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PUBLIC FINANCING OF ELECTIONS: NEW PROPOSALS TO MEET NEW OBSTACLES

TOM R. MOORE* and RICHARD D. LA BELLE III**

I. INTRODUCTION

In politics, as well as the everyday affairs of personal life and business, "money talks." Of course, big money talks loudly.

In March 1985, the United States Supreme Court heard the arguments for and against big money in politics in *Federal Elections Commission v. National Conservative Political Action Committee*,¹ a public financing case involving massive sums spent by a political action committee to influence the outcome of the 1984 presidential campaign.² In the name of freedom of speech and freedom of association under the first amendment,³ the Court struck down the express congressional prohibition of the subject expenditures⁴ and decided that they amounted to constitutionally protected speech.⁵ This decision in *NCPAC* gives advocates of public financing of elections good reason to reconsider again that advocacy.⁶ This Article summarily reviews the course of events and reasons leading to the enactment of numerous campaign financing laws throughout the country, including public financing legislation. It then reviews the judicial reaction to such campaign financing legislation.

In that context and with that background, the authors retreat from their earlier very positive views favoring public financing, not only as to presidential elections, but also as to public financing of campaigns with less visibility. The authors conclude that, in the absence of further legislative responses to the Supreme Court's opinions and favorable judicial reactions to those legislative responses during the next decade, public financing of elections may become a footnote in the troubled history of American political fi-

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1. 105 S. Ct. 1459 (1985).

2. *Id.* at 1462, 1465-66.

3. *Id.* at 1467.

4. *Id.* at 1462.

5. *Id.* at 1468.

6. In 1976, the Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976), and opened the door to massive private independent political expenditures outside the campaign funds of the candidates.

nancing. At the moment, there does appear to be a virtually Court-confirmed constitutional right to buy elections.⁷

Notwithstanding the "serious obstacles" placed by the Supreme Court in the path of those who would use public financing to combat the potentially corrupting effect of private money in election campaigns,⁸ the Florida Legislature should nevertheless seriously consider joining the ranks of those state legislatures which have augmented campaign financing with public funds. The potential remains for state legislatures and state courts to play a significant and positive role by using publicly funded campaigns to control the corrupting influence of money in politics.⁹

In light of the serious obstacles which do exist, the first venture by the Florida Legislature into the confused world of public financing of elections should focus on elections which would be the least likely to generate controversy and to attract large private indirect expenditures which would make a mockery of the public funding system. This cautious approach does not mean that the legislature should not support carefully drawn public financing legislation for gubernatorial elections, Florida Cabinet races, or other elections which, in fact, would create considerable controversy and perhaps invite ingenious efforts by large contributors to circumvent the legislation. It simply seems advisable to demonstrate in a low-key pilot program that public financing will accomplish the lofty goals of the campaign financing reforms of the past decade.

The Florida Legislature should take the approach, already taken

7. See Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A. J. 1078 (1983). Justice White concluded in his dissenting opinion on the impact of the majority's decision in *NCPAC* that: "The result is that the old system [of presidential campaign financing] remains essentially intact, but that much more money is being spent." *NCPAC*, 105 S. Ct. at 1480 (White, J., dissenting). Justice White failed to "share the majority's equanimity about the infusion of massive PAC expenditures into the political process." *Id.* at 1479. Justice White also believed that the Court's decision assures the United States "the worst of both worlds," *id.* at 1480 (i.e., spending more total dollars than ever before without holding down the questionable contributions at all).

8. See generally, *NCPAC*, 105 S. Ct. 1459 (1985); *Buckley v. Valeo*, 424 U.S. 1, (1976); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

9. See, e.g., H. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* (3d ed. 1984) [hereinafter cited as H. ALEXANDER, 3d ed.]; H. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* (2d ed. 1980) [hereinafter cited as H. ALEXANDER, 2d ed.]; A. HEARD, *THE COSTS OF DEMOCRACY* (1960). Herbert E. Alexander, perhaps the country's leading scholar on how political money is raised and spent, says: "Some states have been more experimental than the federal government in dealing with public funding, and the results of their pioneering may affect development of federal electoral regulation policy in the future." H. ALEXANDER, 2d ed., at 42.

by some states, that a public financing system should make no attempt to limit campaign spending. Public funds made available to candidates willing to forego contributions from special interest groups may prove to be a powerful weapon against those candidates who rely on massive special interest funds to reach voters. Such a "floor without a ceiling" plan would at least give all qualified candidates a certain amount of money with which to work.

