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# Political Party Contributions and Expenditures Under the Federal Election Campaign Act: Anomalies and Unfinished Business

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## I. Introduction

The corruption and abuses of the electoral process uncovered during the Watergate investigations prompted the 1974 amendments to the Federal Election Campaign Act (FECA) which regulates the financing of federal election campaigns.<sup>1</sup> The Supreme Court decided, however, that some of these justifiable reforms exceeded constitutional bounds. In *Buckley v. Valeo*,<sup>2</sup> a 1976 decision, the Court held that restrictions on campaign expenditures could not withstand strict first amendment scrutiny, but limitations on campaign contributions were warranted by the compelling state interest of preventing the actuality and appearance of corruption.<sup>3</sup>

What the Supreme Court left unanswered in *Buckley* is how

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1. *Buckley v. Valeo*, 424 U.S. 1 (1976). Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (current version at 2 U.S.C. §§ 431-56 (1982)).

2. 424 U.S. 1 (1976) (per curiam).

3. In *Buckley*, the Court struck down as violative of the first amendment those portions of the Federal Election Campaign Act Amendments of 1974 which imposed a \$1000 ceiling on: (1) independent expenditures on behalf of a specifically designated candidate; (2) a \$25,000 ceiling on expenditures by a candidate from his or her personal or family funds; and (3) a limit on aggregate campaign expenditures by any one candidate. The Court equated political expenditures with political speech and subjected the direct limitations to the strictest scrutiny. The Court upheld: (1) a \$1000 limitation on contributions by individuals or groups to any candidate for federal office; (2) a \$25,000 limit on the aggregate contributions that an individual could make annually to all political campaigns; and (3) a \$5000 limit on contributions by political committees. The contribution limitations were viewed as entailing only a "marginal restriction upon the contributor's ability to engage in free communication," (*id.* at 20-21), and were thus subjected to less exacting scrutiny. The state interest in limiting contributions as a hedge against campaign finance corruption sufficiently outweighed the contributors' free speech interests.

its rationale pertains to political parties. Although rhetoric has flowed regarding the importance of political parties for the democratic process in general and the electoral system in particular, neither Congress, nor the courts have analyzed precisely what that role is or how political parties may differ from other multi-candidate committees.

This Article will demonstrate how the federal statutory and regulatory mechanics governing political campaigns have been reformed in the wake of the *Buckley* decision; then how case law has highlighted inconsistencies and generated further structural defects of the federal election laws with consequences for local and state as well as federal political organizations.<sup>4</sup> This Article will then examine how the *Buckley* criteria for limiting campaign contributions could be applicable to political parties on all levels. Finally, the potential consequences to political parties of applying the *Buckley* criteria to the statutory framework of the FECA will be raised. The Article will conclude that electoral reform has far-reaching implications and that the impact of these revisions on the structure of national, state and local political parties has yet to be ascertained.

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4. See *infra* notes 48-67, 75-78, 108-11 and accompanying text. The Article will focus on congressional elections as the Court held in *Buckley* that the presence of public funding of presidential races permits Congress to condition acceptance of such findings on limitations not otherwise permitted. While it is the candidate and not the party that accepts the funds, parties are implicated in those limitations in ways that would require a different analysis than that applicable to unfunded races because of the requirement of § 9002(2) of the Presidential Election Campaign Fund Act, defining a candidate as one who

(A) has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party, or

(B) has qualified to have his name on the election ballot or to have the names of the electors pledged to him on the election ballot as the candidate of a political party for election to either such office in 10 or more states.

26 U.S.C. § 9002(2) (1976).

Despite his independence from party labels, John Anderson was found in Advisory Opinion 1980-96 to have been nominated by a sufficient number of state organizations to qualify as a candidate under this definition. A party label is not required to be a candidate under the Federal Election Campaign Act. Section 431(2) defines a candidate as "an individual who seeks nomination for election, or election, to Federal office." 2 U.S.C. § 431(2) (1982).

## II. Statutory and Regulatory Background

According to the Federal Election Commission (FEC) there are three types of outlays that political committees can make in support of a candidate, although only two of them are defined by the FECA. These outlays are called "contributions," "independent expenditures," and "co-ordinated expenditures." Contributions are defined by section 431(8)(A) of the Act as:

- (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
- (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.<sup>5</sup>

This simple definition is followed by a list of fourteen items which are not to be considered contributions. Those specific to political parties will be discussed in Part IV. How much a political committee can contribute to a candidate depends on what kind of committee it is. Section 441(a) of the FECA<sup>6</sup> provides that those qualifying as multicandidate committees, including party committees, may contribute up to \$5000 per election.<sup>7</sup> An exception is made by section 441a(h) for the republican or democratic senatorial campaign committees which share with their national committees a joint contribution limit of \$17,500 to a Senate candidate during the year in which the relevant election is held.<sup>8</sup>

The definition of "independent expenditure" is more concise. Under section 431(17) it means

an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without co-operation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.<sup>9</sup>

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5. 2 U.S.C. § 431(8)(A)(i)-(ii) (1982).

6. *Id.* § 441a(a)(2)(A).

7. *Id.* § 441a(a)(1)(A).

8. *Id.* § 441a(h).

9. *Id.* § 431(17).

This definition was added after the Supreme Court in *Buckley v. Valeo*<sup>10</sup> invalidated limits on independent expenditures on first amendment grounds. Congress then sought, as much as possible, to combine the effect of this ruling through this new, narrow definition of independence and through disclosure and reporting requirements.<sup>11</sup>

Co-ordinated expenditures are not specifically defined, nor is the term used, in either the Act or the regulations. Instead the FEC employs that term in its other literature<sup>12</sup> to refer to section 441a(d) expenditures by the national and state committees of political parties. That section provides:

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States . . . . Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds —

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of —

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10. 424 U.S. 1 (1976). See *supra* note 3 and accompanying text.

11. See H.R. REP. NO. 917, 94th Cong., 2d Sess. 5 (1976).

12. See *infra* notes 14-15 and accompanying text.

- (i) 2 cents multiplied by the voting age population of the State . . . ; or
  - (ii) \$20,000; and
- (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, \$10,000.<sup>13</sup>

The term "co-ordinated expenditure" appears in the FEC's *Guide for Party Committees*,<sup>14</sup> which explains that these expenditures differ from contributions in that they can be made only in the general election campaign, must be either "in-kind," or, if monetary, must go directly to a supplier rather than through a candidate, and need be reported only by the party committee, not the candidate.<sup>15</sup> Only political parties can make co-ordinated expenditures. Since they can be made in co-operation or consultation with a candidate, they would be deemed contributions if made by any other type of political committee.

