, at 6-7.
tawdry spectacle of the idle rich "king maker" has been shifted slightly off center stage, it has not necessarily been replaced by a democratic or equitable process. Rather, what appears to be emerging is a system dependent upon individual contributions of a still substantial amount, well beyond the reach of most citizens.

One indication of whether a candidate is receiving large numbers of contributions in excess of $250 is to compare the ratio of total private money received to money that has been matched with federal funds. Presumably, that portion of unmatched money represents money received over the $250 ceiling on matchable contributions.

Of the three Democratic candidates that raised over $2 million by the beginning of 1976, only one, Alabama Governor George Wallace, was able to aggregate a large campaign treasury through almost entirely matchable contributions. By February 1976, Wallace had been authorized to receive $2,193,585.38 from the federal government in public money. The other two, Senators Jackson and Bentsen (D-Tex.), were able to raise comparably large amounts of money, but based on the above calculus much of this money was apparently given in relatively large sums. Thus, while Bentsen had been able to raise $2,110,451 through December 1975, only $511,023 (24.3%) was matchable. Similarly, of Jackson's $3,457,374 only $906,586 (26.2%) was matched. Those with lower contribu-

208. Further, it is not clear exactly how far "off-stage" such "fat-cats" have been shifted. For example, the Buckley decision led to speculation that the activities of such individuals would simply re-emerge in the form of "independent expenditures." See, e.g., Newsweek, Feb. 9, 1976, at 15-16; Time, Feb. 9, 1976, at 10-12.

209. Private contributions to a single candidate in the primaries are limited to $1000 by an individual, Federal Election Campaign Act Amendments of 1976, § 112(2), 2 U.S.C.A. § 441a(a)(1)(A) (West Cum. Supp. 1977), and $5000 by a political committee, id. § 441a(2)(A). Contributions by individuals are matchable by federal funds up to $250. I.R.C. § 9034(a).

210. Governor Wallace was in the unique position, among the presidential candidates, of receiving royalties from the use of his name and likeness on campaign materials. The royalties were held permissible by the FEC. 40 Fed. Reg. 44,040 (1975). The problem for the Commission was whether to characterize the royalty proceeds as "contributions" eligible for matching funds, or some other form of receipt of funds by the campaign. Consequently, the Commission has recommended to Congress that the Act be amended to prohibit federal candidates from personally profiting from their campaigns. 1976 FEC Report, supra note 42, at 76.

211. Amounts certified as matchable were reported in 2 FEC Record, supra note 67, no. 2, at 7 (1976). Overall contribution figures are from reports filed with the FEC examined on Dec. 22, 1976.

212. Id. at 6.

213. Id. at 7.
tion totals, however, had higher ratios of matchable contributions to total contributions. Former Governor Carter's matchable ratio was 45% ($1,213,959 in private contributions of which $547,771 was matched). Congressman Udall's was 70% ($830,000 in private contributions of which $581,208 was matched).

Former Senator Fred Harris' "populist" campaign, however, produced a ratio of only 36.7% ($460,000 in private contributions of which $168,859 was matched).

It is fair to imply then that most of the 1976 candidates were still dependent upon relatively large private contributions in the early "seed money" stage of the campaign. In fact, since contributions of $1000 are at least 25% matchable it would seem that, even when one allows for possible delays in the receipt of federal money or unmatchable contributions from political committees, many of the early campaigns were fueled by $1000 contributions. A perfunctory examination of the records on file with the FEC supported this hypothesis. Senator Bentsen's list of contributors disclosed a multitude of $1000 contributors, with few below the maximum permissible amount. The relatively few contributors, beyond those necessary for initial matching certification, who resided outside the Senator's home state, reflected his regional popularity. This factor led to his early withdrawal from the race.

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214. Id.
215. Id.
216. Ultimately the average amount of contributions received was lower once the campaigns had progressed beyond the "seed money" stage. The average contribution received by all candidates which was submitted for matching funds was $28.86. The highest average of the major candidates was $43.06 by President Ford and the lowest, $11.74 by Senator Harris. However, the incidence of larger contributions at the seed money stage is corroborated by the substantially larger average contributions of candidates who never made it past that stage. Hence, Sanford's average contribution was the largest ($126.07) followed by Shriver ($104.12) and Bentsen ($84.98). Moreover, averages are not really indicative of the size of the bulk of a candidate's contributions since the receipt of ten $5 contributions and one $1000 contribution would still result in an average of less than $100. 1976 FEC REPORT, supra note 42, at 16.
217. Thirty percent of the reports filed with the FEC in the initial period of the election were returned as "inadequate" under early requirements of strict compliance with the reporting provisions of the Campaign Act. 1976 FEC REPORT, supra note 42, at 21, 32. Ultimately, candidates submitting requests for matching funds had a high percentage of such requests certified. The lowest percentage was 83.64% by Governor Brown, and the highest was 99.73% by Sargent Shriver. Id. at 16.
218. Those records on file through December 22, 1975 were examined.
219. Dick Murphy contended that a candidate with a "large handful" of contributors able to give $1000 each enjoys a tremendous advantage over a similar candidate with a "small handful" of such contributors and many impecunious supporters. Interview with Dick Murphy, supra note 140.
The voluminous campaign records of Senator Jackson revealed a broader base of popular support than Senator Bentsen's, but this did not necessarily reflect a broader base of financial support. One of Senator Jackson's principal fundraisers indicated that the source of these funds was the same individuals who had previously contributed heavily to causes in which they believed.\(^2\) Primarily upper middle class, many of them Jewish, they were not the "fat cats" of enormous bankrolls who attempt to buy personal influence, but rather individuals oriented to giving in order to support a cause, issue or personality. Many had given equivalent sums to other candidates in the past, such as Hubert Humphrey.\(^2\)

The most dramatic example of a candidate using the new funding system to launch a presidential effort was, of course, the campaign of former Georgia Governor Jimmy Carter. Although the Carter campaign had a high ratio of matchable funds to overall contributions,\(^2\) he was nonetheless dependent upon the support of a handful of wealthy contributors in the earliest "seed money" stages.\(^2\) These contributors represented a core of backers who had provided funding not only in Carter's 1976 presidential bid, but in his two earlier gubernatorial races as well.\(^2\) Nonetheless, it is unlikely that Carter could have sustained his effort without the infusion of federal funds.\(^2\)

Despite the continued reliance by the most successful fundraising efforts on traditional money sources, the idea underlying public financing—giving candidates without access to large amounts of money a chance at the nomination—seems to have met with moderate success. It is clear that some candidates would not have entered the race without the expectation of timely infusions of federal money. For example, the Harris

\(^2\) Interview with Hershey Gold, fundraiser for Senator Jackson, en route from San Diego to Los Angeles by airplane. (Aug. 22, 1975).

\(^2\) Id.

\(^2\) Through April 14, 1977, Carter had been certified by the FEC to receive $3,726,521.69 in federal matching funds for his primary campaign. This was substantially more than any of his Democratic opponents, except Governor Wallace who received $3,291,308.81. See FEC Press Release (Apr. 14, 1977).


\(^2\) Id.

\(^2\) See Horrock, Experts Say New Election Fund Law Saved Carter from a Blitz by Rivals, N.Y. Times, May 28, 1976, at 12, col. 3. The Times analysis of the Carter campaign and the new finance law concluded that Carter was the "principal beneficiary" of the new law and that it sharply reduced the "built-in advantage" of candidates with access to more substantial funding sources. Id.
campaign limped into February in debt and was returned to bare solvency only by the issuance of a federal subsidy by the Commission. According to Jim Hightower, the Harris campaign manager, this was all part of the Harris scenario:

The new law makes this campaign possible. For the first time [in 1976] it will be possible for a candidate to run independently of the big money, using mainly small contributions of five and ten dollars and federal matching funds. . . . We aren’t going to ever have a bank account that’s very high, but we’ll have enough to run and that’s a big change from ’72 when Fred [Harris] had to drop out before he ever got started because there just wasn’t enough money.226

This view was shared by Fred Wertheimer, vice-president of Common Cause, who observed that the single biggest change under the new law is that it provides “any serious challenger an earlier shot,” and noted that candidacies such as the Harris campaign now become possible: “It doesn’t give them any great advantage; there will still be some campaigns like Jackson’s or Bentsen’s or even Wallace’s with lots of money, but it does allow a Carter or a Harris to start early, get known and show some strength without a gigantic investment by a few big backers.”227

Candidates who had not planned so far in advance, however, contended that the limitations on large contributions in the early stages unfairly handicapped their efforts to raise “seed money.” Sargent Shriver’s campaign manager contended that Shriver had a potentially broad national base, but lacked a dedicated core of supporters willing or able to give the $250 to $1000 sums necessary to reach a larger constituency.228 As a consequence, he contended, Shriver had been forced to spend a good deal of time attending endless small cocktail parties to keep the languid cash flow open in order to cover

226. Interview with Jim Hightower, campaign manager for former Senator Fred Harris (D-Okla.), in Washington, D.C. (Oct. 18, 1975). Former Senator Harris reiterated the strategy when filing his third quarter reports for 1975, which showed only a $1,000 operating surplus until that point. He noted that the presence of federal funds which would be available to him at the beginning of 1976 made it practical to stay in the race. N.Y. Times, Oct. 15, 1975, at 11, col. 1.


