PANEL DISCUSSION: EFFECTS OF FEDERAL ELECTION REGULATIONS ON THE ELECTORAL PROCESS

PAUL CHEVIGNY, MODERATOR

OPENING REMARKS OF PAUL CHEVIGNY: I am going to outline some issues that have been created by the law as shaped by *Buckley v. Valeo.** After our speakers briefly discuss some issues which may not have been covered earlier, the floor will be open for questions concerning what has been said here or what was said at the presentation of the papers.

Some of the basic problems under *Buckley v. Valeo* are these: The Federal Election Campaign Act,** the version that came before the Supreme Court, contained limitations with respect to contributions to federal candidates, spending limits, and independent expenditures. The contribution limits were upheld by the Supreme Court.

The law differentiated between the size of the contribution that was permissible from a political action committee (PAC), that is, from an association of persons, and a contribution from an individual. The amount allowed from a PAC was five times greater than that from an individual. That led to or permitted an explosion of PAC contributions. One problem under the definition of a contribution was how to figure out what constituted a contribution to the campaign of the candidate—whether a loan or the delivery of an object, for example, constituted a contribution. Those are issues that will be discussed here.

At the same time, the Supreme Court in *Buckley* struck down the spending limits for a campaign, whether it be in the form of the candidate's personal fortune or contributions from others. The Court also struck down the limits on the independent expenditure, that is, parallel expenditures on independent issues during the campaign. The combination of permitting limitless campaign expenditures while limiting contributions was one of the things which made a great opening for the growth of PAC's. They were willing to contribute to several different candidates up to the legal limit, and to make independent parallel expenditures.

This combination of regulations leaves open questions as to what is really an independent expenditure and what is a coordinated expenditure. There are also issues concerning the effect that this growth of independent and PAC expenditures has upon the traditional but ever-weakening grip of the party, its candidates, and its policies.

Lastly, there was a decision made by the Court with respect to the public funding for presidential campaigns. Mr. David Ifshin spoke this

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* 424 U.S. 1 (1976).

** 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980).

morning about the effect of this expenditure of public money upon the structure of grassroots party organizations, and there may be some more discussion of that this afternoon. The plaintiffs in *Buckley* argued that the structure of the public funding is oriented primarily toward the major party candidates. The Court held that this does not discriminate in the legal sense against the minor party, the new party, and independent candidates. How the Supreme Court reached this decision, and the effects of this holding, are other matters for discussion this afternoon.

The first panelist is Carol Mast Beach. Ms. Beach is a lawyer, and has researched the tax aspects of political activity for the election law study written by Thomas Schwarz, who spoke this morning. She also served as a research assistant to the National Unity Campaign for John Anderson during this past campaign.

OPENING REMARKS OF CAROL MAST BEACH: This year, perhaps as a direct result of *Buckley,* some of the strongest voices heard in the campaign were those of the independent spenders, the PACs, the fat cats, and the Jerry Falwells. *Buckley*, however, had nothing to say about another very strong voice and one which has the potential for far greater strength in future campaigns — the voice of the artist.

An advisory opinion issued in 1979 specified that when an artist donates a piece of work to a candidate, the amount spent out of personal funds to create that piece of work, in other words, the materials, is the total extent of the contribution by the artist. If an artist like Andy Warhol produces a print and donates it to Carter or Kennedy or whomever he pleases, the value of his contribution in the eyes of the Federal Election Commission (FEC) is only the value of the materials he used, not the value that the print would have on the marketplace. The services of the artist are viewed by the FEC as analogous to those of an entertainer at a fund-raising event and thus come within the "volunteer" exception of the Federal Election Campaign Act, which specifies that a contribution does not include the value of services provided without compensation by any individual who works as a volunteer on behalf of the candidate or political committee. This is why many regard the artist's donation of her own art as a loophole in the Act. Artists resist this interpretation, claiming that the FEC's decision is consistent with federal tax laws, which prevent an artist from deducting more than the value of the materials when donating work to museums. The obvious value to the political candidate on the receiving end of these donations lies in the resale value of the work. Because of the contribution limits established after *Buckley,* art works donated to the campaign can be sold for only one thousand dollars or twenty thousand dollars if sold by the party.

This year, the Democratic National Committee (DNC), President Carter, and Senator Kennedy were able to parlay contributions of art into three hundred thousand dollars, in addition to monetary donations to their

campaigns. Unfortunately, the "Anderson difference" was true to its name and proved not so lucrative. During the 1976 campaign, Carter and the DNC relied heavily on funds raised through rock concerts. Because a candidate can no longer receive matching funds for the full value of each ticket sold at such an event, this year the Democrats turned to print artists for help in raising funds. Jamie Wyeth, for example, donated a watercolor to the DNC which was sold for twelve thousand dollars after bids were taken over the phone.