Conversely, the FEC has ruled that parties cannot make independent expenditures. There is no specific authorization for this ruling in the FECA. Although the language of section 441a(d)(1) which states: "*Notwithstanding* any other provision of the law with respect to limitations on expenditures or limitations on contributions,"<sup>16</sup> implies that there are other kinds of expenditures that can be made by political parties, such as co-ordinated expenditures, the FEC submitted to Congress regulation 110.7(b)(4), which prohibits state and national party committees from making independent expenditures in general elections.<sup>17</sup> Initially the FEC had proposed an alternative clause stating that the presumption that parties could not make truly independent expenditures should be rebuttable rather than conclusive.<sup>18</sup> By the time the third and final version was submitted on August 25, 1976 (and resubmitted the following spring due to Congress' early adjournment) this alternative had been

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13. 2 U.S.C. § 441a(d) (1982).

14. Federal Election Commission, *Campaign Guide for Party Committees* 9 (March, 1981).

15. *Id.*

16. 2 U.S.C. § 441a(d)(1) (1982) (emphasis added).

17. 11 C.F.R. § 110.7(b)-(c) (1983).

18. Federal Election Campaign Act Proposed Regulations, 41 Fed. Reg. 21,587 (1976).

removed.<sup>19</sup>

Congress tacitly approved this interpretation by its failure to veto the proposed regulations as permitted by section 438(d).<sup>20</sup> However, the "detailed explanation and justification" of the regulations which that section requires as an accompaniment to the proposals<sup>21</sup> provided neither. The FEC did not provide a written explanation of the prohibition against independent expenditures by parties, but FEC staff justified it as a logical extrapolation of regulation 109.<sup>22</sup> That regulation sets out in broad terms that the co-operation or consultation between a candidate and a supporter will deprive an expenditure of its independence. Indeed, such co-operation is presumed when it is:

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made;

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent.<sup>23</sup>

The FEC has elaborated on this regulation in a series of Advisory Opinions in response to specific requests for guidance — most frequently from the National Conservative Political Action Committee.<sup>24</sup> These judgments have consistently imposed restrictions on proposed activities by independent committees. The FEC appears to be following Congress' lead in using those means not prohibited by *Buckley* to regulate and limit independent spending. The prohibition against independent expenditures by parties may be open to question.<sup>25</sup> The FEC assumes that parties are so closely tied into their candidates that they

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19. 41 Fed. Reg. 35,951 (1976) (codified at 11 C.F.R. § 110.7(b)(4) (1983)).

20. 2 U.S.C. § 438(d) (1982).

21. *Id.* § 438(d)(1).

22. Federal Election Campaign Act Proposed Regulations, 41 Fed. Reg. 21,587 (1976).

23. 11 C.F.R. § 109.1(b)(4)(i)(A)-(B) (1983).

24. See 80 Op. F.E.C. (1979); 46 Op. F.E.C. (1980).

25. Federal Election Campaign Act Proposed Regulations, 41 Fed. Reg. 21,587 (1976).

could not make both co-ordinated and independent expenditures; that the consultation inherent in one would preempt the lack of consultation necessary to the other. Such an assumption implies that all party committees have the same relationship to the candidates that bear their name. It ignores the very real difference in treatment by the FECA and its regulations of local, state and national party committees. It ignores the fact that many state and local committees have transferred their right to make co-ordinated expenditures to their congressional campaign committees.<sup>26</sup>

There is, however, no particular demand by the parties for unlimited independent expenditures. This is partially because the ceiling on co-ordinated expenditures appears to be greater than the fund raising ability of the parties, and partially because it is not in the interest of the Democratic Party, which still controls the House, to give the republicans greater spending power. In the 1981-1982 election cycle the democrats spent \$3,195,199 on congressional candidates and donated \$1,723,593 to them. The republicans spent four times more: \$14,284,963 in co-ordinated expenditures and \$5,626,216 in contributions.<sup>27</sup>

The consequence of these FEC interpretations is to create a strange mosaic depending on whether a financial supporter is a party committee or not. Party committees can make contributions and limited but co-ordinated expenditures. Non-party committees and individuals can make contributions and unlimited independent expenditures. This novel interpretation has both benefited and hindered parties in comparison with non-party political committees. It has benefited them in that more money could be spent in co-operation with a campaign, and thus presumably more efficiently. It has hindered parties in that the unlimited independent expenditures permitted non-party committees are precluded. As will be demonstrated later, this mosaic is complicated further by the different treatment of state, local and national party committees. National party committees are clearly the favored sons and daughters; a favoritism bestowed on them by Congress, elaborated on by FEC regulations and Advi-

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26. See *infra* note 103 and accompanying text.

27. Federal Election Commission, Press Release, Dec. 3, 1983, at 30.



sory Opinions, and sanctified by the Supreme Court.<sup>28</sup>

### III. Consequences of the Failure of the Supreme Court to Apply the *Buckley* Standards to Political Parties

The source of this mosaic was not congressional deliberation on the manner in which party and non-party committees ought to fit into an overall campaign finance scheme, but the failure of the Supreme Court to address how parties were affected by the criteria of constitutional limitations upon campaign contributions and expenditures. When it distinguished in *Buckley v. Valeo*<sup>29</sup> between campaign contributions, which were permissibly subject to congressional limitations, and independent expenditures, which were not, the Court's decision was restricted to non-party political committees and individuals. Parties were given only a passing mention in two footnotes where the Court claimed that no first amendment challenge had been made by the plaintiffs to "separate limitations for general election expenditures by national and state committees of political parties."<sup>30</sup> Footnote sixty-six states:

Appellants do not challenge these ceilings on First Amendment grounds. Instead, they contend that the provisions discriminate against independent candidates and regional political parties without national committees because they permit additional spending by political parties with national committees. Our decision today holding . . . independent expenditure limitation[s] unconstitutional and . . . campaign expenditure ceilings unconstitutional removes the predicate for appellants' discrimination claim by eliminating any alleged advantage to political parties with national committees.<sup>31</sup>

The Court's decision not to apply the standards of *Buckley* to the major political parties was not compelled by a clear reading of the plaintiffs' brief. Argument III of the brief entitled "[T]he FECA Limitation on Campaign Expenditures by Political Candidates, Parties or Committees Violate the Constitu-

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28. See *infra* notes 66-69 and accompanying text.

29. 424 U.S. 1, 22 (1976). See also *FEC v. NCPAC*, No. 83-2823 (E.D. Pa. Dec. 12, 1983).

30. *Buckley*, 424 U.S. at 58 nn. 66-67.

31. *Id.*

tion”<sup>32</sup> did not single out parties in the general sections of this argument, but the brief did state that “[w]hat is true of candidates is also true of political parties and committees.”<sup>33</sup> Parties were specifically addressed in section E of Argument III entitled “The Limits Imposed by the FECA Amendments Violate the First and Fifth Amendments Because They Discriminate Against Certain Candidates and Parties.”<sup>34</sup> The thrust of that section was that “distinctions between various kinds of party committees, other formal political committees, and informal associations are unprecedented in American election law and serve no purpose other than discrimination.”<sup>35</sup> Nonetheless, to interpret that thrust as a failure to challenge the ceilings on first amendment grounds indicates a narrowness more deliberate than accidental. It implies that the Court has reserved for another time how the standards of *Buckley* should be applied to political parties.