228. Interview with Dick Murphy, supra note 140. Shriver’s matchable contributions came from only 2,745 people, compared with 58,372 for Jackson or 97,764 for Udall. 1976 FEC REPORT, supra note 42, at 16.
basic expenses. Similarly, this effort consumed a substantial portion of staff time.\footnote{229}

Although conclusions based on one year's experience are by definition fragile, it would appear that the new law has not produced a great shift in who gives or receives campaign money. The primary difference is that the ceiling on individual contributions will reduce the personal influence of single big contributors—and shift the emphasis to a slightly wider segment of the population, mainly the upper middle class. While candidates such as Fred Harris, Jimmy Carter, or Morris Udall who are willing to begin long in advance and gamble on ultimate success have become more plausible, they will continue to suffer under a significant money differential between themselves and the candidates who are able to draw on the traditional money sources. The important unanswered question, which only several elections can resolve, is whether there is simply a minimum amount of money necessary beyond which added increments offer no significant advantage. That is, if a candidate can garner enough funds to run a basic organization and support minimal media coverage in the early stages, will that provide him with sufficient exposure to attract the financial backing critical to long run success. If so, then candidates who previously had no chance of entry will now be able to muster enough funds to begin a serious campaign.

This new system also has not altered the continuing reality that the broad mass of people in this country remain disenfranchised in one of the most critical stages of selecting the president and vice-president of the United States. They are disenfranchised by their inability to afford the necessary contributions in the early stages to get a candidate started. Contributions play a critical role in the esoteric and arcane primary and caucus system that persists in the United States, yet the vast majority of people in this country cannot afford to participate in this aspect at all.

Finally, in 1976, even with these new reforms, it would seem fair to conclude that candidates questioning whether to run for the nomination were still forced to consider, not their own qualifications or electability, but rather their ability to secure the financing needed to withstand the nominating process. Thus, the screening effect of the Act, while an improve-

\footnote{229. Interview with Dick Murphy, supra note 140. Shriver ultimately received $285,069.74 in federal matching funds. FEC Press Release (Apr. 14, 1977).}
ment over earlier elections, leaves much to be desired as a method for determining which candidates will make the decision to enter the race for the nomination.

**Effect on Staying Power**

One of the most fundamental unanswered questions about the impact of the new law is what effect it will have on the "staying power" of candidates. That is, will candidates who are not doing well in other respects nonetheless stay in the race longer than they otherwise would because of the availability of federal funds?\(^{230}\)

Former Secretary of the Interior Stewart Udall, campaign manager for his brother, Congressman Morris Udall in his unsuccessful bid for the Democratic presidential nomination, commented on the importance of this issue at the outset of the campaign: "The issue may be stated simply: Does the Federal law keep a candidate in beyond his natural political viability? If it does, it may re-write the whole book of traditional campaign strategies."\(^{231}\) The campaign of Henry Jackson was built on the premise that both the $1000 limit on individual contributions and the availability of matching funds would give a candidate with strong support in the upper middle class the greatest advantage. Since this was Jackson's major area of strength, the new campaign law was viewed by his strategists as a decisive factor in his favor. Robert Keefe, national political director for Jackson, put it bluntly:

> We will start the primaries in February with enough money in the bank to last us through all of the primaries right up to the convention in July. We won't be vulnerable to the crisis that hit the Muskie campaign after Wisconsin where a couple of poor showings in earlier primaries caused his money to dry up. Even if things get rough in the early primaries, we'll have enough money in advance to take us right through California."\(^{232}\)

The fundraising reports filed with the FEC through January, 1976 bore out Keefe's predictions that his candidate would re-

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\(^{230}\) See I.R.C. § 9033(c)(1). This section, applicable to future elections, eliminates a candidate's eligibility for federal matching funds if he receives less than 10% of the vote in two consecutive primaries.


ceive a large volume of contributions under $1000 early in the campaign. Up to that point, the campaign had raised 1.6 million dollars.233

Once they achieved this early volume of contributions, the Jackson strategists contended that the new campaign finance system would continue to work in their favor for two basic reasons. First, it was felt that the large reserves of money would keep the campaign moving, even if Jackson made poor showings in early primaries and the flow of contributions temporarily dried up. Conversely, other candidates who did not fare well early and did not have Jackson’s reserves would be forced to drop out, giving Jackson the opportunity to make a better showing in later primaries with a narrowed field of candidates.

Second, Jackson’s strategists felt the availability of federal money would keep some candidates in the race longer, each of whom would pick up blocs of delegates to the convention. In this event, Jackson’s large reserves would enable him to mount a cumulatively more effective effort, giving him a plurality that could only be matched by Governor George Wallace.234 Jackson would then be in the best bargaining position to put together a winning coalition. Thus, two important premises of the Jackson strategy rested on the increased staying power of candidates under the new campaign finance system: first, Jackson would not be forced out by early mediocre showings, and second, the field would be comparatively larger for a longer period of time allowing him to win the nomination even if he had only a plurality of delegates at the end of the primaries.

The results of the Jackson strategy in 1976, indicated to some extent that federal money added little to the staying power of a well-known candidate.235 One reason is that such candidates have the ability to attract large amounts of money with which to finance their campaigns. Consequently, the additional federal money is not a crucial factor in determining whether the campaign will continue. Moreover, the election reforms actually operate as a restraint on a well-known candidate’s ability to finance his campaign. In order to receive fed-

234. The new rules that placed delegate selection at the congressional district level further strengthened the Jackson strategy. As Robert Keefe observed: “There aren’t 33 primaries but over 377. We’re planning on that basis. The new finance law comes into play, because we’ll target by congressional districts rather than states. We’ll spend money on districts that have higher odds.” Interview with Robert Keefe, supra note 232.
235. See N.Y. Times, May 2, 1976, at 1, col. 5.
eral funding, the candidate may not receive contributions in excess of $1000 from an individual.236 This is a serious restriction on a candidate with big money backing since in prior years contributions well over $1000 were not uncommon. Thus, the new federal law has impaired this advantage of better known candidates, leaving them dependent on larger numbers of smaller contributors.

It cannot be overlooked, however, that the ultimate reason for Senator Jackson’s lack of success in 1976, was political; his lack of success at the polls.237 Nevertheless, his failure in the primaries also caused a precipitous drop in contributions to his campaign238 which Jackson pointed to as the immediate reason for his withdrawal.239 This experience seems to indicate that federal money alone is not enough to continue the type of campaign that well-known candidates generally operate.

The staying power of some lesser known or marginally financed candidates in the 1976 primaries, however, seemed to have been significantly increased by timely infusions of federal money. The Harris campaign, as noted earlier, provided a prime example.240 This is undoubtedly due to the fact that these campaigns, unlike those of their well-known counterparts, traditionally have been plagued by serious financial problems. The attrition among these candidates is generally due to inadequate funding and not poor showings in the primaries. The marginally financed campaigns are less influenced by poor showings in the primaries partly because their expecta-

237. See Kneeland, The Jackson Campaign: An Exercise in How To Undo It, N.Y. Times, May 9, 1976, § 5, at 3, col. 2. Mr. Kneeland concluded that the Jackson campaign failed because he had relied on a long-range “cost-effective” effort to gather delegates while failing to develop a genuine constituency or dominate a significantly broad segment of the party. His efforts to appear as the “consensus” candidate left him vulnerable to the Carter challenge for the same image. Id.
238. The Jackson financial crisis was as much a cash flow problem as a lack of an ability to continue raising funds. See Kneeland, Jackson’s Strategy Hampered by Lack of Federal Subsidy, N.Y. Times, Apr. 16, 1976, at 1, col. 4. This was amply illustrated by the fact that two weeks after his withdrawal, Jackson filed a claim with the FEC for $330,000 in matching funds, while his debts at that time exceeded his cash on hand by only $200,000. Thus, part of Jackson’s failure may be attributed to the delay in receipt of federal funds occasioned by Buckley. See note 92 and accompanying text supra; J. WITCOVER, supra note 1, at 317.
239. Senator Jackson stated: “I lost the Pennsylvania primary, a primary I had to win if my candidacy would remain viable . . . . I do not have the financial resources to continue an active campaign. I do not have a personal fortune to enable me to go further . . . .” N.Y. Times, May 2, 1976, at 1, col. 5.
240. See note 226 and accompanying text supra.
tions are lower and partly because they often characterize their defeat as the result of inadequate resources. Federal financing solves this constant financial crisis and as a result, measurably increases the staying power of the smaller candidates.