The Carter people thought that the best approach they used this year was the solicitation of limited editions from six artists. Each artist, including Ansel Adams and Audrey Flack, donated an edition of 150 prints which were placed in portfolios and sold for two thousand dollars apiece. Ted Kennedy's campaign, faltering in the early spring and desperate for money, took the same approach but on a much bigger scale. Initially, Kennedy was the recipient of a forty-five thousand dollar watercolor by Jamie Wyeth, which was won by a syndicate of three Capitol Hill secretaries who pooled their funds to buy a five hundred dollar ticket to a fundraiser at the Senator's home. Later, however, the campaign organized the "Artists for Kennedy" project. Twenty-two artists donated lithographs and silk screens to the campaign. The artists included Andy Warhol, who donated 350 prints, Jamie Wyeth, who donated 300, Bob Rauschenberg, Leon Polksmith, Jack Youngerman, and Lowell Nesbitt. The prints were appraised, many below market value, in order to bring them within the contribution limits of the Act. They were then sold through direct mail, gallery showings, house parties, and media publicity. Although all the prints have not as yet been sold, sales have exceeded three hundred thousand dollars for the Kennedy effort. In addition to the sale, the pieces were used as collateral for a one hundred thousand dollar loan from Chemical Bank.

The advantages to the contributor who receives the art include the acquisition of an investment piece of art at below market price, and the added bonus of a federal tax credit for the contribution. Unfortunately, as I mentioned, John Anderson's National Unity Campaign did not fare as well. One reason is that the art solicited was not in multiples but in highly valued single originals. Another reason is that the Anderson-Lucey ticket did not have the status of a political party in the eyes of the FEC. They were thus unable to accept twenty thousand-dollar contributions. When the Campaign decided to go the art route, Arnold Glimsher, head of Pace Galleries, was asked to coordinate the project. Partly because he felt that the sale of single originals was superior to the sale of multiples, Glimsher contacted seven artists and solicited works valued at one hundred seventy thousand dollars. None of these was valued within the thousand dollar spending limit, however. The artists included Alex Neal, Jimmy Ernst, Isamu Noguchi, Tony Smith, Ernst Trober, Helen Frankenthaler and Louise Nevelson, one of whose contributions alone was valued at thirty thousand dollars. Glimsher had hoped that the Campaign could hold a lottery and sell one-thousand-

dollar tickets for a chance to win one of the pieces. Unfortunately, a little research done a little late revealed that such a project would violate both state gambling and federal mailing laws. The Campaign hoped at least to be able to use the work as collateral for bank loans, as Kennedy had done, but the banks refused unless a guaranty was secured, a requirement that again ran up against the thousand dollar contribution limit. The works remain useless to the Campaign, unless Anderson is given political party status which would enable him to accept contributions of twenty thousand dollars. Otherwise, they will probably be ceded to a nonprofit artists' organization for other purposes.

This past year produced record sales in the world of art, and the investment interest among members of the public who are investing in art is quite clear. This interest, illustrated in the few examples I've cited here, demonstrates how important artists' contributions can be in future political campaigns. Indeed, after *Buckley,* the artist's may be the only voice that can combine and be equal to that of the independent spenders.

PAUL CHEVIGNY: Our next panelist is Harriet Hentges. She is Executive Director of the League of Women Voters' Education Fund. She worked as an economist for the policy planning staff of the State Department, and before that, as special assistant to the Deputy Special Trade Representative in the White House Office of the Special Representative for Trade Negotiations.

OPENING REMARKS OF HARRIET HENTGES: The question before this panel is whether the FECA was a successful curb of abuses or an unduly burdensome regulation. From the point of view of the League of Women Voters, the answer is "yes" to both questions.

The League supported and lobbied for the passage of the FECA, and then found itself in a four year battle with the FEC over the implementation of regulations in a specific area. The FEC's action was a manifestation of the temptation to regulate in an area where there was not really any abuse to begin with. The issue concerned the debates with which the League was involved during the 1976 primary season. Having sponsored the debates in May of 1976, we then announced that we were going to sponsor presidential debates in the fall, and we began to seek funding for what we expected to be a three hundred thousand dollar endeavor—just for the general election debates. Because that is too large a sum to be handled through the regular national League budget, and because our most common source for special projects of this nature is corporate and union funding, we immediately began to seek corporate funding in May. We asked the FEC informally what they anticipated in the way of problems, specifically, how contributions should be treated. Through their General Counsel, we were led to believe that this would not be a problem. In August of 1976, while we were in the midst of negotiations with the candidates for the fall debates, the FEC

issued a policy statement* which said that these indeed were not contributions or expenditures to a candidate. They were also not "in connection with" an election in the normal sense and they were not intended to influence the outcome of an election. Thus, they were not a partisan expenditure. However, the FEC regarded them as disbursements in connection with an election. This was a puzzling bit of advice which had a very chilling effect on our corporate contributors, to say the least. Any checks collected were sent back and any funding solicitations were stopped dead in their tracks. The League decided nevertheless to go ahead with the expenditures. I cannot understand how the League expected to pay for them at the time. For the 1976 debates, the League eventually recouped about two-thirds of the expenditures through individual contributions, and then one-third was drawn from the League's own reserves. This put the League in a very difficult position. The League then brought suit** against the FEC in March of 1977 concerning the interpretation of that particular portion of the Federal Election Campaign Act which defines contributions.