As an example of this approach, the appendix to this Article includes a proposed bill for the public financing of nonpartisan elections of Florida's trial judges.

II. THE AMERICAN CONSENSUS ON THE CORRUPTING INFLUENCE OF MONEY IN POLITICS

There is nothing new about criticism which focuses on the relationship of money and public elections.¹⁰ This section only restates the conclusions of scholarly discourses, which generally stand for the proposition that money does have a corrupting influence in politics and that the degree and extent of this influence continues to escalate.¹¹ Providing a brief bibliography of books and articles should be sufficient to pique the interest of anyone reluctant to take seriously either the existence of money-in-politics evils in American politics or the potential of public financing as a means for combating such evils.¹²

10. As John Quincy Adams, sixth President of the United States, stated: "To pay money for securing [the Presidency] directly or indirectly" was "incorrect in principle." H. ALEXANDER, 2d Ed., *supra* note 9, at 4 (quoting VII MEMOIRS OF JOHN QUINCY ADAMS 468-70 (1875)) (as quoted in J. SHANNON, MONEY AND POLITICS, at 15 (1959)).

11. See generally Wright, *supra* note 8.

12. See generally H. ALEXANDER, 3d ed., *supra* note 9; H. ALEXANDER, 2d ed., *supra* note 9; H. ALEXANDER & J. FRUTIG, PUBLIC FINANCING OF STATE ELECTIONS: A DATA BOOK AND ELECTION GUIDE TO PUBLIC FUNDING OF POLITICAL PARTIES AND CANDIDATES IN SEVENTEEN STATES (1982); H. ALEXANDER & B. HAGGERTY, POLITICAL REFORM IN CALIFORNIA: HOW HAS IT WORKED? (1980); H. BRETTON, THE POWER OF MONEY (1980); COMMON CAUSE, A COMMON CAUSE GUIDE TO MONEY, POWER, & POLITICS IN THE 97TH CONGRESS (1981); COMMON CAUSE, HOW MONEY TALKS IN CONGRESS: A COMMON CAUSE STUDY OF THE IMPACT OF MONEY ON CONGRESSIONAL DECISION-MAKING (1979); CONGRESSIONAL QUARTERLY, DOLLAR POLITICS (3d ed. 1982); E. DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION (1983); A. HEARD, *supra* note 9; G. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980); M. MCCARTHY, ELECTIONS FOR SALE (1972); R. PEABODY, J. BERRY, W. FRASURE, & J. GOLDMAN, TO ENACT A LAW: CONGRESS AND CAMPAIGN FINANCING (1972); T. SCHWARZ, PUBLIC FINANCING OF ELECTIONS: A CONSTITUTIONAL DIVISION OF THE WEALTH (1975); G. THAYER, WHO SHAKES THE MONEY TREE? (1973); Forrester, *supra* note 7; Peck & McDowell, *Dollar Democracy: An Analysis of Public Financing of State Politics*, 15 URB. LAW. 921 (1983); Wright, *supra* note 8; Note, *All the Free Speech That Money Can Buy: Monopolization of Issue Perception in Referendum Campaigns*, 35 U. MIAMI L. REV. 157 (1980).

This Article accepts, as a self-evident truth, that such political campaign financing evils do exist to a degree that requires serious attention. One recent article on the political inequality of campaign financing began by quoting California politician Jesse Unruh, who stated that “[m]oney is the mother’s milk of politics.”¹³ That article and others make clear that their premise is not that this “mother’s milk” is healthy and good for the nurturing and development of politics, but rather that without strict regulation and control of that necessity, the nature and quantity of such “milk” instead may produce sick—or sickening—politics.¹⁴ The electorate, the candidates, and the legislators will continue to find that there is a never-ending battle to balance the competing interests of private contributors with the independence that elected officials should have from those who provide them with campaign funds.