To the extent candidates are able to remain in the race and spend federal money despite poor showings in the primaries, the process of allowing one candidate to emerge as the standard bearer of the ideological factions within the party is postponed. This is critical since a candidate’s strategy often centers on emerging as the representative of an internal segment of opinion as a prelude to inducing potential contributors who have not yet committed themselves to any candidate. Moreover, it is generally felt that this emergence will lead volunteer workers and contributors who have given once to realign themselves with a new candidate rather than simply losing interest as their first choice drops out. It is this narrowing of the field to no more than a few candidates that is the fundamental *raison d’être* of the primaries.

There is an inherent tension between two purposes of primary elections. First, it is desirable that entry into the race be easy enough to allow a wide field of candidates to present a significant range of viewpoints and diversity of personality. Second, once the field has been established, the primaries must serve the function of narrowing the field based on voter preferences. The financial resources of candidates for the nomination are a critical element in this latter phase. The 1976 campaign demonstrated that the Campaign Act is not equipped to balance these competing purposes. As previously noted, the Act’s infusions of federal money inhibits the usual winnowing of candidates. These two functions cannot be harmonized by the Act alone. Other reforms are needed; specifically, reform of the primary system. The current system of primaries in thirty-one states, over the course of four months, without any significant federal control, is an anomaly under the Campaign Act. Having moved into the area of federal regulation of campaigns, Congress should not stop short of the development of a coherent, equitable system. In future amendments of the Act, Congress should examine the effects of the system as a complete entity and give greater consideration to the interaction of a variety of factors. Adoption of a national or regional primary would be a first step toward the development of such a comprehensive system which would permit more reasoned consideration of the impact of the availability of federal money on the nominating process.
The Campaign Act and its provisions for matching funds clearly influenced the overall campaign strategy of the candidates with respect to their timing of entry into the race, initial funding procedures, and staying power. However, overall strategy is only one aspect of a presidential campaign. Equally important is the effect of the Act on the internal workings of a campaign.

PART FOUR: THE ALLOCATION OF CAMPAIGN RESOURCES

Campaigns for the presidency are from their earliest stages multifaceted affairs. Integrating the disparate and often competing components of a campaign into an effective strategy is the most fundamental task of a campaign manager. Tactical decisions on the allocation of always limited resources are inevitably a function of the availability of those resources over the course of a campaign. When resources will be available is often as critical an issue as whether they will be available at all.

Under the Federal Election Campaign Act and its amendments, the timing of the flow of money into the campaign has been dramatically changed. Part Four considers the impact of the Campaign Act on the allocation of resources. Specifically, it focuses on how the new law affects the candidate’s use of his time; the decision to emphasize campaign organization or to rely on the media; the use of consultants; the timing of receipt and expenditure of money; and the fundraising devices used during the campaign.

Candidate’s Time

The amount of time a candidate has available to spend campaigning is a key element in developing any campaign strategy. When long range strategies are formulated in the pre-primary stages, a fundamental inquiry must be made into which primary states the campaign wishes to invest its resources, including the candidate’s time, and in which states the candidate’s personal presence will have the best effect. There is a complicated calculus involved in these decisions, including such factors as how the press will treat a candidate who invests a great deal of time in a given state yet does not perform well, the image the candidate seeks to project,\(^\text{241}\) and the effective-

ness of the local staff in a given primary state. This calculus has been made even more complicated by the change in campaign finance procedures and the concomitant increase in demand on the time of the candidate and staff to pursue fundraising activities. The amount of time that must be so spent has been reshaped by the threshold requirement that to be certified as eligible for federal matching money a candidate must receive $5000 in contributions of $250 or less in each of at least twenty states.242

For campaigns which begin accumulating large reserves of money in the years prior to the election, meeting the certification and matching requirements demands no significant change in strategy.243 However, for a late entry, the situation may be much different. A candidate entering the field shortly before the first primary may be compelled to spend considerable amounts of time raising money in states of no immediate political significance, in terms of the sequence of primaries, in order to meet the requirements for matching funds.244 By comparison, his opponents, who began earlier, will be able to devote more time to the first three primary states. A member of the campaign staff of Senator Birch Bayh, who traveled with the Senator, noted the frustrations occasioned by late entry. Immediately after Senator Bayh entered the race,245 most of his available campaigning time was devoted to traveling all over the country qualifying for federal matching money, while his opponents were concentrating on the two early primaries in New Hampshire and Massachusetts.246 Bayh's poor showings in these early states ultimately ended his candidacy.

Ed Cubberly, assistant national political director for Sar-

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242. See text accompanying notes 66-69 supra.
243. The decision to begin fundraising two years before the first primary was a critical element in the strategy of the ultimate winner of the 1976 Democratic nomination, Jimmy Carter. See text accompanying notes 222-225 supra. The requirement that a candidate qualify by receiving a minimum amount in 20 states may even have the beneficial effect of encouraging a candidate to begin building a national constituency earlier than he otherwise might have.
244. See text accompanying notes 182-200 supra.
246. Interview with Al Unger, campaign staff of Senator Birch Bayh, in San Francisco, Cal. (Nov. 14, 1975).
gent Shriver, seemed particularly concerned about this problem and saw it as an aspect of the general “seed money” dilemma facing certain candidates. Rather than being able to develop a broader constituency, Cubberly contended Shriver was being forced to spend an inordinate amount of time aggregating small contributions. Under the old system, or one with higher limits on individual contributions in the early “seed money” stages, a candidate like Shriver with ready access to a handful of large contributions might secure enough initial money to get started with “a few phone calls,” freeing him to campaign. Under the current system, Cubberly continued, Shriver was spending too much of his time “everywhere but New Hampshire and Massachusetts, the two places he should be now.”

The Campaign Act has also affected the types and numbers of people the candidate comes into contact with during the process of fundraising. The advantage of a narrow but devoted constituency enjoyed by the more affluent candidates, such as Jackson and Bentsen, is partially offset by the need of a candidate dependent on a large volume of smaller contributions to “reach out” to an expanding range of people. These latter campaigns are better able to avoid the problem of continually “preaching to the converted.” This problem was encountered in the early stages of the Jackson campaign when most of the candidate’s time was spent enhancing his appeal with people who were already firmly behind him and able to make contributions in the $100 to $1000 range. The necessity of other campaigns to devise alternative strategies to reach out to new supporters in this early stage allowed some candidates to broaden their constituency while raising funds. Thus, the Harris campaign strategists undertook to send their candidate cross-country in the early fall, a move which not only helped Harris reach his qualifying goal in the necessary number of states but also provided needed media exposure and contact with new voters. Other campaign managers similarly speculated that they probably were getting their candidates to seg-

248. See text accompanying notes 229-230 supra.
249. Interview with Ed Cubberly, supra note 247.
250. Interview with Robert Keefe, supra note 232.
The problem of how to allocate a candidate's time is an element of one of the fundamental disputes surrounding the campaign reforms: Does the Act provide an unfair advantage to incumbents? In Buckley the opponents of the reforms charged that the Act inordinately favored incumbents by setting contribution limits, which presumably handicap the lesser-known candidates' ability to publicize themselves. The Supreme Court rejected this contention, by noting a number of provisions in the reforms designed to put challengers on a more equal footing. The extent of the Act's discrimination against a certain class of candidates remains unclear. Among the participants in the 1976 Democratic nominating process the conclusion was unanimous: Each campaign manager agreed that the law discriminated most harshly against his own candidate and worked to the advantage of all his opponents.

Media v. Organization

A controversy parallel to that surrounding the influence of campaign finances has persisted over the propriety of the various techniques for promoting candidates for public office. The most significant aspects of this controversy are not the blatant "dirty tricks" of the Watergate variety, but the manner in which campaigns are conducted. Traditionally, political campaigns have relied most heavily on a good organization as the sine qua non of electoral victory. While other elements were important, it was often the ability of the machines to carry key states that provided the margins of victory in presidential elections. More recently, however, the increased mo-

252. Joseph Duffey, the Democratic nominee for United States Senator from Connecticut and now Director of the National Endowment for the Humanities, noted that despite the support for him by organized labor, his contacts with that group were really only on a symbolic level, since he was so dependent on other groups for money and volunteers. Interview with Joseph Duffey in Washington, D.C. (Sept. 21, 1975).