One consequence of the *Buckley* omission was to create something of an anomaly in section 441a(d).<sup>36</sup> This section was originally written as section 608(f) of the 1974 amendments to the FECA when Congress contemplated total public funding of general election campaigns for federal office.<sup>37</sup> In that context, expenditure limits on parties were analogous to but greater than those on other “persons” (defined by the Act to include political committees).<sup>38</sup> The rather rapid revision of FECA in the wake of the Court’s far-reaching decision removed the now unconstitutional section 608(e) on “expenditures relative to clearly identified candidates”<sup>39</sup> but overlooked that on expenditures by party committees and with it the possibility that expenditure limits on parties were just as unconstitutional as those on non-party political committees. The FEC resolved the apparent discrepancy when it first proposed regulations for the amended FECA in

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32. Brief for Appellant at 79, *Buckley v. Valeo*, 424 U.S. 1 (1976).

33. *Id.* at 85.

34. *Id.* at 104.

35. *Id.* at 106.

36. 2 U.S.C. § 441a (1982).

37. S. 3044, 93d Cong., 2d Sess. § 101(a) (1974).

38. 2 U.S.C. § 431(11) (1982).

39. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1265 (codified at 18 U.S.C. § 608(e) (1974)) (repealed 1976).

May, 1976 by interpreting renumbered section 441a(d) to create the unique category of co-ordinated expenditures.<sup>40</sup> Since these "expenditures" are actually in-kind contributions, the FEC's interpretation significantly increased the amount of direct support parties can give candidates compared to other political committees.

The legislative basis for co-ordinated expenditures is rather sparse, consisting solely of an obscure reference in the Conference Report on the 1976 FECA. There the Conference Committee stated:

The conference substitute is the same as the House amendment and the Senate bill with regard to political party expenditures on behalf of the party's candidates. This limited permission allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection, these expenditures would be covered by the contribution limitations stated in subsections (a)(1) and (a)(2) of this provision.<sup>41</sup>

The 1976 amendments created in section 441a(h) separate contribution (not co-ordinated expenditure) limits of \$17,500 for the republican and democratic senatorial campaign committees, but not for the equivalent House committees.<sup>42</sup> The latter, by omission, is treated the same as any multicandidate committee with a \$5000 limit.<sup>43</sup> However, the Senate committees share their limits with the national party committees by statute,<sup>44</sup> while the House has separate limits from the national committees under regulation 110.3(b)(2)(i).<sup>45</sup>

One could reasonably interpret this pattern as indicating a congressional intention that each of the main party committees should have distinct, but not cumulative, contribution limits reflecting the size and type of their potential candidate constituency. State and national party committees could each contribute up to two cents per voter or \$20,000 to Senate candidates and

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40. See *supra* notes 14-15 and accompanying text.

41. H.R. REP. NO. 1057, 94th Cong., 2d Sess. 59 (1976).

42. 2 U.S.C. § 441a(h) (1976).

43. *Id.* § 441a(a)(2)(A).

44. *Id.* § 441a(h).

45. 11 C.F.R. § 110.3(b)(2)(i) (1983).

\$10,000 to those for the House.<sup>46</sup> The Senate campaign committees could contribute \$17,500 to Senate candidates and the House campaign committees \$5000 to House candidates.<sup>47</sup> Instead, the FEC has increased the spending power of all party bodies by interpreting the limits cumulatively, by distinguishing co-ordinated expenditures from contributions and by permitting agency agreements. It is only the latter that has been challenged in court.

#### IV. Agency Agreements

Agency agreements were the subject of the only case under the FECA on political parties to come before the Supreme Court, *FEC v. Democratic Senatorial Campaign Committee* (DSCC).<sup>48</sup> It arose when DSCC challenged in the district court a ruling by the FEC that there was no "reason to believe" that the National Republican Senatorial Committee (NRSC) had violated the FECA by acting as the agent of state republican parties in order to make their allotted co-ordinated expenditures under section 441a(d)(3).<sup>49</sup>

The DSCC charged that rather than directing the NRSC to spend state money, as ordinary agency agreements might, the state parties were transferring their spending authority to the NRSC so that it might spend more of its *own* money than would otherwise be permitted by the FECA contribution limits. The FEC said that this was "placing form over substance."<sup>50</sup> It claimed that since 2 U.S.C. § 441a(a)(4) permits unlimited transfers of funds "between and among political committees which are national, state, district or local committees (including any subordinate committee thereof) of the same political party" there was no substantive difference between transferring spending authority from the states and transferring funds to them.<sup>51</sup>

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46. 2 U.S.C. § 441(a)(d)(3)(A)-(B) (1982).

47. See *supra* note 43 and accompanying text.

48. 454 U.S. 27 (1981), *rev'g* 660 F.2d 773 (D.C. Cir. 1980).

49. *Democratic Senatorial Campaign Comm. v. FEC*, 660 F.2d 773, 776 (D.C. Cir. 1980).

50. *Id.* at 781.

51. Federal Election Commission Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 11, *Democratic Senatorial Campaign Comm. v. FEC*, No. 80-1903 (D.D.C. Aug. 18, 1980).

The dispute began in 1978 when several republican state committees signed agency agreements with the NRSC which resulted in two complaints with FEC<sup>52</sup> after the NRSC spent \$2,599,290 in 1978 senate campaigns as agent for the Republican National Committee (RNC) and \$579,974 as agent for various state parties.<sup>53</sup> The Democratic National Committee (DNC) had previously filed a complaint challenging the 1976 agency agreement between the RNC and NRSC, but later withdrew it and made a similar arrangement with DSCC to make its section 441a(d)(3) expenditures.<sup>54</sup> Both of the 1978 complaints were dismissed after review by the FEC, as was a third complaint filed by the DSCC on May 9, 1980.<sup>55</sup> In response to this third dismissal, the DSCC filed a petition for review with the United States District Court of the District of Columbia on July 30, 1980 under 2 U.S.C. § 437(8)(A), asserting that the agency agreements between the state committees and the NRSC were improper.<sup>56</sup>

After cross motions for summary judgment and oral argument, the district court found in favor of the FEC. Its ruling was not on the merits, but on the ground that the relevant question was one of deference due an agency in the administration of its statute. Unless the FEC's determination was arbitrary, capricious or not in accordance with the law, this deference required that its decisions be sustained.<sup>57</sup>

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52. National Comm. for an Effective Congress v. National Republican Senatorial Comm., FEC Matter under Review No. 780 (1978); Friends of Stewart Comm. v. National Republican Senatorial Comm., FEC Matter under Review No. 820 (1978).