As a result, the FEC agreed to undertake rule-making to clarify the interpretation of the law, and we withdrew the suit. Over the next three years, we tried to get a clarification. Finally, in April of 1980, regulations were put into place, but only after a great deal of pushing and pulling and arguing and debating. One regulation had been vetoed by Congress in September of 1979.

Buckley v. Valeo and the FECA concerned limitations upon contributions to, and expenditures of, the candidate. The question was, how should a contribution to a nonpartisan organization be treated? The FEC was treating this, although they did not admit it, in the same way as they were going to treat a contribution to a candidate. Thus, it was forbidden. This was clarified, as I said, through the implementation of the regulation in 1980, four years later, but not without raising a whole range of questions in connection with the issue of debates, questions which included: Who could be a sponsor? Who should participate? What is nonpartisanship? Who sets the standards? In the first go-round of the regulation, the FEC probably went beyond what it needed in order to attempt to define "nonpartisan." It was an attempt to, I think, correct what was never an abuse. At the state and local level, the League had been sponsoring candidate debates throughout its history. Then, all of a sudden, there was an effort to correct a non-abuse.

The effect of this regulation enabled the League to go to corporations and unions in April 1980 and ask for funding for the debates. We were

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* Presidential Debates (August 30, 1976) (unpublished), *vacated by* FEC Notice 1978-4, 43 F.R. 16547 (Ap. 19, 1978).

** League of Women Voters v. Federal Election Comm'n, No. 77-0235 (D.D.C. Feb. 11, 1977).

successful at this, and we have raised over five hundred thousand dollars for the 1980 series. It was clear, however, that while the regulation was pending, there was an uncertainty in the corporate community as to whether this was something that it should touch. Corporations that did not want to pledge put money in escrow until they had the whole thing locked up.

The question of what the FEC should get itself involved in, and to what extent, arose in the Nashua Telegraph debate. The Nashua Telegraph extended an invitation to Reagan and Bush while the regulations were pending. Had the regulations been in effect, the debate would have been made possible. But the FEC policy led the Nashua Telegraph to rescind its invitation, and Governor Reagan paid for that particular debate.

We were challenged by the supporters of Barry Commoner on the question of the debates. That complaint was not accepted by the FEC, but the thrust of its response was that any decisions made by the independent sponsor would be looked at as an indication of partisan intent.

There was a range of issues here, aside from the funding question, that the FEC had to raise. It got into the question of its jurisdiction vis-a-vis the Federal Communications Commission (FCC). It raised questions concerning the press and journalists. The first regulation created the fear that it was possibly preventing the newspapers or broadcasters from ever sponsoring these events. This caused a great deal of concern in Congress, and the first regulation was vetoed.

The League has been in the difficult position of basically supporting the law but not knowing how it is to be implemented. There is one temptation that can be yielded to, which is to plug every loop-hole or to anticipate every possible abuse. I don't think that this is possible. We will be interested to see what develops in this particular area and the effect that it will have on future issues such as the sponsorship of debates.

PAUL CHEVIGNY: Our next speaker is Xandra Kayden, an assistant professor of Political Science at Brandeis University. Ms. Kayden is a member of the Campaign Finance Study Group at the Institute of Politics at Harvard. She chaired the Institute's Faculty Study Group on party structure and the Policy Committee of the State Board of Massachusetts Americans for Democratic Action. She has written numerous reports on the relation between campaign finance laws and party structure, and the most recent has been published by the American Enterprise Institute and the House Administration Committee.

OPENING REMARKS OF XANDRA KAYDEN: I'm going to talk about the impact of the law on political parties. The party structures today are going through a reorganization. Part of this change is a response to the law, and part a response to technology, particularly the computer capacities for direct mail solicitation and accounting. The technology is like Mount Everest: it's there, it's going to be used, and there is probably nothing to be done about it. In terms of the impact of the law on the parties, both parties and

campaigns have gone through a centralizing process because of the need for compliance, among other things. The parties must maintain accounts and be able to report how much money comes in and how much money goes out. The law also has imposed a tremendous burden on campaigns, and consequently on parties, to provide a lot of legal assistance. You will note, probably happily as aspiring lawyers, that there is a burgeoning field in campaign finance law.

