INDEPENDENT FUNDRAISING FOR AN INDEPENDENT CANDIDATE:

REMARKS OF STEWART MOTT

I would like to start by introducing myself in a way that Cheryl Weisbard didn't. First, I am not a lawyer. Second, I am not in politics as a full-time occupation, nor am I an author or professor. I am a fat cat, in the old tradition, and in the new tradition. Fred Wertheimer and Common Cause thought they were going to make a skinny cat out of me and reduce me to the same level as everybody else, but I figured out a way to fool them and I will tell you about that a little later.

I have a hunch that attorneys will absolutely love this new law, the Federal Election Campaign Act. You know why? Fred Wertheimer has mentioned that it is an incumbents' protection act; I am convinced that it is an employment act for attorneys. You cannot begin to maneuver in the field of campaign finance without consulting an attorney and hiring a good accountant to keep track of what you are doing. I must make a few miscellaneous remarks about some of the previous comments and then I'll get to independent expenditures, and then independent campaigns.

Jimmy Carter remarked that life is unfair. I say that there are always going to be imbalances in campaigns. Some candidates are going to have the good looks of a Robert Redford and others are not. I question whether it is in the public interest to start regulating all the aspects of campaign activity. I would hate to see, for example, a law which in the interest of preventing corruption, would say that Frank Sinatra can only make so many appearances on behalf of his favorite candidate. Or that Jerry Falwell can speak only so many times or that Richard Viguerie can only use so many pieces of mail in his mail operation, or that authors or universities must be severely curtailed or regulated in the use of their ability or their facilities in support of a candidate.

Why pick out fat cats alone? Just because money is countable and visible? We all know that illegal campaign contributions have existed in the past, and they are still around. They were illegal before; they are illegal now. I'm in favor of repealing the whole damn law, except for the disclosure provisions—the American public should know where the money is coming from and base its decisions on the merits or demerits of the candidate.

I take issue with the notion that the presence of money in campaigns is evil or that candidates hate to raise money. I've found a good many candidates for office who actually like raising money, who look upon it as an opportunity, and as David Ifshin indicates, it is an opportunity for people at the grassroots to get involved. Have you noticed that in the last two elec-

tions there was a noticeable absence of campaign buttons? Back in 1968 and 1972, everybody was wearing a button. There were hardly any buttons this year, and that is just a further illustration of the lack of grassroots participation.

Another problem is that in regulating campaign finance to death, there is a loss of spontaneity and fluidity. It used to be that if you wanted to advocate something, or object to something, you could always place an advertisement in the *New York Times* or form a committee. But now you have to study the campaign act, or go to the Federal Election Commission for an advisory opinion, and that certainly inhibits spontaneity. I would defend to the last the right of a Catholic bishop in Boston to speak out against abortion and either directly or indirectly express his approval or disapproval of candidates. Those of us who are pro-choice must remind ourselves that in 1968 we enjoyed the good graces of many churches which opposed the war in Vietnam, and asked them to speak out against the war and against the candidates who were in favor of continuing the war. It would be hypocritical in the extreme for a pro-choice person to say that a cardinal or bishop has no right to speak out in favor of or against any candidates. I would defend to the last the right of a farmer to use as much money as he pleases to oppose a candidate who is in favor of a new interstate highway which would run through his property and ruin his homestead and career. To translate that into political terms, I find it very, very hazardous to create a body of law which says just how much money a person may spend on behalf of a cause.

The FEC, Congress, and the courts have created a fine distinction between giving money and spending money which is very hard for me, as a layman, to understand. The *Buckley* case* upheld the right to make independent expenditures, either to defend one's farm or to advocate the election or defeat of a candidate. But it said, in effect, that if you associate with other people, all of a sudden you are in trouble. Now, back in March, it occurred to me to take out radio ads in four different states for John Anderson, and a pair of ads in the *New York Times*, one on behalf of Kennedy and the other on behalf of Anderson. I did so with my own money and without other people's money, although I had the collaboration of a layout artist, an advertising agency, and other people who assisted with services. Because these people did not put any money into the pot, we were not a committee. Therefore, we did not have to file as a committee with the FEC. I did have to file as an individual, though, and did so. At the same time, Norman Lear in California had made up his mind to buy newspaper advertisements in Massachusetts, just before that primary. By coincidence, I was out at Norman Lear's home in Beverly Hills. We weren't sure that we were allowed to talk with each other. Neither of us had talked with John

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

Anderson in anticipation of these activities. None of the people in the campaign knew the ads were coming, and so we were clean as far as being independent. But if Norman Lear and I had chosen to collaborate and pool our money and do just exactly what we did and have the ads signed by Stewart Mott and Norman Lear, then from all appearances, we would have been in violation of the law. If we formed a committee, the maximum that we would have been allowed to put into the committee would have been a thousand dollars. But, acting separately, I spent about one hundred thousand dollars and he spent at least fifty thousand dollars in our different ways. Now, was this "corrupting influence?" Is that a good reason for the FEC or Congress or the courts to impose a thousand-dollar ceiling on the amount that Norman Lear and Stewart Mott spent together? I even wondered if it was legal for my wife and me to collaborate on the program.