53. Federal Election Commission Reports on Financial Activity, 1977-78, Final Report — Party and Non-Party Political Committees at 127. National 441(d)(3) expenditures by the Democratic Party for the 1977-78 election cycle were only \$68,822 and state expenditures were \$329,765. *Id.* at 125.

54. The national committee's assignment of its co-ordinated expenditure limits to a congressional campaign committee is not surprising when one understands the different historical roles of the two committees. The major parties' national committees have generally focused on presidential politics with at best weak and informal ties to Congress. D. IPPOLITO & T. WALKER, *POLITICAL PARTIES, INTEREST GROUPS, AND PUBLIC POLICY: GROUP INFLUENCE IN AMERICAN POLITICS* 67, 72-73 (1980). Congressional campaign committees were established by both parties in 1866 to help their members get re-elected. A. RANNEY, *CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA* 17 (1975). Thus they are the more logical party units to make co-ordinated expenditures for congressional candidates.

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56. FEDERAL ELECTION COMM., *ELECTION CASE LAW* 55-56 (1981).

57. *Id.* at 56.

A three-judge appeals court heard argument less than a month later and on October 9, 1980, two of the judges decided otherwise. Stating that "we deal in this case, not with a discretionary exercise of Commission power, but with an interpretation of a federal statute,"<sup>58</sup> it justified its de novo review on the grounds that the Commission had presented no reasoned explanation of its decision.<sup>59</sup> The court found that the FEC General Counsel's report of previous complaints about the agency agreements which formed the basis of its ruling lacked consistency.<sup>60</sup> Thus the circuit court concluded that "we must decide for ourselves whether the action of the Commission was 'contrary to law.'"<sup>61</sup>

It concluded that the plain language of section 441a(d)(3) precludes agency agreements between state committees and the NRSC because the NRSC was not in fact an agent but a principal which raises and spends its money as it sees fit.<sup>62</sup> Quoting from the legislative history, the circuit court noted that Congress had had ample opportunity to indicate whether the spending authority of the state and national committees could be shared with the congressional campaign committees and had not done so. It rejected the contention of the NRSC that it itself was a national committee by asserting that it was not the national committee referred to in the definitions section, section 431, of the FECA, and concluded that party organizations could not rewrite section 441a(d)(3) "to displace state committees and substitute congressional campaign committees in their stead."<sup>63</sup>

The Supreme Court reversed unanimously without reaching any of the constitutional issues raised. Instead it held that section 441a(d)(3) "does not expressly or by necessary implication foreclose the agency agreements."<sup>64</sup> Its reading of the legislative history of the statute was that either interpretation was permissible, therefore, the Commission's conclusion should be deferred

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58. *Democratic Senatorial Campaign Comm. v. FEC*, 660 F.2d 773, 776 (D.C. Cir. 1980).

59. *Id.* at 777.

60. *Id.*

61. *Id.* at 778.

62. *Id.* at 779.

63. *Id.* at 782 n.37.

64. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

to. It then added that the "Commission's interpretation is not inconsistent with any discernible purpose of the Act."<sup>65</sup> Because the agency agreements did not permit the "expenditure of a single additional dollar,"<sup>66</sup> they had no effect on corruption or the prevention of corruption.

This assertion reinforces the rationale of *Buckley v. Valeo* that prevention of corruption or the appearance of corruption is the only state interest sufficiently compelling to permit a limitation of first amendment rights. The implication had been challenged by the DSCC in its brief when it argued that if a limitation on agency agreements could be shown to be a burden on the NRSC's first amendment rights, that burden would be justified by the fundamental state interest of fostering "active participation by State and local political parties in the federal elective process."<sup>67</sup> This assertion was dismissed by the Court because "none of the limited legislative history . . . supports this view."<sup>68</sup>

## V. State and Local Political Parties in the Federal Elective Process

Fostering the active participation of state and local political parties in the federal elective process may not be a compelling state interest in the eyes of the Supreme Court, but it has been a compelling concern of Congress. After the 1976 election, political party leaders complained that the FECA almost completely eliminated state and local party organizations from the presidential campaign. The restrictions on spending imposed by the Presidential Election Campaign Fund Act precluded local party organizations from engaging in the extensive fund raising activities of previous campaigns, and consequently deprived them of a major portion of their campaign activity. These limitations also discouraged the national parties from spending money on the traditional tools of grass-roots politics such as buttons and bumper stickers in favor of the more cost effective media

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65. *Id.* at 41.

66. *Id.*

67. Brief for Respondent at 38-39, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

68. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 41-42 & n.22.

advertising.<sup>69</sup>

Consequently, in 1979 the FECA was amended to exempt from the definition of contributions and expenditures the purchase of these traditional campaign materials for volunteer activities in general elections,<sup>70</sup> and the conduct of voter registration and get-out-the-vote drives for presidential candidates.<sup>71</sup> The original section of the FECA has permitted slate cards and sample ballots.<sup>72</sup> If parties had been permitted to make independent expenditures, these amendments might not have been necessary. Parties could have bought an unlimited amount of grassroots campaign materials as long as they did not consult with or duplicate those put out by the candidate (which are deemed contributions under 11 C.F.R. section 109.1(d)(1)).<sup>73</sup> They could only have engaged in voter drives or other activities for presidential candidates up to a cost of \$1000 prior to 1980.<sup>74</sup> But since the United States District Court of the District of Columbia ruled in 1980 that the \$1000 limitation under section 9012(f) on independent expenditures by unauthorized (non-party) political committees in presidential campaigns was unconstitutional, that is no longer true.<sup>75</sup> Since that holding, left standing by the Supreme Court in a 4 to 4 split vote,<sup>76</sup> non-party committees can make unlimited expenditures in support of presidential candidates as long as they are done independently of the campaign, but local committees of a candidate's own party, no matter how remote they are from the campaign itself, can spend very little. Non-party committees can also make expenditures in primaries.<sup>77</sup> Parties are limited to contributions, and volunteer campaign materials are not exempted from these limits.<sup>78</sup>

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69. 35 CONG. QUARTERLY ALMANAC 559 (1979).

70. 2 U.S.C. § 431(8)(B)(x) (1982) (contribution exemption); *id.* § 431(9)(B)(viii) (expenditure exemption).

71. *Id.* § 431(8)(B)(xii) (contribution exemption); *see also id.* § 431(9)(B)(ix) (expenditure exemption). These exemptions apply to presidential and vice presidential candidates only.

72. *Id.* §§ 431(8)(b)(v), (9)(b)(vi).

73. 11 C.F.R. § 109.1(d)(1) (1983).

74. 26 U.S.C. § 9012(f) (1976).

75. *Common Cause v. Schmitt*, 512 F. Supp. 489, 501 (D.D.C. 1980).

76. *Common Cause v. Schmitt*, 455 U.S. 129 (1982) (*per curiam*).

77. 2 U.S.C. § 441a(d) (1982); *see supra* text accompanying note 13.