254. See Interview with Dick Murphy, supra note 140; Interview with Mike Wetherall, supra note 139; Interview with Bill Wise, Senate staff of Senator Birch Bayh (D-Ind.), in Washington, D.C. (Dec. 22, 1975).


257. See Watergate and Related Activities: Hearings Before the Senate Select
SANTA CLARA LAW REVIEW

bility of the American populace and the rapid growth of communications technology has profoundly altered the American culture. Political campaigns were not left untouched: emphasis began to shift away from traditional machine organizations toward broader mass appeals through the public media. This shift increased the need for and was facilitated by the existence of large sums of money available for distribution to the national campaign itself rather than to lower “grass roots” organizations.

The technique of heavy media emphasis has begun to fall into disrepute. At a time when political managers and consultants are carefully rethinking the relative advantages of political advertising; the federal campaign laws have imposed limitations on the essential ingredient of media use—money. The conclusion being drawn by participants and observers about this new reality is fairly uniform: during the early stages of the primaries the use of the media will be sharply curtailed and there will be a return to the emphasis on effective organization utilizing unpaid partisans. While this may have been partly attributable to the successful use of this technique by the 1972 McGovern campaign, there was a clear consensus among most campaign strategists that the new law left them little alternative. For some campaigns this seriously affected the entire strategy. Dick Murphy, Shriver’s campaign manager, drew the conclusion during the campaign that:

[The new law has] eliminated any possibility of media for us . . . . [T]his does not contribute to a meaningful discussion of issues. Without the law there is no question this campaign would have much more money, and we would definitely be putting much more emphasis on media. We would use every extra dime to put [Shriver] on the radio in many of the key states . . . . There is no question that

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258. See V. Packard, A Nation of Strangers (1972).


260. Title I of the 1971 Act imposed some regulation of the broadcast industry and political campaigns. See text accompanying notes 9 & 10 supra.

261. But see Wright, supra note 101, at 1011-12. (the new law will not necessarily impair the effective use of the media).

Although media use was limited in the early stages, as the campaign progressed and the field of candidates narrowed it became more widespread. See generally J. Witcover, supra note 1.
we are definitely putting more into organization now . . . . There is no media effort.\textsuperscript{262}

Similarly, one of Senator Church's strategists noted that a lot more thought was going into pacing expenditures by state because of the proliferation of primaries, and that ultimately, organizational priorities seemed to be taking precedence as the more effective use of money. But he noted that the decision would vary from candidate to candidate, and that a more affluent candidate with little initial support in a given primary state but significant potential to widen his base might lean toward a "media blitz" and completely forego organizational efforts.\textsuperscript{263} This technique was used by Governor Wallace in Massachusetts to counter speculation about his health. Responding to polls indicating that many potential supporters were reluctant to vote for him because of such doubts, Governor Wallace relied on thirty-second spots in the Boston area portraying him as a vigorous individual, capable of undertaking the strains of the presidency.\textsuperscript{264} Elsewhere, Governor Wallace made a similar media effort, to urge his scattered supporters to attend precinct caucuses.\textsuperscript{265} Wallace received only 18\% of the vote in the Massachusetts primary and despite a comparable statewide media appeal in Oklahoma he finished a weak fourth with only 11.64\% of the vote.\textsuperscript{266}

Other campaign managers joined in the general consensus that the new law shifted the emphasis back to traditional organizational efforts.\textsuperscript{267} Stewart Udall's remarks mirrored the overall reaction: "Tactically, the most important change

\textsuperscript{262} Interview with Dick Murphy, \textit{supra} note 140.
\textsuperscript{263} Interview with Mike Wetherall, \textit{supra} note 139.
\textsuperscript{264} See Kifner, \textit{Jackson Beats Wallace, Carter is 4th in Massachusetts}, \textit{N.Y. Times}, March 3, 1976, at 1, col. 5.
\textsuperscript{265} \textit{Id.}
\textsuperscript{267} In shifting the emphasis back to good organization, the new campaign laws were indirectly responsible for an undesirable phenomenon—the single issue candidate largely financed by public funds. The campaign of Ellen McCormack provided the prime example. Using the "right-to-life" organizational lists and contacts, she received the requisite contributions and was certified to receive matching funds. The basic purpose of her candidacy was to promote the position of the anti-abortion advocates. The success of such a tactic by the supporters of any issue, whatever the merits, raises several concerns. First, it was not the intent of Congress to provide federal funds for the mere propagandizing of one side of a controversial issue. Second, the potential availability of public money to such candidates may be expected to lead to unusually large numbers of candidates in the field which will serve to splinter the vote and lengthen the time necessary to allow the strongest candidate to emerge.
[under the new law] is on the allocation of resources and priorities. On the expenditure side, there will be lean campaigns for everyone. The emphasis will be on organization now [and] no longer on big splashy media campaigns.\textsuperscript{268}

Despite these early projections of increased reliance on volunteers, however, use of the media increased as the primaries progressed. In Pennsylvania, Carter used his superior financial position over his opponents to purchase television and radio commercials promoting his candidacy.\textsuperscript{269} To counter this, the Udall campaign attempted to maximize their candidate's exposure through free news coverage and interviews.\textsuperscript{270} Even the financially hard pressed Udall, however, expended $80,000 on media advertising in the Michigan primary, in an effort to project an image that would contrast with Carter's alleged vague stand on the issues.\textsuperscript{271}

It would seem premature then, to conclude that the era of the media candidate is over. While the new law will clearly contribute substantially to a shift back to greater reliance on organization, that shift may be traced to other equally important factors such as the failure of earlier media campaigns, greater voter sophistication about such techniques, and lower voter turnouts which allow maximum proportional return for voter turnout drives. Moreover, the declarations by various campaign managers of their commitment to organization were made at the early stages of the campaign—a time when money was low and media was merely so much straw cast to the wind. As the campaign intensified, the inability of some campaigns to attract the volunteer support necessary to build effective organizations in many states tended to push those campaigns back into reliance on more media.\textsuperscript{272}

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\textsuperscript{268} Interview with Stewart Udall, \textit{supra note} 231.
\textsuperscript{269} Lelyveld, \textit{supra} note 241.
\textsuperscript{270} Charlton, \textit{Udall Lacking T. V. Funds}, \textit{supra} note 241.
\textsuperscript{271} Id. Governor Carter's reliance on the media in the late primaries may represent a general tactical preference rather than an exigency dictated by other pressures. In the first month of the campaign in the general election, Carter purchased $5 million of broadcast advertising time and spent $330 thousand on production of commercials. By contrast, then President Ford spent $1.4 million on media during the same period. \textit{See} Weaver, \textit{Ford Can Outspend Carter this Month}, \textit{N.Y. Times}, Oct. 14, 1976, at 28, col. 4.

\textsuperscript{272} It was in this regard that the \textit{Buckley} decision's striking down of limitations on individual expenditures had its greatest impact. Purchasing various forms of media advertising was a natural outlet for erstwhile large contributors, who were now limited to giving no more than $1000 to any single candidate. \textit{See} Alpern, \textit{The New Money Rules}, \textit{Newsweek}, Feb. 9, 1976, at 16; Levin, \textit{Lifting the Lid on Campaign Spending}, \textit{New Republic}, Feb. 14, 1976, at 11.
Use of Campaign Consultants

Another aspect of the controversy surrounding campaigning techniques involves the use of professional campaign consultants, the “hired guns” of the political world. As campaigns have become more sophisticated and money more abundant, Washington and many state capitals have spawned a plethora of firms and associations dedicated to the task of electing candidates to public office. While many consultants assert that they work only for candidates with whom they share an ideological affinity, their activities have been frequently criticized as those of unprincipled mercenaries.

The great reduction in available campaign money will undoubtedly have a drastic effect on the number of political consultants employed and the scope of their activities. Tom McCoy, a fundraiser for former Senator Eugene McCarthy in 1968, and now director of the Washington Information Associates (WIA), a consulting firm, observed that the new law, combined with other economic factors, had already resulted in the reduction of the number of political consultants in Washington.

Other observers shared this view. Warren Weaver of the New York Times felt it was clear that the new law would make it “very difficult for consultants,” since “no one would be able to afford their steep fees anymore.” Similarly, Fred Wertheimer, vice-president of Common Cause, saw the consultants as being “very surprised” by the new law and consequently “very much against it.”