What we have seen in the course of development of the law has coincided with the fact that the Republicans have been out of office. The Republicans have historically taken the lead in the development of party structure, and they certainly did this time. I see the Republican Party as the prototype of the future. What you look at when you see the structure of the Republican Party is a highly centralized, nationalized party system which provides resources to candidates in campaigns at the state and local level as well as to candidates for federal office. The national Republican Party has intervened in primaries at the state level. It has provided staff at the state level. It provides a tremendous array of resources, including the training of campaign managers. The reason it has been able to provide such support is because of its decision to use direct mail solicitation.

The consequence of this shift in tactics is that direct mail solicitation produces small money. When fat cats gave in days of yore, they had an interest in the system. What the fat cats bought for their money was access. You are not going to buy access for twenty-five dollars or even a hundred dollars, so what is the motivation to give? Generally speaking, the motivation is that you give on the issues that you care deeply about and those issues tend to be the ones on which you are in the minority. So, you give out of anger, out of frustration, out of hostility—and the Republican Party consequently benefitted from having all the issues. For instance, a great deal of money was raised opposing the Panama Canal Treaty. Suppose you favored the Panama Canal Treaty, as the majority of the American public did. What would possibly be the incentive to give? To whom would you give? The Democratic Party? They already had the Administration. They had the Congress. We have also seen the development of a whole array of far-to-the-right groups, which may be more of a threat to the Republican Party than to the Left. Nonetheless, the consequence of this development has been to move the Republican Party, because of its resource potential, somewhat to the right.

The benefit of this shift, for the Democrats, is that their time has come. For instance, it is not inappropriate that the National Conservative Political Action Committee (NCPAC) has begun its attack for the 1982 Senate campaign before the Reagan Administration takes office because the steam will soon go out of the Right's ability to raise funds. If the Democratic Party follows tradition, it will counter-organize the Republicans, although one should never underestimate the ability of the Democratic Party to do itself in. The Democrats will desist from operating on the "fat cat" donor

approach, which they were able to do rather cost-effectively while they had the Administration. Without the Administration, they will have to go heavily into direct mail solicitation. The Democrats raise money from the Left, the Republicans raise it from the Right. On the whole, the new system has a potential for perhaps becoming a better party system than the one we've known. It does raise the possibility, however, that it will emphasize instability by forcing both parties to extremes.

There is another consequence of all this, which has been alluded to today, and that is the decline of grassroots activity. It clearly is not feasible for the parties at the local level to be as active politically as they were in days of yore, before the finance laws. It may also be that such a system is no longer functional. One of the functions of a grassroots party is to communicate with voters. Technology provides that communication, not only through the media, but through the direct mail, because the mail brings in money and serves an educational function as well. This centralizing tendency is only a natural evolution of the party system. It follows a pattern which has been typical of all other organizations in American life.

This centralization was delayed for the Democrats, because they always were able to rely on labor in the past to provide organizational strength for the campaigns. By relying on labor, the Democratic campaigns were able to organize easily. Labor provided enough early money and certainly sophisticated technology. Up until 1978, the Democrats outspent the Republicans in congressional races.

The loss of labor's support should force or encourage the Democratic party to move towards greater development. Perhaps it will also lead to realignment, but I'm not sure whether what we are seeing is so much realignment as a restructuring of the party.

I don't know whether this change is for the better. National studies show that centralized parties tend to put forward stronger candidates, but the question remains as to who will control the parties. It is unclear whether it will be the ideologues, thereby forcing us further to the left, or the professionals, who are concerned about winning elections. If the professionals control the party, we will probably be in for a better time.

There is one other remark I want to make because the last time I saw Stewart [Mott], we were flying back from Washington and he said, "Well, what about other parties?" This is obviously a concern of his, and I have thought about it since we last spoke. It seems to me that the Anderson candidacy was extremely viable. It is easier to mount a national party than a grassroots party or a national candidacy. I think the Anderson campaign lost steam for a lot of reasons. One should never underestimate the traditional behavior of Americans with respect to novel campaign organizations, but Anderson's type of candidacy is perfectly viable. It's more likely to develop under a centralized than a decentralized system.

OPENING REMARKS OF GEORGE FRAMPTON: Perhaps we should discuss what Fred Wertheimer suggested this morning—finding a mechanism to

provide some up-front funding for independent presidential candidates. In *Buckley,* the Supreme Court found on the facts presented that providing federal funding to the major parties but not to the independents and new parties was not unconstitutional discrimination. The Court noted that circumstances could change, requiring a different holding in a different context. Anderson's campaign provides some evidence of the real differential impact; whether it is an unconstitutional discrimination is a different question.