78. *See supra* notes 4-8 and accompanying text. *See infra* notes 81-82 and accompanying text.



Paradoxically, despite the implementation of the 1979 amendments to enhance participation by local and state parties, this legislation has decreased the ability of local and state parties to initiate in presidential participate campaigns. This was made particularly clear in Advisory Opinion 1980-87.<sup>79</sup> The Pelham Republican Town Committee wanted to engage in political advertising for the republican candidates for president and vice president for the 1980 general election. Their proposed expenditures would have been less than \$1000 but would have included direct mail and local newspaper advertising, which are excluded from the exemptions.<sup>80</sup> The FEC advised:

Prior to the enactment of the 1979 amendments to the Act and the promulgation of regulations implementing those amendments, the described expenditure (not exceeding \$1000) by the town committee could have been made in support of the party's nominees for President and Vice President without regard to the limits of 2 U.S.C. 441a(d). . . . However, the 1979 amendments to the Act and revised (as of April 1, 1980) Commission regulations which clearly delineate the role of subordinate committees of a state party, as defined in 11 CFR 100.14, with regard to Federal elections no longer provide an exemption for such an expenditure by a subordinate committee.<sup>81</sup>

Consequently, to utilize direct mail, advertising or a general public communication for a presidential or vice presidential candidate a local party committee has to be designated as an agent of the national committee and the expenditure has to be reported by the national committee under its co-ordinated expenditure limitation. On the other hand, if a local committee wants to distribute the traditional grass-roots materials that are exempted or conduct a voter drive, it cannot do so with materials given it by the national committee, or funds donated by the national committee for that purpose.<sup>82</sup> Anything emanating from the national committee is a co-ordinated expenditure and is counted against those limits.<sup>83</sup>

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79. 87 Op. F.E.C. (1980).

80. *Id.*

81. *Id.*

82. 11 C.F.R. §§ 100.7(b)(15), .8(b)(16) (1982).

83. 2 U.S.C. § 441a(d) (1976). *See also supra* text accompanying notes 12-15 (discussing the statutorily undefined co-ordinated expenditure).

Since the national committee is unlikely to supply campaign materials for local use when the money can be more effectively used for media, this regulation does not work to enhance grass-roots participation in the democratic process. Furthermore, the combination of regulations, which limit local committees to volunteer campaign materials and also require that the local committees raise the money for them is not likely to cement the relationship between the national and local party committees. The result of these regulations is to force them to operate as totally independent bodies.

This effect is exacerbated by the regulations<sup>84</sup> on voter drives. The exemption for both voter registration and get-out-the-vote efforts is limited to the national ticket in the general election.<sup>85</sup> If a voter drive refers to another federal candidate in more than an incidental fashion, the prorated cost is not exempt, but must be counted against either the contribution or coordinated expenditure limits.<sup>86</sup> Since these limits are state-wide,<sup>87</sup> their use is controlled by the state party, which is not required to share with local party committees. Because many states have signed agency agreements with their party's congressional campaign committees,<sup>88</sup> local committees may have to get authorization from a national committee to run voter drives for their local federal candidates — an authorization not required for presidential candidates.<sup>89</sup>

Alternatively, their state party could agree to count the cost against the state's contribution limit. The limits on contributions from state and local party committees to a candidate are the same as from any other political committee: \$5000 per election for a multicandidate committee, and \$1000 otherwise.<sup>90</sup> However, with a very restricted exception<sup>91</sup> the limit is state-

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84. See *supra* text accompanying notes 70-71.

85. *Id.*

86. 2 U.S.C. § 431(8)(B)(xii)(3) (1982) (contribution); *id.* § 431(9)(B)(ix)(3) (expenditure).

87. *Id.*

88. See *supra* text accompanying notes 49-54.

89. *Id.* See also 2 U.S.C. § 431a(d) (1982). The Act contains no corresponding section for presidential candidates.

90. 2 U.S.C. § 441a(2) (1982) (multicandidate \$5000 limit); *id.* § 441a(5)(C)(ii) (\$1000 limit).

91. 11 C.F.R. § 110.3(b)(2)(ii)(A)-(B) (1983).

wide. That is, a state party committee and all of its affiliated committees share one contribution limit, and all local committees are presumed to be affiliated. This interpretation is *in the regulations*, not in the Act itself.<sup>92</sup> The regulations also establish a joint contribution limit for a party's national committee and any political committees "established, financed, maintained or controlled" by it but specifically exempt the House campaign committee.<sup>93</sup> Since the national committee and the Senate campaign committee share the much larger contribution limit of \$17,500, the consequence is that Senate candidates can receive three and one half times more from their national party than from the state party whose nominee they are, and House candidates can receive twice as much.<sup>94</sup>

An exception is made for local party committees that are independent of the state party committee. These committees can have separate contribution limits. But the requirements are so stringent that it is unlikely that many exist. To be independent a local party committee not only must not be established by the state party, but cannot have received "funds from any other political committee established, financed, maintained, or controlled by any party unit" or have made any contributions in co-operation or consultation with any other party unit.<sup>95</sup> In other words, it can be party committee in name only, without even the rights of non-party political committees to receive contributions from a party and to make independent expenditures.

Not only can the national party committees give more to candidates, but they can receive more from individuals and multicandidate committees. By statute, the state and local party committees can receive \$5000 per year, and national party committees can receive up to \$20,000 from individuals and \$15,000 from multicandidate committees per year.<sup>96</sup> However, regulations and advisory opinions have served to significantly reduce the amounts that can be given nationally. In several advisory opinions, the FEC has ruled that not only do the state parties

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92. *Id.* § 110.3(b)(2)(ii).

93. *Id.* §§ 110.3(b)(1)(i), .3(b)(2)(i).

94. 2 U.S.C. § 441a(h) (1982) (Senate limit); *id.* § 441(d)(3)(B) (House limit).

95. 11 C.F.R. § 110.3(b)(2)(ii) (1983).

96. 2 U.S.C. § 441a(1)-(2) (1982).

and their local affiliates share a combined limit on contributions made but on contributions received.<sup>97</sup> The regulations make the opposite "clarification" for the national committees. A party's national committee, Senate and House campaign committees can each receive the maximum amount a contributor can give to national committees.<sup>98</sup> These clarifications were not in the final version issued on August 25, 1976.<sup>99</sup> The FEC's official "Explanation and Justification of Regulations" released the following April contains language which implies that the additional wording was a result of congressional pressure.