In anticipation of doing something like this, I filed, along with the National Conservative Political Action Committee (NCPAC) and one of their donors, a suit, *Mott v. Federal Election Commission,*[1] which sought to define the rights of two or more people to associate with each other to make independent expenditures. I also wanted to test whether prohibiting an extra thousand dollars above the twenty-five thousand dollar ceiling could be constitutionally upheld. I'm allowed to give one thousand dollars directly to any one of twenty-five different candidates but why would a twenty-sixth gift of one thousand dollars be corrupting if the first twenty-five such gifts are not? It's a strange, strange law. And now that I'm married, my wife and I can give fifty gifts of one thousand dollars and that's not corrupting until I give the fifty-first gift, right? Frankly, I'm glad I'm not a lawyer.

The case was filed in December, but by March, when I was about to act on the independent expenditures, I was told that the case was mooted by the law which came into effect in January[2] and that I had the right to go to the FEC for an advisory opinion. In December, I wasn't an eligible person—an individual was not entitled to an advisory opinion from the FEC. A candidate was eligible. How was I going to get a candidate like John Anderson to request an advisory opinion for me, who wanted to make an independent expenditure on his behalf? Ipso facto it's not independent. Well, now that I have a right, thanks to the implementation of the new law, I hope that we will be able to get an advisory opinion on this. I'm not sure quite what the status of the remainder of the suit is. I believe that NCPAC may be pursuing it.

I was further told that unless I intended to act immediately on the issues that were raised in the suit, I couldn't get a ruling from the courts, and I found that extremely strange. One of the lawyers here can explain to the audience better than I why the question of ripeness affected my suit. I did

1. 494 F. Supp. 131 (D.D.C. 1980).

2. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified in scattered sections of 2, 5, 18 U.S.C. (Supp. IV 1980)).

indeed proceed with the independent expenditure, and I wanted the freedom to do so in the future, in collaboration with other people, but my case wasn't ripe unless, I suppose, I was on my way down to the *New York Times* with a check in hand about to make the expenditure.

Regarding the further limitations on independent expenditures and collaboration with the candidate, I felt that I was perhaps walking a fine line on this issue because in January of 1980, or in early February, I had given a fundraising party for John Anderson in New York. The candidate slipped into the apartment with maybe 200 guests and the press and disappeared from New York the next day. So, raising a few thousand dollars was the full extent of my contact with the candidate or the campaign. In reading the fine print on the FECA, I was told that if somebody had been authorized to raise money for a candidate, there was a presumption of collaboration with the candidate which invalidated the independent expenditure. That is, there is a presumption of guilt before a finding of the facts. Well, I drew in a deep breath, talked it over with my attorney in Washington, who was formerly with the FEC, and I said, "That regulation be damned!" The fact that I gave a fundraiser for Anderson in February should not invalidate the independence of the radio spots and newspaper ads made in March. I took those ads out without any prior consultation or knowledge on the part of the candidate. It was completely my own initiative. As one person put it, we were holding our breath to see if the bull, meaning the FEC, would come out of the chute. I guess we passed.

I want to talk about John Anderson's decision to go the independent route and about the problems of ballot access. It was back on April 1st that he went and sat under a eucalyptus tree to consider running as an independent. He took three weeks to make that decision. I think the scene shifted to a palm tree in Florida and then back to Washington. I thought he was going to go to a hemlock tree next, but valuable time was slipping by: the dates for ballot access were coming up in New Jersey, which was the first in line, then in Massachusetts, Michigan, and Utah. Knowing that, I brought together a group of people who were looking at their calendars and hearing the minutes ticking by and realized that we had to get something going in those four states, at least, if he were to gain access in those states. So I got on the phone with people in New Jersey and Massachusetts and Michigan and Utah and started "networking." I explained what the law was in their states, and what they needed to do. Would you believe I got at least four or five phone calls, one from John Anderson himself, others from David Garth, telling me to stop, that I was not allowed to do this, that I didn't have an authorization! I didn't presume to have authorization, but the Anderson campaign clearly needed to get something going in those states. I then realized that there was something very wrong with the management of the campaign, and I wrote a couple of memorandums in May which got me booted out of the campaign. Anderson was as embarrassed as could be

about the whole thing and he insisted upon being a peacemaker and brought us all back together to sit in the same room and talk things out.