The consensus among scholars appears to support the popular belief that the greater the amount of a contribution, the greater the potential that the contribution will corrupt the political process and certainly the more likely it will appear as corruptive.¹⁵ No one suggests that a ten dollar contribution is the same as a \$1 thousand contribution in terms of what the contributor expects for his contribution. In fact, the \$1 thousand contributor may expect recognition by the politician to whom he gave the money and, at the least, a friendly audience with the politician when the contributor seeks to have the politician hear his views on some political issue dear to him.

Similarly, few would quarrel with the proposition that the larger the amount a candidate receives from persons or organizations with common goals, the more corruptive the influence of that money upon the politician. These “special interest” groups fuel the political engines of campaigns from the lowest elected offices in the land to the presidency.¹⁶ Notwithstanding the freedom of associa-

13. Peck & McDowell, *supra* note 12, at 921.

14. As one prominent jurist stated: “The predominance of money comes at the expense of the ideals of liberty and equality that underlie our political system.” Wright, *supra* note 8, at 614.

15. See generally H. ALEXANDER (3d ed.), *supra* note 9; A. HEARD, *supra* note 9; Forrester, *supra* note 7; Peck & McDowell, *supra* note 12; Wright, *supra* note 8; Note, *supra* note 12.

16. For instance, according to the results of a joint study by *The St. Petersburg Times*, *The Miami Herald*, and *The Orlando Sentinel* on the 1984 campaign for the Florida Senate and House of Representatives, successful candidates for the House positions, which paid \$12,000 per year, listed \$5,115,641 in total contributions, \$2,322,217 of which was contributed by PACs. Seven candidates (Gibbons, Dem., Tampa; Gustafson, Dem., Ft. Lauderdale; Hazouri, Dem., Jacksonville; Kutun, Dem., Miami Beach; Lombard, Repub., Osprey; Mac-

tion and freedom of speech arguments successfully utilized by

kenzie, Dem., Ft. Lauderdale; and Wallace, Dem., St. Petersburg) raised over \$100,000 each. Seven candidates (Gallagher, Repub., Coconut Grove; Gardner, Dem., Titusville; Gustafson; Hazouri; Mackenzie; Ward, Dem., Ft. Walton Beach; and Webster, Repub., Orlando) received over \$50,000 each in contributions from PACs. Three candidates (Gutman, Repub., Miami; Lombard; and Morse, Repub., Miami) spent over \$20,000 apiece of their own money in furtherance of their campaign. The St. Petersburg Times, Mar. 31, 1985 at D6-7, col.1.

The twenty successful candidates for the Senate raised a total of \$1,991,090, of which \$823,015 was contributed by PACs. Half of the candidates raised more than \$100,000 each. Two candidates (Hair, Dem., Jacksonville; Hill, Dem., Miami) raised more than \$200,000 each. Only two candidates (Plummer, Dem., Miami; Jennings, Repub., Orlando) raised less than \$20,000 each. Eight candidates (Childers, Dem., Pensacola; Frank, Dem., Tampa; Gordon, Dem., Miami; Hair; Hill; Langley, Repub., Clermont; Myers, Repub., Hobe Sound; and Scott, Repub., Ft. Lauderdale) received more than \$50,000 each in PAC contributions. Of these, four candidates (Hair, Hill, Myers, and Scott) received over \$80,000 each, with all but Myers receiving more than \$90,000 each. Only two successful candidates (Johnson; Weinstein, Dem., Coral Springs) received less than \$10,000 each in PAC contributions. Johnson, however, led the Senate candidates by far in spending \$20,000 of his own money to get elected. *Id.*

The statistics for congressional races are even more staggering. According to a Common Cause study of the 1984 elections for the United States House of Representatives, the 802 general election candidates for the House raised, in the period from January 1, 1983, through December 31, 1984, a total of \$196,756,155, of which \$74,364,036 was from PACs. It is also evident whom PACs think are their best bets—for every \$1 contributed by PACs to challengers for House seats, \$4.60 was contributed to incumbents. PAC contributions to House candidates also increased an average of 32% over 1982. *House Incumbents Get \$44 of Every Campaign Dollar from PACs in 1984 Election, Common Cause Study Shows, COMMON CAUSE STUDY* (Apr. 12, 1985), at 1.