The consequence of these regulations is that the treatment of state parties very much resembles that of non-party committees, except for the exemptions of certain campaign materials and the prohibition on independent expenditures. In effect, the many party committees in a state are one large committee as far as the federal election laws are concerned. This is exactly how the Act treats non-party committees with a diverse and complex organization.<sup>100</sup> The treatment of the national party committees is much more favorable. They are independent units for the purpose of regulating receipts and disbursements, and the limits on both of these are higher than the limits for state party committee and non-party committees. Yet national party committees are treated as affiliated units for the purpose of agency agreements and transfers.<sup>101</sup>

Unlimited intra-party transfers was a privilege given to parties in the 1976 revision of the FECA<sup>102</sup> but the provision has meaning only insofar as funds are transferred between the state

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97. 104 Op. F.E.C. (1976); 39 Op. F.E.C. (1978); 68 Op. F.E.C. (1979); 77 Op. F.E.C. (1979).

98. 11 C.F.R. §§ 110.1(b)(2)(i), .2(a)(ii) (1983).

99. 41 Fed. Reg. 35948 (1976) (codified at 11 C.F.R. § 110.1 (1983)).

100. 11 C.F.R. § 110.3 (1983); 2 U.S.C. § 441a(a)(4)-(5) (1982). There is one difference. Section 441a(a)(4) provides that, unlike local parties and non-party committees, a state party does not have to contribute to five candidates to qualify as a multicandidate committee. But it does have to have been registered for six months and have received contributions from over 50 persons. Prior to the 1976 amendments, local units of labor organizations, corporations, etc. could set up separate contribution limits. The "anti-proliferation" amendments in 1976 reduced the ability of such special interest groups to contribute to candidates they supported but they could still make independent expenditures.

101. See *infra* note 103 and accompanying text.

102. 2 U.S.C. § 441a(a)(4) (1982).

and national committees or among the national committees. Because the state and local party committees share joint contribution and co-ordinated expenditure limits, funds transferred between them have no more of an impact than funds transferred between units of non-party committees. The ability of funds to flow to party units which may have unused contribution or expenditure limits make them a potent source of party power. If the national committees shared a single contribution limit with their state committees or if agency agreements had been prohibited, the transfer provisions would have much less meaning.

The democrats realized how potent this combination was when the FECA was undergoing further amendments in 1978. In a move that surprised the Republican Party, the House Administration Committee reported a bill which would lower the contribution and expenditure limits of parties and other political committees, restrict the unlimited transfers between party committees, and combine the separate limits of the national and congressional committees. The republicans, expecting a bill similar to that passed by the Senate in 1977 which made relatively innocuous changes in the FECA, were outraged.<sup>103</sup> After a barrage of criticism that the bill was an attempt to penalize the Republican Party for its greater fund-raising ability, the bill was defeated with a vote on a technical rule.<sup>104</sup> The democrats made no subsequent legislative attempts to limit party fund raising ability, but two years later filed their objection to the agency agreements in district court.<sup>105</sup> When the Supreme Court upheld these agreements in *FEC v. Democratic Senatorial Campaign Committee*, it cited the 1978 "failure to adopt a proposed amendment" as an inference that Congress had never intended to preclude agency agreements.<sup>106</sup>

The question of agency agreements would never have arisen if Senator Brock's proposed amendment<sup>107</sup> to the 1974 Act had

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103. 34 CONGRESSIONAL QUARTERLY ALMANAC 769 (1978).

104. 124 CONG. REC. 7879-80 (1978).

105. *Democratic Senatorial Campaign Comm. v. FEC*, No. 80-01903 (D.D.C. Aug. 28, 1980) (petition filed July 30, 1980). The FEC's motion for summary judgment was granted on August 28, 1980. *Democratic Senatorial Campaign Comm. v. FEC*, 660 F.2d 773, 776 (1980).

106. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 35-36 (1981).

107. 120 CONG. REC. 9549 (1974) (proposed amendment no. 1102 to FECA).

been adopted. Noting that the congressional campaign committees were largely ignored in the expenditure and contribution allocations of that year's amendments, he proposed that they be exempted altogether from the Act's expenditure limits. The Senate initially adopted the amendment, but reversed itself five days later.<sup>108</sup> This vote was certainly as important as the Supreme Court's disregard of the party expenditure limits in *Buckley v. Valeo* in creating the current structure of the Act.

Nonetheless, in *FEC v. Democratic Senatorial Campaign Committee*, the Court virtually invited the congressional campaign committees to choose between making coordinated expenditures as agents of the national and state committees, and independent expenditures as ordinary political committees. In footnote twenty it noted that "if congressional campaign committees were not considered as part of the national party, their ability to make independent expenditures would seem to escape any limitation prescribed by the Act."<sup>109</sup>

While the NRSC in *FEC v. Democratic Senatorial Campaign Committee* made much of being a national committee in its briefs,<sup>110</sup> it is not evident from *Buckley* that such a choice is necessary. Indeed there is nothing in *Buckley* which sanctions the prohibition on independent expenditures by party committees. The only other reference to parties beyond those in footnotes sixty-six and sixty-seven, discussed earlier, is one where the Court compares the expenditure limitations on parties to those on campaign organizations as providing "substantially greater room for discussion and debate."<sup>111</sup> Since the Court later discussed the limitations on campaign organizations out of existence, it might well have done the same for parties.

## VI. *Buckley* Criteria as Applied to Political Party

Nonetheless it is possible to ask if the criteria developed for justifying limitations on contributions are applicable to parties.

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108. 120 CONG. REC. 9551 (1974) (Brock Amendment adopted Apr. 3, 1974); 120 Cong. 10,062-64 (1974) (Clark Amendment, to repeal Brock Amendment, adopted Apr. 8, 1974).

109. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 40 (1981).

110. Brief of Petitioner, National Republican Senatorial Comm. at 13-14, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

111. *Buckley v. Valeo*, 424 U.S. 1, 20 (1976).

The only compelling state interest the Court acknowledged as legitimate to restrict financial contributions was "the actuality and appearance of corruption."<sup>112</sup> It said this interest was sufficient to overcome first amendment rights when applied to contributions but not to independent expenditures for three reasons: 1) "The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."<sup>113</sup> 2) While the "Act's contribution ceilings thus limit one important means of associating with a candidate or committee, [they] leave the contributor free to become a member of any political association and assist personally in the association's efforts on behalf of candidates."<sup>114</sup> 3) "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."<sup>115</sup>

These justifications will be examined in regard to their potential application to a political party. First, symbolic expression of support for a candidate may be adequate for an individual or a non-party political association but it is a hollow shell for a major political party. The Democratic and Republican Parties in the United States exist only to elect their candidates. In so far as they promote issues they do it through their candidates. Their lack of a cohesive ideological message, their acceptance of any candidate who chooses to bear their label and their focus on winning elections make it clear that the quantity of the communication does increase with the quantity of the contribution. To restrict their ability to support their candidates is to restrict the only form of political expression that has any meaning to a major political party.

Second, independent expenditures provide individuals and non-party committees with an alternative form of political expression to contributions. Under current FEC regulations, this

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112. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

113. *Id.* at 21.

114. *Id.* at 22.