Congress never really debated the problems and possibilities of providing some advance money to new parties and new candidates. The problems of trying to do this on the basis of the polls or some other set of criteria has been passed off as being insurmountable. Fred [Wertheimer] suggested that Congress reconsider the proposal. The question is, how can it be done, even if it is something the people want to do?

There is a real problem with relying on the polls to determine how campaign money gets distributed. This was demonstrated recently by the debate controversy. The question was whether the polls should be used to determine whether Anderson and other third or fourth candidates should be included in the debates.

Another possible approach would be to provide a very small amount of money. Seed money could be given to any candidate who got on the ballot, let's say in ten states, which is a definitional criterion under the FECA. Slightly larger amounts of money could be awarded to candidates who got on the ballot in twenty-six states, or forty states, or fifty states. The problem of conditioning federal money on state certifications and state law requirements presents some additional problems, but that might be one subject that we would like to discuss.

OPENING REMARKS OF CHARLES STEELE: One of the effects of *Buckley* and of the campaign financing laws that ought to be looked at is the relationship of the first amendment to contributions and to expenditures. In reality, there is a flow of money from people who, for whatever reasons, want to give to the parties or to the candidates. Should this be viewed as an absolute right? Is this one of those associational rights that you are willing to leave uncontrolled?

In *Buckley,* the Supreme Court reversed what had been the law for a period of about seventy years by eliminating controls on expenditures while retaining controls on contributions. The original laws had placed limits on expenditures but not on contributions. The contribution and expenditure controls are thus in a state of chaos, and I don't think that I or the FEC or Congress or the Supreme Court or the law have any answers. The problem, however, is very interesting analytically, and ties in with a lot of other first amendment problems.

OPENING REMARKS OF STEWART MOTT: Have the *Buckley* decision and the FECA amendments successfully curbed abuses, or have they led to

burdensome regulations? Your answer probably depends upon what you are all about and what your goal is. If you want to encourage people to take a walk on a nice sunny day, do you make them learn a whole new vocabulary and count every crack in the sidewalk? Fred Wertheimer said, "If you believe that money in politics corrupts, then you have to favor regulations." I don't buy that. If there's a lot of food in the refrigerator, you can get real fat on it, but why did we have to put a T.V. monitor on the icebox door, to install a clock that checks every time that it is opened and closed and to make people weigh in and weigh out when using the kitchen? Come on! There is an underlying assumption that special interest money is ipso facto bad because it buys influence—particularly special interest money of a kind that comes from economically-motivated interest groups.

Let's not kid outselves about the abuses that we were correcting. The 1972 or 1971 dairy industry contributions were collected from dairy farmers who gave in the amounts of one hundred or five hundred dollars. Nothing has changed since then. All the dairy farmers have to do is run a different train down that track. They can still go out to encourage political contributions to the candidates of their choice, so what have we changed? What have we won by these so-called reforms?

We've redefined what it is to be a "fat cat." Just follow me for a moment and you will understand. A person who is a media wizard, like a David Garth or a Rafshoon, or who is an attorney like Mitchell Rogovin, who can afford to work without income, could be one of the biggest fat cats in a campaign. Another very large category is the rock musician who gives concerts. Now we come, in descending order, to the print artist. My wife is a sculptor. If we now have to value the cost to the artist of a casting, as Louise Nevelson did, you who know sculpting know that a thousand dollars doesn't buy very much bronze. Thus, my wife, can only contribute one small bronze piece, whereas the print artist, a Warhol or a Wyeth, can give a great deal more. Is the law meant to discriminate among people in such a way? How can an M.D. such as the candidate's personal physician, contribute to a campaign? What if he is a rectologist? Or suppose you're a psychiatrist? Would the candidate want you around? I think it's rather peculiar that the campaign law should be written in such a way as to favor certain kinds of volunteerism and activity while discouraging others. I wish that we'd spent these last eight years trying to think of ways in which to encourage political participation. We could have embarked on voter education and registration programs, for example. Instead, we have restricted and confined the participation of people in politics.

PAUL CHEVIGNY: Thank you very much Mr. Mott. I am now going to open the floor up to question and comments.

AUDIENCE QUESTION: I would like to address two questions to Ms. Kayden. First, what was the role of single interest issue groups in the 1980 election, and how did this role differ from prior campaigns? Secondly, I've

seen studies on candidate selection, which show that candidates who are chosen through centralized selection, such as a political machine, tend to be highly homogeneous—heavily white and male. Won't centralized selection tend to exclude minorities and women as candidates?

XANDRA KAYDEN: Let's take the second question first. From what I know about cross-national studies, centralized parties are more likely to select women as candidates to balance the ticket. It should also be noted that we are talking about parliamentary systems in which we are actually voting for a party and not a candidate.