Some consulting firms, such as the WIA, are meeting the problem by diversifying their operations and offering similar services (e.g., fundraising, opinion research) to other nonpolitical clients, such as charities or private industry. WIA has developed a hybrid service which assists corporations in setting up and effectively administering political action committees. Other firms are shifting their campaign services from traditional consulting activities such as targeting precincts and analyzing data to, perhaps somewhat ironically, advising on how

274. Id. at 1.
276. Interview with Warren Weaver, supra note 161.
277. Interview with Fred Wertheimer, supra note 227.
278. Interview with Tom McCoy, supra note 275.
to comply with the administrative requirements of the campaign laws, which many opposed so bitterly. One consulting firm now calls its staff “finance consultants” and advertises “both fundraising counsel and finance management” to enable its clients to take maximum advantage of the new law. 279 Partly because of this new area for specialization, not everyone is convinced that consultants will fare poorly under the new law. Anne Wexler, currently Deputy Under Secretary of Commerce, noted:

It’s a much riskier proposition for them, but they’re probably going to do just as well. They’ll start putting on financial people who perform accounting functions . . . . They’ll computerize the operation. They’ll become the campaign treasurers. Things have gotten so technical, the consultants have got more mystique than ever since they’re the ones who understand how to target, how to break down precincts, how to use polls. I think they’re doing well because campaigns have become so sophisticated, especially with this new law, that they’re the only ones that know what they’re doing. 280

A post-1976 campaign study on the role of independent individuals and organizations in the election concluded that the new law had shifted influence from wealthy contributors to those best able to solicit a large number of small contributions. 281 Professional fundraising consultants who are able to develop programs which will garner large amounts of money from small contributors may become the primary beneficiaries of the changes wrought in campaigning techniques under the new law.

Parts Three and Four of this article closely scrutinized the profound effects of the Campaign Act on the campaigns themselves, focusing specifically on the overall election strategy and the internal allocation of resources. However, examining the effects of the new law on the campaigns themselves tells only half the story. The full picture is completed with a look at the effects of the reforms on the organizations and individuals who participate in the political process independent of the individual campaigns.

281. Malbin, supra note 134.
PART FIVE: POLITICAL ACTIVITIES CONDUCTED INDEPENDENTLY OF CAMPAIGNS

Campaign reform is meaningless if the only result is that activities deemed illegal or subject to disclosure if done directly by a campaign organization are merely shifted to parallel organizations or individuals not subject to similar legal sanctions. The need for regulation of all the major influences on the electoral process, however, is limited by first amendment protections of free speech and association. The Supreme Court in Buckley generally upheld the first amendment intrusions of the contribution limits as sufficiently justified by the strong governmental interest in preventing corruption in elections, but invalidated those elements of the law which restricted the right of individuals to make expenditures independent of such campaigns.

One consequence of the new law, particularly after Buckley, will be the strengthening of the importance of those organizations and individuals capable of mobilizing volunteers, making substantial expenditures relevant to but independent of a campaign, or establishing and controlling political action committees.

Labor Unions, Corporations and Political Action Committees

The 1971 Act and 1974 Amendments altered the fundamental ground rules for political activity by corporations and unions. Direct contributions to federal candidates by either

282. See text accompanying notes 93-97 supra.
283. See text accompanying notes 98-112 supra.
are flatly prohibited, but unions are allowed to spend unlimited amounts advocating a candidate's election among their own members. Corporations are similarly permitted to spend unlimited amounts communicating with their administrative personnel and their stockholders. Under the 1976 Amendments, however, both must file reports with the FEC disclosing such expenditures if the total exceeds $2000 per election. Moreover, both may spend unlimited amounts on nonpartisan efforts such as voter registration or get-out-the-vote drives. Such expenditures may be directed at the general public and need not be reported. Both may also spend unlimited amounts advocating the election of a candidate through communications directed at the general public, but such funds must come from a voluntary segregated fund rather than through union dues and must be reported to the FEC.

In addition to permitting limited direct efforts by corporations and unions, the Campaign Act allowed the establishment of multicandidate political committees, or PAC's as they have come to be known (the acronym denoting 'political action committee'). Such multicandidate committees may contribute up to $5000 to a candidate per election, provided

which 12 contributions totalling over $749,000 were made to the Committee to Re-elect the President. Id. at 446. See Lamber, Corporate Political Spending and Campaign Finance, 40 N.Y.U. L. Rev. 1033 (1965); Comment, The Constitutionality of the Federal Ban on Corporate Contributions and Expenditures, 42 U. Chi. L. Rev. 148 (1974).


291. There remain serious constitutional questions about the regulation of political activity by unions and corporations even after Buckley. See Clagett & Bolton, supra note 88, at 1371-73.


293. Election refers to either a primary, general, special or run-off election.
they contribute to at least five or more candidates for federal office in a single year and receive contributions from more than fifty persons.294

In the early stages of the 1976 presidential election, concern was expressed that the new law would permit undue corporate influence on the political process.295 The controversy was fanned by the FEC's Advisory Opinion 1975-23, which defined the ground rules for corporations deciding to establish their own political action committees. The opinion was requested by Sun Oil and the issue before the Commission was whether a corporate political action committee could use its treasury funds to solicit contributions from its employees. Ruling against the recommendation of its staff, the FEC held, 4-2, that it could.

Organized labor reacted sharply to this advisory opinion,296 and the 1976 Amendments revised the ruling to limit the number of solicitations a corporate or labor committee could direct to employees to two per year.297 The amendments also made it illegal for a PAC to use employer or union contributions which have been solicited through the threat or use of “physical force, job discrimination, [or] financial reprisals.”298

Reports filed with the FEC, however, indicate that in 1976, it was organized labor rather than business that was able to

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294. Federal Election Campaign Act Amendments of 1976, § 112(2), 2 U.S.C.A. § 441a(2)(A) (West Cum. Supp. 1977). Political committees must also have been registered with the FEC for at least 6 months before making such contributions. Id. The requirement that donations be made to at least 5 federal candidates is essentially meaningless since there is no minimum amount of each contribution. Hence, committees could contribute $1 to each of 4 candidates and then be free to give $5000 to 1 candidate.


296. In an interview conducted shortly after the Sun Oil decision, Bill Dodds, political director of the United Auto Workers, argued that the opinion did not reflect the legislative intent of the Act and thus would be challenged both in the courts and Congress. Interview with Bill Dodds, supra note 163.


operate most effectively under the new law. Despite the relaxed constraints on political activities by corporations, their actual performance was totally overshadowed by the operations of unions. Although unions contributed about half the money given through PAC’s in 1976, their significant activity was carried on through such “non-partisan” activities as voter registration and voter participation drives. According to a post-election study, labor directly expended $8.5 million on behalf of the Carter-Mondale ticket in the general election, with additional unreported expenditures raising the total to over $11 million.

By contrast, business had little impact on the presidential election. The two candidates who ultimately received the nomination of the two major parties each received only around $100,000 from business PAC’s during the primaries, despite early organizational efforts to establish such groups. Al-

299. Former President Ford was the early beneficiary of this new corporate right. Through May, 1976, his campaign received $65,200 in contributions from PAC’s, compared with $13,600 given to his principal primary opponent, former California Governor Ronald Reagan. By contrast, Carter received $16,800 in corporate political committee contributions, almost all of it in April when he had emerged as the front runner. See Companies Aid Ford, N.Y. Times, May 18, 1976, at 1, col. 7.


301. See Unions and Doctors are Ahead in Group Campaign Donations, N.Y. Times, Oct. 23, 1976, at 13, col. 1.

302. Such activities are specifically exempted from contribution and expenditure limits by the Act. 2 U.S.C.A. § 441b(b)(2)(B) (West Cum. Supp. 1977). The political arms of the AFL-CIO and the United Auto Workers were estimated to have spent $3 million each on such efforts in 1976. See Malbin, supra note 134.

303. Malbin, supra note 134. Malbin concluded that this amount was of even greater proportionate significance than all of the large individual contributions combined in earlier elections because of the spending and contribution limits in the new law. Id.

The influence large labor contributions have on elected officials has been heavily criticized. See Political Action and Education, Wall St. J., May 16, 1977, at 16, col. 1. Despite organized labor’s dominant role in the 1976 elections, it has so far been unable to convert electoral power into legislative victory. Although 71.3% of AFL-CIO endorsed candidates were victorious in 1976, its early efforts in Congress to enact pro-labor legislation were firmly rejected. See Hyatt, Labor Striking Out on Capital Hill, Wall St. J., June 2, 1977, at 12, col. 4.


305. Id.

The Ford campaign spent $13.3 million during the primaries while the Carter campaign spent about $12 million. Total campaign expenditures by all candidates in the primaries were about $70 million, including approximately $24 million of federal subsidies. See Weaver, supra note 198.

306. The United States Chamber of Commerce and the National Association of Manufacturers launched vigorous campaigns to induce corporations to organize corpo-
though a large number of corporate PAC's were created, no coherent political strategy comparable to labor's emerged.