115. *Id.* at 47.

alternative is not available to political parties.<sup>116</sup> Only individuals can personally assist a candidate. Since a party is not a tangible person its assistance necessarily takes on a material form. Recruiting volunteers is material assistance, as is donating the time of paid staff members. Like associations and candidates, parties can "aggregate large sums of money to promote effective advocacy."<sup>117</sup> But unlike them it cannot spend all of that money to advocate the election of its candidates. If the limitation on independent expenditures violates "the original basis for the recognition of First Amendment protection of the freedom of association"<sup>118</sup> by precluding "most associations from effectively amplifying the voice of their adherents"<sup>119</sup> surely this is as true for party as for non-party associations.

Third, while the FEC's claim that parties are incapable of making independent expenditures undermines the Court's rationale for limiting contributions, it does focus more attention on the Court's concern with *quid pro quos*. If a party is incapable of acting independently from its candidates,<sup>120</sup> is there necessarily the danger of corruption or the appearance of corruption that there is for individuals and non-party associations? The answer must begin with a definition of corruption. Unfortunately, there is no definition of corruption available in the federal cases on election laws — even those on the original Corrupt Practices Acts which were superseded by the FECA — to provide a standard for such an analysis.<sup>121</sup> Ironically, the Court has rested the constitutionality of a major piece of political legislation on an undefined term.

Court definitions of corruption in other contexts are not much help. They generally appear in decisions involving fraud, jury tampering or on more general obstructions of justice, and usually involve an "evil or impure motive."<sup>122</sup> *Black's Law Dic-*

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116. 11 C.F.R. § 110.7(b)(4) (1983).

117. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976).

118. *Id.* (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

119. *Id.*

120. See *supra* note 49 and accompanying text.

121. Although the federal statute defining bribery uses "corruptly," 18 U.S.C. § 201(c) (1976), it does not define "corruptly." See generally Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451 (1978).

122. See, e.g., *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (mail fraud); *United States v. Ogle*, 613 F.2d 233, 242 (10th Cir. 1979) (jury tampering); *United*



*tionary* defines corruption as

an act done with an intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.<sup>123</sup>

This definition has some meaning in the non-electoral context where an official's salary is paid by the entity to whom loyalty is owed. Money or things of value received from others are automatically suspect.

In the electoral context, money and things of value from others are necessary to get the job. In order to get them, an elected official looks to those in whose interest the office holder generally acts. The intent of most political activists and political associations is to influence the official acts of elected officials. In this effort the distinction between "influence" and "undue influence" is not very clear.

Any attempt to make this distinction has both an empirical and an analytical component. Empirically, if one could define corruption one might be able to ascertain if parties have engaged in the practice. But even without such a definition, one can ask about appearance. Historically, there certainly has been a belief that parties were capable of corruption. Most of the state laws regulating parties passed at the turn of the century were intended to eliminate perceived corruption. This was done through the creation of the civil service to deprive parties of patronage jobs, and direct primaries to deprive them of their control over nomination.<sup>124</sup> However, the FECA only looks to the corrupting power of money, and it is not clear that parties have used money to control their elected officials, perhaps because incumbency creates its own power. In fact, a major purpose behind the original federal restriction on corporate contributions was not to keep corporations from controlling candidates, but to keep parties from assessing corporations for campaign contributions.<sup>125</sup>

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*States v. Haldeman*, 559 F.2d 31, 115 n.229 (D.C. Cir. 1976) (obstruction of justice).

123. BLACK'S LAW DICTIONARY 311 (5th ed. 1979).

124. A. RANNEY, *supra* note 55, at 121-31.

125. E. SIKES, STATE AND FEDERAL CORRUPT PRACTICES LEGISLATION 188-90 (1928).

Currently, there does not appear to be a widespread belief that parties exercise undue influence over their candidates. As Representative Quillen (R. Tenn.) stated in the 1978 debate over the proposed amendments which would further restrict the ability of parties to make contributions and expenditures,<sup>126</sup>

[i]f it is reform we are after, why reduce the ability of the political parties to support its candidates? How can the Republican Party unduly influence a Republican candidate? How can the Democratic Party unduly influence a Democratic candidate? On what basis should the ability of the two political parties to support their candidates be prevented?<sup>127</sup>

This was not challenged. Even the Supreme Court appears to be operating under the same assumption. In *FEC v. Democratic Senatorial Campaign Committee*,<sup>128</sup> where the Court decided unanimously that agency agreements did not promote the appearance or reality of corruption, it stated approvingly that “[a]gency agreements may permit all party committees to benefit from fundraising, media expertise, and economies of scale. In turn, effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party.”<sup>129</sup> One does not encourage loyalty and responsiveness to a provider of campaign contributions if the relationship is perceived as potentially corrupting.

Analytically, one should ask what parties would want from candidates in exchange for financial support. Perhaps the parties want nothing. It benefits all party members to have many people bearing the party label in Congress because the majority party has a great deal more power than the minority. Even if parties were to ask for a *quid pro quo* vote in exchange for campaign contributions, is this considered corruption? In parliamentary political systems, voting the way one is told is usually a requirement for bearing the party's label, let alone receiving campaign contributions. Among political scientists this is called the “responsible parties model” and there is extensive literature urging

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126. See *supra* notes 104-05 and accompanying text.

127. 124 CONG. REC. 7872 (1978).

128. 454 U.S. 27 (1981).

129. *Id.* at 42.

its adoption in the United States.<sup>130</sup>

Since political parties would not exist without candidates, at least not as parties, one might also ask whether it is useful to distinguish them from their candidates. The FEC regulations imply that this cannot be done.<sup>131</sup> If a party is so tied to its candidate that it cannot act independently in support of them, it would follow that to restrain a party's support is equivalent to limiting the candidate's ability to speak for himself or herself. If a party speaks through its candidates, to deprive it of supporting those candidates is to violate the first amendment's proscription "upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy."<sup>132</sup>

One might also take the Court's comparison of parties with campaign organizations a step further. It stated that corruption as a compelling state interest does not apply to campaign expenditures because the danger of candidate dependence on large contributions is pre-empted by those limitations.<sup>133</sup> Since parties do not create their own money — or earn it — but must get it under the same conditions as campaigns (albeit with a larger limit), it would seem that unearmarked expenditures on behalf of its own candidates would be similarly untainted. Parties would act as a buffer between candidates and supporters, serving to mute their individual influence. They are not likely to support more than one candidate for a given general election, so there is little chance of their using contributions to insure that the winner is always indebted to them. Instead, insofar as a candidate is representing its party, the party is promoting itself.

By now it should be evident that if corruption is the sole basis for restricting the use of campaign money, the application of the FECA to political parties is anomalous. If parties can corrupt — however defined — their candidates, then why treat them differently from other multicandidate committees? Higher contribution or co-ordinated expenditure limits might pass a rational basis test, since that test requires a minimal threshold,

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130. Report of the Committee on Political Parties of the American Political Science Association, *Toward a More Responsible Two-Party System* (1950).