Responding to the first question, it seems to me that it is only the single issue groups which will tend to go out to attack a candidate. The 1980 elections were the first time that we had any systematic negative independent expenditures. Labor, for example, always tends to support its friends: it doesn't attack. Corporate PACs were originally organized by Republicans. The PACs tended to give to incumbents, so originally they actually gave more to Democrats. Trade associations feel that they are "sitting ducks," because it's cheaper for a corporation or a trade association to give a hundred or two hundred dollars to a candidate who solicits them than to say no. Unless you are dealing with ideological corporate PACs, and there are not many of them, the most important criterion for corporate PAC giving is to stay out of trouble.

With respect to single issue groups and independent expenditures, there is a very serious problem. If you look at it from the perspective of a campaign, there are a lot of heavy independent expenditures against you. If you address them, you risk changing the focus of your campaign to what is being challenged, which may not work either to the candidate's advantage or to the voters' advantage.

The other problem with independent expenditures was illustrated in Indiana in the Bayh campaign. That is, there are very few constraints that can be imposed on independent expenditures. For those that are really new to the political process, there are no internal constraints about what they are going to say, so lies and distortions run rampant. In the past, the voters were used to the candidates charging the other candidates with outrageous behavior. Now, with independent spending, there is a neutral source, or another source, or a source that we don't know about at all. An example of this was the spending against Birch Bayh. There was a group called "Ship Out Bayh" which was handing out John Birch Society literature. You wouldn't know that if you were a voter, though, because there was nothing in the literature identifying its source. Similarly, literature was handed out in the churches by a group called "Faith In America." The source was the church, and it wasn't as easy for Birch Bayh or his campaign manager or anyone else to say that the church was lying or distorting the issues because the accusers were not as likely to be believed when the church was the target, instead of another candidate. The element of the neutral group making

charges to which the candidate must respond is throwing the electoral system somewhat askew.

AUDIENCE QUESTION: Following up on that point, is the remedy to control spending or is the remedy to have more disclosure?

XANDRA KAYDEN: You can't control independent expenditures in terms of spending. Disclosure is obviously important. The only way you can do anything about this problem is to focus not on the substance of what the interest groups say, but on their compliance with the law. I was trying to get the Campaign Finance Study Group to recommend to the House Administration Committee that we require those who make independent expenditures to notify the FEC and the opposing campaign twenty-four hours in advance before they make the expenditure, so that at least you will know that there is a link between the expenditure and the group. In Indiana, a lot of the groups that were spending weren't even registered with the FEC and they certainly were not reporting what they were doing. You could now catch them on that since it is illegal. Proving it, however, is very difficult. There is also another problem. Suppose the campaign registers a complaint? If it registers a complaint with the FEC, the FEC is not allowed to talk about it during the pendency of the investigation. The public is thus not informed. It's a catch-22.

AUDIENCE QUESTION: Ms. Hentges, this is a follow-up on a point that Mr. Frampton made. When John Anderson was unable to gain recognition as a serious candidate until he could raise contributions, and simultaneously unable to raise contributions until he was seen as a serious candidate, didn't the League of Women Voters become the final arbiter of the legitimacy of John Anderson's candidacy? How could a voter education group such as the League possibly feel comfortable with such a role? As long as we have campaign contribution laws which will not allow particular constituencies to support the candidate of their choice to the fullest extent, aren't we going to have to have groups like yours, or editorial writers, perform an arbitrary function? For example, Anderson did very well with certain segments of the business community and with upper middle class professionals. These constituencies, had they been allowed to, could have more than adequately funded his campaign. Instead, we have the League of Women Voters and we have a few pollsters passing judgment on whether John Anderson can be a serious candidate for President of the United States.

HARRIET HENTGES: Well, you've got about five questions in there, and I'll answer selectively because I remember selectively. Feel free to come back to any question that I don't address. The catch-22 you pose of the candidate being able to raise enough money so he can have campaign ads so he can become known—you're right, this is a problem. It's probably the reason that we wanted to find some measure of the voter interest in support of that particular candidate which was separate from the subjective assessments we

could make by reading the newspapers or talking to people or watching television. The criteria that we used to decide whether to include the third party or independent candidate in the debates were the polls. Although an imperfect tool, the polls were the best measure we had at a given point in time of the degree of voter interest in and support of a candidate. So, it was not so much our judgment that we were relying on, although we made the judgment as to what the level of interest had to be. That was the reason for moving to the polls. When you talk about playing an arbiter role and that therefore the significance of his candidacy was left to nonpartisan groups like the League and the pollsters, I can't agree. The pollsters don't make up their data.

The pollsters turn to a sampling, and there are difficulties in the use of that tool. At this point, there's probably no group that knows better about the imperfections of that tool than the League. We had numerous and endless conversations with polling experts as to the degree to which we should rely on polls as a tool, and there were differences among the pollsters as well. We tried to broaden our reliance on pollsters by having an array of them that were nationally recognized with national samples. I don't know if I got to the thrust of what you were trying to ask.