It is probably premature, however, to conclude on the basis of the 1976 experience that the labor-business imbalance is inevitable under the new campaign laws. The uncertainty of the permissible scope of political operation under the new system coupled with the revelation of the illegal activities of many corporations in the 1972 election may have had a chilling effect on the 1976 activities of business that will be less profound in 1980.

**Independent Expenditures**

The 1974 Amendments prohibited expenditures "relative to a clearly identified candidate" in excess of $1000 in a calendar year. After the Supreme Court held in *Buckley* that restrictions on independent expenditures were unconstitutional, concern was expressed that a loophole had been created which would permit the continued influence of wealthy individuals on the electoral process. The parallel holding that candidates could not be limited in the amount of personal resources they contributed to their own campaigns created similar fears.

The role of independent expenditures reported in the 1976 campaign, however, proved to be minimal. Total independent expenditures relative to all candidates were only $373,993. Of rate PAC's. See Jensen, *The New Corporate Presence in Politics—The Rush is on to Develop to In-House Soliciting Units*, N.Y. Times, Dec. 14, 1975, § 3, at 1, col. 1.

There were 675 business PAC's operating in 1976. Malbin, *supra* note 134, at 416. There was a total of 836 committees from business, medical, legal and agricultural groups compared with 253 from labor. Seventy-seven other committees brought the total number of PAC's active in 1976 to 1,166. Id.

Malbin concluded that there may be structural reasons inherent in the business community and the nature of their interests that will always block the emergence of a co-ordinated political strategy promoting the interests of business. Id. at 412, 415.


See text accompanying notes 98-112 supra.


Nelson Rockefeller, then Vice-President, suggested after *Buckley* that wealthy candidates had always enjoyed an advantage in the public eye in that they were perceived as less susceptible to improper influence. Id.

FEC Record, *supra* note 67, no. 5, at 5. This figure may not accurately reflect actual expenditures since many independent expenditures which should
that amount, $364,823 was spent in support of forty-three federal candidates while $9170 was spent opposing two of them.\textsuperscript{314} Moreover, $267,686 of that amount was spent relative to presidential candidates.\textsuperscript{315} Eighty-three percent of the money was spent on behalf of Reagan and Ford, with the remaining 17% expended in support of seven Democratic candidates.\textsuperscript{316} However, the 1976 figures may not be a reliable indicator of future independent activity as the Campaign Act becomes better understood and new situations arise which make independent expenditures tactically effective. Such a situation potentially arose in 1976 when Governor Brown’s late entry into the race prompted one traditionally large campaign contributor to consider mounting an independent effort on behalf of Jimmy Carter in California.\textsuperscript{317}

One restraint on independent expenditures may have been the decision in \textit{Buckley} upholding the constitutionality of a requirement that individuals who spend in excess of $100 “other than by contributions to a political committee or candidate” file reports with the FEC disclosing such expenditures.\textsuperscript{318}

\begin{center}

<table>
<thead>
<tr>
<th>Candidate</th>
<th>Amount Spent</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ronald Reagan</td>
<td>$115,957</td>
<td>43%</td>
</tr>
<tr>
<td>Gerald Ford</td>
<td>$108,214*</td>
<td>40%</td>
</tr>
<tr>
<td>Frank Church</td>
<td>$ 24,212</td>
<td>9%</td>
</tr>
<tr>
<td>Jimmy Carter</td>
<td>$ 17,091*</td>
<td>6%</td>
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<tr>
<td>Morris Udall</td>
<td>$  675</td>
<td>1%</td>
</tr>
<tr>
<td>Jerry Brown</td>
<td>$  630</td>
<td>1%</td>
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<tr>
<td>Milton Shapp</td>
<td>$   448</td>
<td>—</td>
</tr>
<tr>
<td>George Wallace</td>
<td>$   445</td>
<td>—</td>
</tr>
<tr>
<td>Henry Jackson</td>
<td>$    14</td>
<td>—</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$267,686</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

*Figures do not include expenditures made in opposition to the candidate: $650 made in opposition to Gerald Ford and $8,520 made in opposition to Jimmy Carter."

\textit{Id.}

\textsuperscript{314} FEC RECORD, \textit{supra} note 67, no. 5, at 5.

\textsuperscript{315} Id.

\textsuperscript{316} The FEC released the following compilation of independent expenditures on March 23, 1977 based on an index it had compiled of reports filed with it pursuant to the Act:

\textit{Id.}

\textsuperscript{317} Brown’s late entry raised other problems. See text accompanying notes 197 & 198 \textit{supra}; \textit{N.Y. Times}, May 14, 1976, § 1, at 14, col. 7.

Compliance with this requirement may have deterred some individuals, particularly since collaboration with the campaign sought to be helped would have destroyed the independent character of the expenditure. The Commission has recommended that the $100 threshold for reporting of independent expenditures be raised to $250 to alleviate this burden.

Encouraging increased independent expenditures, however, may not necessarily be a desirable goal. Money spent by individuals who are not connected with the campaign and who are prohibited from acting "in concert" with it most likely will be spent on some form of paid advertising. If the purpose of the Act is to democratize participation in the political process, the money would be better directed to activities that promote citizen participation. Thus, allowing independent money to be channelled into other organizational efforts would be more desirable. One proposal, recommended by the FEC to Congress, is to relax the limitations on expenditures by state parties in support of presidential candidates and to remove them entirely from local parties where the expenditures are made in connection with activities normally associated with volunteer efforts. Similar exemptions for other organizational efforts might contribute to greater citizen activity in campaigns and provide constructive outlets for independent money.

The removal of restrictions on the use of a candidate's own personal funds in his campaign had no appreciable impact on the presidential primary, primarily because none of the candidates for the Democratic nomination in 1976 had sizable personal fortunes. On the contrary, fear of personal debt was a factor offered by both Udall and Jackson as a reason for refusing to borrow heavily to sustain their campaign efforts.

Persons Seeking Election as Delegates

The presidential primary system is administered sepa-
rately by each state. As with the electoral college, citizens vote not only for a candidate but usually for persons seeking election as delegates to the national convention. State laws and state party rules vary widely as to the method of selection of delegates, the independence of candidates for delegate from the presidential candidates they support, and their freedom of action as convention delegates if elected. In states which continue to utilize the precinct caucus system, campaigns may expend almost as much effort promoting the selection of certain individual delegates as they do the presidential candidate directly.

The FEC recognized the potential loophole that existed in the Campaign Act created by this multipurpose function of primary elections. Presidential campaigns could evade expenditure restrictions by encouraging would-be contributors to give their donations in support of persons running as delegates who are committed to their candidate’s election. Advertisements ostensibly urging the election of X as delegate to the convention could simultaneously promote the nomination of candidate Y as the nominee. On September 23, 1975 the Commission issued Advisory Opinion 1975-12 which held that since persons running for delegate are not “candidates” for federal office within the Campaign Act, their expenditures are not limited by it. The Commission ruled, therefore, that any restriction on their


326. J. Abels, supra note 255, at 97.


329. Precinct caucus states normally elect delegates to successively higher levels of the party structure up to the national level. These elections provide various candidates with a certain number of delegates through a fixed number of ballots at the party convention. Beyond these initial ballots, the personal loyalty of the delegate to a candidate is critical. Even in states using primary elections where voters cast their ballots directly for a candidate, he is not always assured that the delegate who will be sent is necessarily his partisan. For example, prior to Senator Humphrey’s disavowal of candidacy, see text accompanying note 347 infra, there was considerable speculation as to how many delegates formally committed to still active candidates were in fact “subterranean” Humphrey supporters. See Carroll, “Efforts” for Humphrey Big Factor in New York, N.Y. Times, Apr. 1, 1976, at 20, col. 4.

expenditures is to be determined by the candidate-for-delegate’s “status with regard to, or relationship with, a clearly identified candidate for President.” The Commission then divided the delegates into three categories. In the first such category were delegates specifically authorized by a presidential candidate. Such delegates were labeled “authorized” and their expenditures attributed to the authorizing candidate. In the second category were “pledged but unauthorized” delegates. These were delegates who had announced their support for a presidential candidate but had not been authorized by that candidate. Delegates in this category were barred from expending more than $1000 in their efforts for election, since such expenditures were considered to be “independent expenditures relative to a clearly identified candidate.” In other words, the expenditures made by these delegates in promoting their own election were treated the same as if they had been made on behalf of the candidate directly. In the final category were “unauthorized and unpledged” candidates for delegate. They were subject to no direct limitations, although the FEC warned that it would look closely at the validity of their denials of commitment to a particular candidate.