131. See *supra* text accompanying note 27.

132. *Buckley v. Valeo*, 424 U.S. at 54.

133. *Id.* at 58.

but the prohibition on independent expenditures would not pass first amendment scrutiny. However, if parties cannot corrupt their own candidates there is no constitutional basis for restricting independent expenditures or contributions. If a party's only effective means of political expression is through its candidates, then the "First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."<sup>134</sup>

#### VII. Application of FECA to Political Party: Unfinished Business

Whether or not the Supreme Court ever takes up the unfinished business of applying the FECA in light of *Buckley* to political parties, one might still speculate on the consequences. If restraints on party support of their candidates were held unconstitutional the effect would most likely be different for each major party, and for each level of party organization.

While congressional rhetoric has not distinguished between national, state and local parties, congressional action has.<sup>135</sup> The national party committees are distinctly favored. The amount of money that can be donated to them is much greater than for the state parties, as is the amount that they can spend in candidate support. The treatment of state and local committees as one committee for purposes of receipts, disbursements, and in some cases reporting, discourages independent action by local committees, historically the workhorses of the party system. The treatment of the national committees as independent for purposes of receipts and disbursements, and interrelated for purposes of fund transfers and agency agreements, facilitates their access to resources and independent action.

Furthermore, the definitions of contributions and expenditures, expressed in the FECA, the regulations and the Advisory Opinions, compel fragmentation of the aid local committees can give federal candidates by type of office, election, and kind of support. The paperwork requirements of reporting and the FEC enforcement procedures, not discussed, are more burdensome<sup>136</sup>

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134. *Id.* at 57.

135. See *supra* text accompanying notes 96-102.

136. See generally Note, *The Federal Election Commission, the First Amendment*,

on local parties than on national committees.

As described earlier, the combined state-and-local party committee is treated by the FECA virtually the same as a non-party political committee, except that it can make co-ordinated expenditures and it cannot make independent expenditures.<sup>137</sup> Since the former expenditures are largely signed away through agency agreements, at least for the Republican Party, and are not applicable to the national ticket, the state-and-local party is in reality in a much weaker position to provide support for its candidates than non-party committees. Thus, removal of the independent expenditure limits would put it on the same footing as other multicandidate committees. However, since the agency agreements seem to be a consequence of the state party's inadequate fundraising ability, such removal might not have a major effect on financial support unless contribution limits to parties were also raised, or the state and local committees had separate contribution limits. Fragmentation, however, might be reduced by making it easier for local party committees to provide other kinds of support such as local advertising for presidential candidates, or combined get-out-the-vote drives which "pull" for other federal candidates without worrying about authorization for use of a co-ordinated expenditure limit. Parties might not be able to use independent expenditures as effectively as non-party committees for "negative" campaigns<sup>138</sup> since their identification with their own candidates would taint them in ways that non-party committees do not. Furthermore, it is unlikely that state-and-local party committees would ever be able to raise the funds of the more professional non-party committees because they are less able to reach a national constituency and lack the appeal of a single emotional issue.

Whether the removal of the prohibition on independent expenditures for the national committee would increase their campaign strength even more depends on their fund raising ability and their ability to meet the FEC's stringent criteria for inde-

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and *Due Process*, 89 YALE L.J. 1199 (1980) (discussing the inherent burdens in FEC requirements).

137. See *supra* text accompanying notes 14-16.

138. Negative campaign funding is a common usage for describing money spent advocating the defeat of an opponent, rather than the positive promotion of the candidate. See, e.g., 8 F.E.C. Rec. 7 (No. 3, Mar. 1982).

pendence. If any national committee will benefit, it will be the Republican Party since they raised four times the money of the Democratic Party. The national committees' sources of strength are the higher limits on co-ordinated expenditures, the much higher limits on contributions to them, and the fact that there are three national party committees to which one can contribute, while each state-and-local party is the equivalent to one. The NRSC is quite aware of the beneficial effect of the FECA. Its literature states:

The Committee's early low-key existence was challenged by the 1974 revisions of the Federal Campaign Laws. Most important were the new restrictions limiting an individual's contribution to \$1,000 per federal campaign, but up to the maximum of \$25,000. The need for a more active Senate campaign committee, to make use of the money it could raise, was made clear by the difficulty individual campaigns had in fundraising, and by the large number of Democratic incumbents the Republicans needed to challenge to gain control.

The 1974 Campaign Act . . . allowed for expenditures on behalf of each Senate candidate up to four cents per eligible voter in his or her state. This "four cent money" breaks down to two cents which state party organizations may spend on behalf of their Senate candidates and two cents which the national party organization may spend. In most states, the state parties assign the right to spend their two cents to the NRSC. . . . This total "four cent" expenditure can range from \$90,000 in less populous states to \$1.2 million in California, the most populous state.<sup>139</sup>

As long as this amount of money continues to be spendable by the national party committees — and they can raise it — they will be major determiners of campaign strength regardless of independent expenditures. Instead of just permitting parties independent expenditures if all restrictions were to be removed, the balance might shift. Candidates might have a choice of receiving party money as contributions to be spent as they prefer, rather than on their behalf, and local state party committees would not have any restrictions on their ability to support their candidates. They would not have to worry about allocation, contribution and expenditure limits, refraining from activities which

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139. Leaflet, NRSC, *Origins of the NRSC*.

violate the FECA, engaging in fundraising events (which are also party builders) or competing with their state and local party committees for a given individual's contribution.

This kind of shift would be more likely to favor the democrats than the republicans because it would remove restraints from that party level where the democrats are strongest. For many decades the Democratic Party had developed an effective organization only during the immediacy of a campaign year and then mostly confined to the state and local level.<sup>140</sup> The most powerful democratic organizations have traditionally been in major cities while the national party has often been no more than a common label for highly contentious components. The Republican Party developed a substantial national organization which effectively asserted national control while the Democratic Party was building local machines. As many commentators have noted<sup>141</sup> increased centralization and nationalization has been a trend in both parties for the last thirty years. This trend has shifted the resources necessary for electoral success from strong local organizations to professional expertise and fund raising ability — a shift in which the Republican Party has a head start. Removing restraints from state and local party expenditures and increasing the contribution limits to them might counterbalance this trend — or at least slow it down. This would benefit the democrats.

Reform has many unintended consequences, and those of the decade's revisions of the federal election laws are still making themselves felt. The impact of these laws on political parties has many anomalies. The business of resolving them is not yet finished.

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140. Kennedy School of Government, Institute of Politics, Campaign Finance Study Group. Harvard University. *An Analysis of the Impact of the Federal Election Campaign Act, 1972-1978*. Final Report to the Committee on House Administration of the U.S. House of Representatives at 84 (1979).

141. X. Kayden, *The Nationalizing of the Party System*, in *PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS* 257 (M. Malbin ed. 1980).