AUDIENCE QUESTION: No, my point is that Anderson's core constituency was a fairly affluent group compared to the rest of the population. It would seem to me that if they weren't shackled by strict contribution limitations, the campaign could have done a much better job of raising money and getting its point across to the rest of the electorate. In one poll, sixty percent said they weren't satisfied with the choice of Jimmy Carter or Ronald Reagan.

PAUL CHEVIGNY: That seems to me to be a question for anybody on the panel. Does anybody want to talk about that?

XANDRA KAYDEN: What about the banks? Lloyds of London, I believe, was asked to insure the loans made by banks to the Anderson campaign. Lloyds tested a few political people in Washington and decided it wasn't a good risk. Lloyds refused to insure the banks, and the banks therefore refused to make loans. I think that was a substantial cost to the Anderson campaign, which ought to be looked at in the future.

STEWART MOTT: I question the notion that the Anderson campaign could really rely on banks. Look at the experiences of Strom Thurmond, Henry Wallace or George Wallace. They slipped very badly in the last week of their campaigns from whatever their standing was to two-thirds or one-half of that. Anderson's showing at the polls also eroded considerably in the last week. Banks can look at that history. It's hard to imagine how any candidate, short of somebody who is already up to twenty-five or thirty percent of the polls, could get a bank loan. Bankers are cautious people and financing campaigns is like betting on a horse race. I don't know a single

banker who would be willing to bet a stockholder's money. It's different in the case of Mott Enterprises. This wasn't directly a loan; rather, it was an extension of credit. But I have only myself to account to because I'm a one hundred percent stockholder of Mott Enterprises.

PAUL CHEVIGNY: I don't know if everyone knows the law. Anderson had to get five percent of the vote in order to get it paid back by the government. The banks had to "bet" as to whether he would make the five percent. I hope that's clear to everyone.

AUDIENCE QUESTION: I address this to Stewart Mott. It seemed that what you were advocating this afternoon basically is that since there is no law that can be totally fair about weeding out special interests or campaign financing, we should eliminate all of it. I can only give an opinion based on the New York State gubernatorial race in 1978, in which there were no limitations on contributions, as far as I know. There was someone named Donald Trump, who made a contribution of $148,000 to Hugh Carey's campaign. Before that, Donald Trump had not been known for his social concern or his special interests in other areas, so you may say, well, why did he give $148,000? What is he going to get? At least in the federal arena, there are limitations on the contributions made by the Donald Trumps. How would you solve the problem of the Donald Trumps in federal elections?

STEWART MOTT: When you build a doorway so low that only a person who is five-foot five can go through it, you really are eliminating an important segment of the population. Even if the doorway is seven feet tall, you are going to eliminate a few people. If you are to accept a ceiling on contributions, how can you justify telling a wealthy Jew that he cannot give his last dollar to protect the rights of Jews, if that's the issue in a campaign? Or how can you tell the anti-abortionists that they cannot give their last dollar if they believe abortion is murder? If you accept the notion that people should be able to give in an unlimited way to influence ideological issues, what basis do we have for saying that somebody with economic interests should suddenly be limited in campaign contributions? The people with economic interests have just as much a right to participate in politics as anybody else.

HARRIET HENTGES: But doesn't unlimited participation by those people who have the money somehow affect the rights of those people who do not have the economic wherewithal?

STEWART MOTT: Jerry Falwell may not have a lot of money but he has a lot of influence. Likewise, Lane Kirkland of the AFL-CIO. There are people who have influence because of their station in life and I think that when you start regulating them, by golly, then if it's bad for people with money to have power, then you have got to wonder if it isn't bad for editors of newspapers to have power and deans of law schools and so forth.

AUDIENCE QUESTION: What about lower income families who don't really have influence? They don't have money and they don't have influence. But they have a vote and an interest in the election, as they should. Isn't the goal of regulation the restriction of big money and big influence so that the people without wealth are not overshadowed?

STEWART MOTT: One thing that hasn't been talked about today is the concept of floors and enabling. Some people have written on the subject of creating scrip or vouchers, a token system whereby all people eligible to vote would start off with a token worth two dollars or one dollar or five dollars, which voters could use as campaign contributions as they saw fit. I wish that we were thinking of moving a little bit more in that direction because, in effect, people who give money to campaigns are voting more than once. They are voting with their contribution early on, and then they are voting at the ballot booth on election day. I think a lot more people would like to be able to participate, especially if they had the scrip or some mechanism of putting money into a candidate's hand.