However, after Buckley invalidated the limitations on independent expenditures by individuals and permitted unlimited contributions by a candidate to his own campaign, the soundness of these rules limiting delegate expenditures was in doubt. As a result, on February 10, 1976 the FEC offered a new comprehensive statement on the delegate selection process. This statement classified delegates into two categories—“authorized” and “unauthorized.” Generally, expenses incurred and contributions received by authorized delegates are attributed to the authorizing presidential candidate’s principal campaign committee. Conversely, the unauthorized delegates are restrained only by the fact that contributions to them count against a contributor’s aggregate limit of $25,000 in a single year.

332. Id.
333. Id.
334. 2 FEC RECORD, supra note 67, no. 3 (1976) (Special Supp.). The FEC approved this policy statement 10 days after the Supreme Court handed down Buckley and before it was restructured by the 1976 Amendments.
335. 3 FEC RECORD, supra note 67, no. 5, at 5. Individuals running for convention delegate classified as unauthorized by any presidential candidate expended $227,167 supporting or opposing identified federal candidates. Id. at 5. This figure does not
The restrictions on delegates are a reasonable extension of the law and essential to preventing its wholesale evasion. An unfortunate byproduct, however, is that the rules may undermine other efforts to open the delegate selection procedure to greater public participation. The Democratic Party established two commissions to further the democratization of the delegate selection process. Both the McGovern-Fraser Commission and the Mikulski Commission attempted to open up this process and free it of backroom control. As a consequence of these reforms of the selection process, election as a delegate to a national nominating convention is becoming a position of bona fide responsibility and representation, rather than simply an honorary appointment to a cheerleading section. Restrictions imposed on the financing of delegate campaigns could operate to make candidates for delegate even more dependent on presidential campaigns, thereby defeating efforts to develop a convention of representatives who are reflective of local party opinion. The FEC should be cautious that, in further defining the methods by which delegates may campaign, it does not intrude upon the vital party reforms instituted in the last ten years. The Commission has recognized the need for further legislation in this area and has recommended to Congress that certain amendments be made to the Act in this

include total expenditures by candidates for delegate or expenditures not clearly identifying a candidate. Id.

A recently proposed amendment to the Campaign Act would exempt from limitation contributions to convention delegate candidates. CAMPAIGN PRACS. REP., Nov. 28, 1977, at 3.

336. The McGovern-Fraser Commission was established pursuant to a resolution of the 1968 Democratic National Convention and was charged with the task of revising delegate selection procedures. COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION, MANDATE FOR REFORM 9-15 (1970).

337. The Mikulski Commission was established pursuant to a resolution of the 1972 Democratic National Convention. COMMITTEE ON RULES, 1972 DEMOCRATIC NATIONAL CONVENTION, BY THE PEOPLE: REPORT TO THE CONVENTION § 6 (1972).


339. See, e.g., J. ABELS, supra note 255, at 77-78.

340. Joseph Gebheardt, who was a staff member of the McGovern-Fraser Commission, a delegate to the Charter Convention in 1974 and a delegate to the 1976 Democratic National Convention observed: “At the Charter Convention . . . it was clear that there is a growing number of independent party people who are taking the role of delegate very seriously and who are seeing it as an important function that extends well beyond a few days in the summer once every four years.” Interview with Joseph Gebheardt, in Washington, D.C. (Dec. 29, 1975). See also Seven of the Democratic Delegate Candidates: Why They Run, N.Y. Times, Mar. 6, 1976, at 27, col. 2.
Specifically, the Commission recommended exemption of costs to delegates in attending conventions and party meetings from the definitions of "contributions" and "expenditures," statutory division of "authorized" and "unauthorized" candidates for delegate, and reporting of contributions and expenditures by candidates for delegate in excess of $1000, rather than the current $100.42

Draft Committees

Traditionally, there have been a number of potential candidates for political office who were unsure of their support and hence reluctant to launch a campaign. In the past, they were able to test political sentiment by observing reactions to committees formed to "draft" them into candidacy. In other instances, citizens organized themselves into such committees in an attempt to persuade a genuinely reluctant individual to run for an office by demonstrating potential support. An important unanswered question about independent activities under the new law is the future of such draft committees.

In 1976, the issue was briefly raised by the recurrent speculation surrounding the intentions of Senator Hubert Humphrey. In December of 1975, a "Committee to Draft Senator Humphrey" filed with the FEC. Shortly thereafter, Senator Humphrey filed a letter with the FEC disavowing any connection with or support for the committee and asking them to cease operations.43

These efforts to organize the "draft Humphrey" committee, led by Representative Paul Simon (D-Ill.), were abandoned after the FEC notified the organizers that they might be subject to the $1000 ceiling on independent expenditures.44 However, the ruling in Buckley that limitations on expenditures by individuals acting independently were unconstitutional45 opened the door to the formation of draft committees, provided they do not act in concert with the candidate whose nomination they are urging. Thus, the inconclusive early 1976

341. 1976 FEC REPORT, supra note 42, at 68.
342. Id.
343. Interview with David Fiske, supra note 172. Professor Fleishman anticipated this problem of the anti-candidate committee. See Fleishman, supra note 37, at 881.
344. Weaver, Humphrey Draft May Be Renewed, N.Y. Times, Apr. 10, 1976, at 1, col. 4.
345. See text accompanying notes 99-112 supra.
Democratic primaries revived attempts to draft Senator Humphrey.\textsuperscript{348} Carter's victory in Pennsylvania eventually led Senator Humphrey to renounce any possible candidacy,\textsuperscript{347} but the efforts on his behalf illustrated the problems that can arise.

The primary problem generated by these efforts involved the uncertainty over the time when independent committee activity ended and a campaign began. In its 1976 annual report, the Commission noted the potential loopholes in this area and recommended that Congress take action to close them. The Commission observed that the current statutory language requiring reports by candidates, individuals making independent expenditures on behalf of a clearly identified candidate, and political committees supporting a clearly identified candidate probably imposed no reporting requirement or expenditure limitation on draft movements.\textsuperscript{346} The Commission also observed that under current law an individual could contribute up to $5000 to a draft committee while being limited to $1000 in aggregate contributions to a declared candidate's campaign. Moreover, it noted that if the draft candidate later entered the race, there was nothing to prevent an individual who had already contributed $5000 to the draft committee from contributing an additional $1000 to the campaign itself.\textsuperscript{349} To rectify this situation, the FEC recommended that a $1000 limit be placed on contributions to draft committees, and that these contributions be applied against an individual's $1000 aggregate contribution limit should the candidate later declare, if they were made "with the knowledge that a substantial portion" of the contribution would be expended on behalf of that candidate.\textsuperscript{350}

The difficulty with the Commission's recommendations is that a candidate who genuinely discouraged the formation of a draft committee might later be penalized for its activities. It would seem unfair to attribute to a popular senator or governor the acts of those he had not authorized and over whom he had no control. While the Commission's proposal only imposes a burden on the contributor by preventing a later contribution to the candidate's campaign committee in excess of the $1000

\begin{footnotes}
\item[346] See J. Wicover, supra note 1, at 311-16. See also Weaver, supra note 344; Carroll, supra note 329; Carroll, Jackson Optimistic as He Seeks to Build State Coalition, N.Y. Times, March 16, 1976, at 24, col. 6.
\item[347] Apple, Humphrey Bars a Campaign Now, Doubts a Draft, N.Y. Times, Apr. 30, 1976, at 1, col. 8.
\item[348] 1976 FEC Report, supra note 42, at 74.
\item[349] Id.
\item[350] Id.
\end{footnotes}
aggregate limit, the candidate is the ultimate loser since he is deprived of an important resource. Moreover, it establishes a dangerous principle. If the contributions made to draft committees can be attributed to a candidate, then it would seem to follow that other unauthorized independent activities could similarly be laid at the candidate's doorstep. This could make it exceedingly difficult for a candidate to benefit from efforts made on his behalf which are imputed to him. One of the principal reasons offered by Senator Humphrey for renouncing his candidacy was his concern that he would be unable to transform earlier independent activities on his behalf into a coordinated organization. The imposition of strict controls on campaign activities by the Act and its amendments should be balanced by the recognition of the candidate's right to exercise tight control over those resources which remain available. The Commission's proposal would establish a contrary principle.

The Role of Political Parties

A focal point of debate over the future of the political system in this country has been the apparent weakening in recent years of political parties. The 1972 presidential election continued this trend to the point where the respective nominees of each major political party had built strong organizations essentially independent of the party structure. The results for each were disastrous. On the one hand, the McGovern campaign's inability to broaden its base to other party constituencies after the nomination strongly contributed to its election day humiliation. On the other hand, the adventures of the Committee to Re-elect the President require no elaboration.