It was a crazy period when the problem of ballot access loomed so large. I frankly think they were making a mountain out of a molehill. The attorney I was talking to was the attorney who worked for Eugene McCarthy in '76. McCarthy was very short on both troops and money in '76, but he had broken down the door to the ballot in many states. Given the fact that Anderson appeared to have plenty of money and troops we figured that ballot access would be a breeze for him in 1980. Well, the Anderson campaign started off on the wrong foot. First, they told me to get lost with my independent activities. Second, they went to Arnold & Porter, which began to undertake ballot access work as if it were filing an SEC case. It injected a tentativeness into the campaign that unfortunately persisted throughout. All along there was the big question of whether we would make it onto the ballot in enough states. That was very sad because those who knew the laws governing ballot access knew that that would not be the principal problem of the campaign. Because of this preoccupation they gave very little attention to organizing after securing a place on the ballot. For instance, the minute the New Jersey filing deadline passed on April 24, the campaign should have gone on to organizing grassroots activity. New Jersey certainly could have been a net export state in terms of money for John Anderson. But it was dropped because they were preoccupied with going on to Massachusetts and Michigan. Massachusetts and Michigan had the same experience after their deadlines; they, too, were dropped, and the focus shifted to New York and California. I think that this experience will make the independent and third-party candidates more aware of the ballot access laws in 1984 and beyond.

Another problem of the Anderson campaign was the curious uncertainty as to whether Anderson was running as an independent or as a third-party candidate. From the beginning, he insisted on calling himself an independent candidate, but to qualify for most federal election funds, he was treated as if he were a third party. In some states, in order to take the easiest road to ballot access, he chose to meet the conditions of being a "party." But quite aside from all the different state laws, he did not make up his mind whether he wanted to become a third force in American politics. On election night, in his concession speech, he spoke of the future and of continuing to work together. But it's still not clear to his supporters whether or not he intends to go the third-party route. Needless to say, it's going to be very tempting for either him, or the National Unity Campaign, or whatever it's going to be called, to take advantage of the qualification for federal funds. Federal funds this year were 4.1 million dollars, but when adjusted for inflation they will be somewhat more than five million dollars in 1984.

Federal funding is another example of the inequities in the law. Those who qualified for presidential campaign funding, the candidates of national

parties beginning with capital "D" and capital "R" and now John Anderson, are the beneficiaries of an escalation for inflation that will boost this year's amount to thirty-five or forty million dollars in 1984. But the independent candidate or third-party candidate who has not qualified for presidential funding is stuck with the old one thousand dollar ceiling on contributions from individuals. That ceiling does not rise with inflation and is an inequity which will continue to dampen the effectiveness of third-party activities.

The Anderson campaign suffered from a great many other problems. Who was the vice-presidential candidate going to be? By what process would he or she be picked? These kinds of questions have been settled by tradition and history in the Republican and Democratic parties, but they added a further air of uncertainty to the Anderson campaign. Would he or would he not be on television? David Garth is supposed to be one of the most brilliant media geniuses in this city, in this nation, but if you look carefully at the Anderson media, you have to wonder about the basis for that reputation. If I had been Anderson's coach during the Reagan debate, I would have made sure that every other prompt card said "smile," "be friendly," "love your audience." Well, he blew it. Do you remember the question, "Would he or would he not be in the debates?" You can imagine what kind of impact that had on fundraising. I knew people who were very well disposed toward John Anderson, but John Anderson and circumstances gave my friends every reason in the world to say, "I better wait and see until such and such happens." To my astonishment as a fundraiser, people were now treating their thousand-dollar gift as if it were their ballot. People who might have given fifteen or twenty-five thousand dollars to one candidate, easily two or three thousand dollars to McCarthy when he campaigned in New Hampshire and another ten thousand dollars when he was in California, were holding onto their one thousand to see what would happen next. That's what the federal spending limitations have done, and Anderson's people blundered right into that trap by conducting such a tentative campaign.

I'd like to conclude by telling you how I've become a new fat cat. When I realized that Richard Viguerie could extend credit to candidates in the normal course of business and had been doing so for causes and campaigns for years, and when I realized that there was no counterpart on the progressive, liberal, left side of the spectrum, I created something called "Mott Enterprises." For the last three or four years, we have had a wide variety of clients in the non-profit world and the commercial world and it is a for-profit entity that is trying to run in the black. We succeeded in that this year. We decided on September 4th, when it was known that John Anderson would be eligible for post-election funding if he got five percent of the vote, that we would extend credit for his direct mail campaign and wound up extending a total of $407,000 worth of credit. You can imagine who the second most nervous man was on election night when the returns started

coming in at only four percent for Anderson. Historically, polls have registered a tremendous drop-off from a week before the election to election day itself for all third-party candidates of the past several decades. That explains why the banks were so nervous and unlikely to make any loans to the Anderson campaign. But Mott Enterprises will get back the $407,000 worth of credit that it extended for postage and printing and so forth. As far as I know the bull is not going to come out of the chute on this one either. It does point out one of the ironies of the law: that Stewart Mott, one of the fat cats whose paws they wanted off of the political system, has figured out a way to participate as a fat cat in the system.

It's ironic that two of the beneficiaries of my independent activity were two of the strongest advocates of the FECA, Ted Kennedy and John Anderson. I think that now both Anderson and Kennedy may have some interesting observations on how the law might be rewritten. For my part, the best possible "revision" would be the abolition of the FEC and a complete overhaul of the FECA.

PART FIVE

Panel Discussions