AUDIENCE QUESTION: I would address this to Ms. Kayden. Are you saying that you are essentially opposed to a bureaucratic type organization like the Securities and Exchange Commission, which would require a filing with disclosure as to who is involved, how much is going to be spent, and perhaps the content of any message? Is this bureaucratic organization going to determine whether that statement is true, and is that organization going to permit responses, or is it going to issue injunctions? Isn't this going to be expensive?

XANDRA KAYDEN: It seems to me that the only way to assure a relative amount of fair play—no one ever said that elections should be fair play, but maybe there is such an underlying assumption—is to focus on the compliance with the law and not the substance of what is done. I don't think that you can control the amount of money spent. In Indiana, I saw groups spending money illegally. There was no remedy for that, or any way that the campaign which was under attack could effectively respond. Tom Schwarz said this morning that the impact of the independent expenditures against the liberal senators was severe because of all this negative spending against them. Actually, the money was not the issue, because the Bayh campaign, for instance, raised more than did the campaign opposing him. All the liberal senators who were under attack were very well supported by the liberals, in terms of their funding, so money was not the issue in this. The issue was that the campaign operated under constraints of law and the independent spenders did not. All I'm saying is that the independent spenders should likewise be constrained. Of course, it isn't clear what "independence" means, but it seems to me that there ought to be a clear definition. If there are independents, then those people who choose to be independent ought to operate under some constraint. They should disclose who they are and what they are, so that there may be some kind of

accountability. This isn't a problem with the parties, because you can hold the parties accountable. In a sense, we are holding the candidates accountable because of this campaign finance law, but there is no way to hold the independent spender accountable unless somebody actually files a complaint with the FEC. But the FEC does not have the power, the effective power, to really make a difference. The Jerry Falwell personage in Indiana, Greg Dixon, said that his group hoped it would win the election because otherwise it would end up in jail. They probably should end up in jail anyway, but it's because they were actively breaking the law.

AUDIENCE QUESTION: When I went to vote this November, I had a choice of Gus Hall, John Anderson, and Barry Commoner in New York. The speakers this morning discussed state ballot access laws and how difficult it is to get on the state ballot. Doesn't getting onto the ballot demonstrate enough legitimacy as far as the debates were concerned so as to permit someone on the ballot to be included in the debate, even at the last moment?

HARRIET HENTGES: I think the question was, why didn't the League use the ballots, rather than the polls, to determine who would have access to the debates? I don't think the point that was being made by George [Frampton] or the Anderson campaign concerned the difficulty of getting on ballots. The timing question was a big element, particularly since you have to know the different access laws in fifty states. In 1980 there were some seven candidates who were on enough state ballots to have a mathematical possibility of winning the election. However, you may look at those seven candidates and you may differ as to what the real possibility was of their winning the election. This led us to look for other criteria. The other reason is that by the time we made our decision, not all the filing dates had passed; I think the latest one was September 25th. We anticipated making our decision in either August or early September, before all the evidence on filing had come in.

GEORGE FRAMPTON: If I could be just mildly critical of the League, I think the League was really poorly advised to use the polls. The League should have decided to include Anderson or to exclude him at the beginning, and then stuck by the decision throughout. That would have saved everybody a lot of time and aggravation. The reason the League didn't use the ballot criterion is obvious: if the League had invited a bunch of other people as well, Carter and Reagan wouldn't have accepted, and the project, which the League wanted to bring off, probably would have fallen through with no debate at all.

It was not the decision of the sponsor alone that had an important role here. Many of you probably don't know it, but John Anderson did participate in the second debate via the miracles of modern television. Ted Turner's Cable News Network rigged up a system for Anderson to appear in D.A.R. Hall in Washington and respond to the same questions posed to

Carter and Reagan. His live responses were spliced into the network feed from Cleveland, and that three-way feed was available free to anybody in the country who wanted to put it on. But virtually nobody wanted to put it on, despite the fact that they had an opportunity to watch a three-way debate instead of a two-way debate. Stations didn't want to put it on, in part, because of perceived or actual legal problems. Stations felt that they were exempted from the equal opportunities provisions of the Communications Act if they put on two people, but feared they would run into legal problems putting on three people. The explanation of that would take a lot longer than we have here today, and I suspect other stations simply made their own news judgment that a two-way debate was something that most of their viewers wanted to see, whereas a three-way debate was not. The availability of sponsors to bring in minor candidates, together with the major candidates, was there and the technology was there. I think a lot of this has to be laid at the feet of the broadcast industry and maybe the pollsters, not only the sponsors.

PAUL CHEVIGNY: I'm sorry that I can't take any more questions, but I will exercise my prerogative in one sense to point out that, after all, the League of Women Voters is a private organization and not a state, and so they did have some discretion to decide who they would call.

HARRIET HENTGES: And that's what the FEC ultimately told us.

PAUL CHEVIGNY: I want to thank all the participants for coming.