Since the function of primaries is to select party nominees, the party itself is obligated to remain neutral. Party activities

351. Apple, supra note 347. Independent efforts had been made to organize a delegate slate in the New Jersey primary and to lay the groundwork for a Humphrey campaign prior to his statement following the Pennsylvania primary. Nonetheless, Humphrey stated that the "lack of campaign organization" in New Jersey concerned him. Id.


are normally limited during this period to voter registration efforts and preparation for the quadrennial national convention. Two of the purposes of the 1974 Amendments were the strengthening of the major political parties and preventing the proliferation of splinter parties.\footnote{355} The amendments offered direct support to political parties through subsidies to the national nominating conventions.\footnote{356} The Act further sought to

\footnotetext{355}{\textit{Senate Report}, supra note 35, at 7-8. The Senate report observed: All but fringe candidates would have an incentive to seek a major party nomination, rather than run as a minor party candidate, so as to be eligible for the full level of public assistance in the general election. The bill would thereby have a cohesive effect, encouraging different factions to compete and work out coalitions within the framework of a basic two-party system. . . . At the same time, minor parties with significant support are eligible to receive a fair share of public assistance commensurate with their proven political strength. \textit{Id.}}

\footnotetext{356}{\textit{I.R.C. § 9008. “Major” parties, see text accompanying notes 59 & 60 supra, are entitled to subsidies up to $2 million. “Minor” parties, see text accompanying notes 71 & 72 supra, are entitled to a proportionate payment depending on their performance relative to major parties in the preceding election. The direct public financing of nominating conventions enhances the perception of party neutrality. Similarly, it frees substantial party resources for other activities. \textit{See J. Bibby & H. Alexander, The Politics of National Convention Finances & Arrangements} (1965). Ed Cubberly, assistant convention manager for the Democratic National Committee in 1972, praised the convention subsidies as one of the greatest benefits of the new law, since it freed the party from “unhealthy” influences in paying for its convention. As he noted: “The kind of activities and compromises parties had been forced into to fund their national conventions were one of the seamier undersides of politics, and lifting this burden is an improvement for everyone.” Interview with Ed Cubberly, supra note 247. Robert Moss, also a Democratic National Committee staff member in 1972, noted that eliminating the need for convention fundraising would also free the party to engage in more significant activity during the nominating period. While emphasizing the importance of strict party neutrality in the pre-convention stages, Mr. Moss noted that there were a tremendous number of support activities the party could undertake during that period which were being duplicated by each campaign and not being done as efficiently as would be possible with centralization. Interview with Robert Moss, \textit{supra} note 139. Discussions with current staff members of the Democratic National Committee indicate that this was, in fact, happening. In contrast to the almost singleminded devotion to delegate selection and convention planning at that time in 1971, the party engaged in a wider range of more intensive support activities in 1975-76. Ralph Gerson, General Counsel to the Democratic National Committee, noted that the party had in recent years initiated or expanded operations to assist campaigns in polling, research, voter identification, voter registration and other essential campaign support services. Moreover, he felt that there was an “unstated assumption” that the party would be active in assisting campaigns, particularly at the lower levels, in compliance with the dictates of the new law itself. Moreover, Mr. Gerson added, the party had expanded its operations in programs to increase involvement of minority racial groups, media assistance, and other programs that campaigns have in the past duplicated. Interview}
enhance the role of political parties by permitting candidates in the general election to receive "substantial private funding, in addition to the public grant, in the form of expenditures by state and national party committees." Political parties are permitted to spend on behalf of their presidential nominees in the general election a sum equal to two cents multiplied by the voting age population (VAP) of the United States. In 1976, each major party was able to spend $3.2 million in addition to the $21.8 million subsidy given directly to the candidate's principal campaign committee. Further, the Act permits each party to spend in each United States senatorial race the greater of $20,000 or two cents multiplied by the VAP of the state, and up to $10,000 in House races.

The Act's opponents contended that these spending provisions unfairly prejudiced the efforts of minor parties and independent candidates, forcing them to compete with a publicly subsidized two-party system. The potential for the new law to favor unduly the major parties and their candidates was considered by the Court in Buckley. The Court concluded that it was not clear that such assistance would necessarily disadvantage minor parties. The Court did note, however, that the problem was "troubling" and possibly left the door open to further


An amendment to the Campaign Act recently proposed by Congressman Frank Thompson, Jr. (D-N.J.), chairman of the House Administration Committee, would exempt from limitation the payment by political parties of the costs of materials used in connection with volunteer activities on behalf of a candidate. This exemption would not include the costs of broadcasting, newspaper, or magazine advertisements if the funds were earmarked for a specific candidate. Campaign Pracs. Reps., Nov. 28, 1977, at 3.


361. Id. § 441a(d)(3)(B). The limits on party expenditures in congressional races in states entitled to only one representative in Congress are the same as those in Senate races. Id. § 441a(d)(3)(A).
challenges based on future performance of the law. Nonetheless, the Court stated clearly that:

[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes . . . . Third parties have been completely incapable of matching the major parties' ability to raise money and win elections. Congress was, of course, aware of this fact of American life, and thus was justified in providing both major parties full funding and all other parties only a percentage of the major-party entitlement. Identical treatment of all parties, on the other hand, would not only make it easy to raid the United States Treasury, it "would also artificially foster the proliferation of splinter parties . . . ." The Constitution does not require the Government to "finance the efforts of every nascent political group."

The 1976 election demonstrated the benefits of the new law to the major political parties. The parties became the natural object of the munificence of erstwhile large private contributors who found their activities limited by the new law. The parties each were able to raise a total of $10.5 million to spend in support of federal candidates. Moreover, while campaign committees were limited to receipt of contributions of $1000 from individuals and $5000 from political committees (and presidential candidates were barred from receiving any private contributions in the general election), individual contributors were able to give up to $20,000 each to political parties and multicandidate committees were authorized to give up to $15,000.

The new law may inadvertently disadvantage political parties in at least one way. Since political parties are able to receive larger contributions than a candidate's principal campaign committee, a candidate would limit the party to receipt of $5000 from all persons by designating the party as his princi-

363. Id. at 97-98. But see Fleishman, supra note 37, at 896-97.
365. Id. § 441a(a)(2)(B). Despite the obvious advantages of a well-financed party under the new law, however, the Democratic National Committee has been permitted to fall into serious debt. Curiously, this has occurred despite control by its members of a majority of federal elective offices, including the White House. The Republican National Committee, on the other hand, has accumulated large cash reserves since 1976.
pal campaign committee. This has the potentially adverse effect of preventing a candidate from centralizing his campaign under one organization. A consolidation of this sort might be desirable given the limitations on money available in the general election. The Commission has pointed out this anomaly and recommended to Congress that it be remedied.366

CONCLUSION

The Campaign Act was an important step toward regulation of an area which had effectively been left ungoverned. The Act sought to restore the diminished public confidence in the political process by proscribing those practices which had been revealed as sources of corruption. This is a natural result where needed legislation results only after a scandal has occurred. In this regard, the Act accomplished its purpose by placing limitations on excessively high contributions and expenditures, requiring disclosure and reporting of campaign financing and establishing a federal administrative agency equipped to enforce it.

The 1976 primaries confirmed that the reforms embodied in the Campaign Act were effective remedies for the abuses that led to their enactment. Remedying abuses, however, is only the first step. Congress must now adopt a more expansive view and reconsider the managerial aspects of operating under the new law in light of the 1976 experience. Thus, for example, the focus should not only be on whether contributions of more than $1000 corrupt the political process, but also whether a candidate can effectively plan a series of primary campaigns that span five months while dependent on the aggregate sum that can be raised under that contribution limit. Similarly, Congress should consider whether the adjustments in resource allocation occasioned by the new Act permit effective campaign planning without corresponding regulation of the time and geographic framework over which they are to be expended. In other words, campaign reform should now be directed towards the establishment of a more comprehensive system that allows effective planning by removing or minimizing the influence of factors extrinsic to the relative merits of the candidates and issues. Where this principle is not served, restrictions should be removed as unnecessarily inhibiting the free flow of political activity.

When any major change is made in a system that has operated with virtual impunity for a long period of time, it is inevitable that difficulties will arise that will leave the new system vulnerable to attack by its critics. The 1976 experience demonstrated that financing and regulation of political campaigns is workable and efficacious. The task now is to refine the new system to relax or remove those aspects of the law that may have unnecessarily restricted political activity and tighten those areas susceptible to evasion, while taking cognizance of the principle that the result must be a process through which candidates and their managers can wage effective campaigns. It is this final element that often is lost in the battle for reform. Thus, future amendment of the Campaign Act does not necessarily entail more restrictive regulation; rather its goal should be adjusting the system of regulation to more smoothly fit the realities of campaign management.