The list of fundraisers was headed by Stein, Dem., N.Y., \$1,780,131; Jones, Dem., Okla., \$1,419,588; and Green, Repub., N.Y., \$1,143,656. Altogether, 51 candidates raised more than \$600,000 each. Forty-two of these candidates won.

The leading PAC contribution recipients were Jones, who received a record-setting \$696,594; Patterson, Dem., Cal., \$447,800; and Morrison, Dem., Conn., \$428,393. In all, 38 candidates, all of them incumbents, received a minimum of \$250,000 each from PACs.

The figures for United States Senate races defy belief. The recitation of the figures for a single campaign will suffice. In the hard fought contest in North Carolina that pitted incumbent Jesse Helms against Governor Jim Hunt, the candidates spent over \$22,000,000, making the campaign the most expensive in Senate history. The effect that this kind of money has on the political process is graphically illustrated in a post-election analysis by Bill Peterson of the *Washington Post*:

The big-money nature of the race made experimentation possible. The Helms camp came up with several innovations. Many voters, for example, were surprised to pick up the telephone and hear the recorded voice of Ronald Reagan on the other end of the line, extolling Helms' virtues. . . .

But much of the creative energy in both campaigns and the biggest chunk of the \$22 million spent in the race went for television commercials stretching over 20 months. Some 7,800 TV spots were broadcast during the last five weeks alone.

The nightly tracking polls and the ability of both campaigns to produce commercials almost overnight produced a new kind of electronic politics, impossible a decade ago. Big money enabled the two campaigns to wage a day-by-day, week-by-week debate far more important than the League of Women Voters forums common to most races.

Peterson, *North Carolina: Lessons of a Dirty Campaign*, Wash. Post Nat'l W'kly Ed., Dec.

groups thus far in winning their independence substantially to influence American elections, new legislative offensives to replace the prohibitions struck down by the Supreme Court can be expected due to the hostility of both the public and legislators toward this kind of financing.

Not even a candidate's personal wealth can shield him from the evil mantle thrown about him by big money in a political campaign. Critics decry the millionaire club to which one must belong to run for high office.¹⁷

A. *Recent Reforms in Financing Politics in America*

Long before Watergate and its backlash, Americans knew their elected officials had to spend money to get elected.¹⁸ Even George Washington furnished "an average outlay of more than a quart and a half per person" of rum, rum punch, wine, beer, and cider to win in his first foray into elective politics in the 1757 election to the Virginia House of Burgesses.¹⁹

Without dwelling on the specifics of 200 years of campaigning history, by the 1970's legislative action had dealt strongly with

3, 1984, at 6, col. 1.

17. For example, six of the past nine Presidents (F.D. Roosevelt, Eisenhower, Kennedy, Johnson, Carter, and Reagan) are considered to have been wealthy or moderately wealthy men when they took office. H. ALEXANDER, 3d ed., *supra* note 9, at 25-26. In 1983, at least 23 senators and 19 representatives were millionaires. *Id.* at 28. In 1978, 58 members of Congress gave or lent at least \$100,000 to their own campaigns. *Id.* at 27. As one author comments:

In New York a political unknown recently gained the gubernatorial nomination of a major political party. He spent more than \$7,000,000 of his own money to do so. One family of billionaires produced three governors, another—a president, an attorney general, and a United States senator. The examples are numerous, and the evidence is overwhelming that money increasingly controls American government. It has become the common denominator of success.

Forrester, *supra* note 7, at 1078-79.

Sen. John D. Rockefeller, IV, Dem., W.Va., has spent a total of \$25,000,000 of his own money on four statewide races, \$12,000,000 in the 1984 Senate race alone. Romano, *If You've Got It, Flaunt It*, Wash. Post Nat'l W'kly Ed., July 15, 1985, at 11, col. 1. Of this fact, Rockefeller says: "Resources are an important part of politics, and I can join those who regret that fact, but it is part of the real world. You get into a campaign, you do what you think you have to do." *Id.* at 11, col.2.

Nelson Rockefeller, John Rockefeller's uncle and long-time governor of New York and Vice President under Gerald Ford, testified in his vice-presidential confirmation hearings that he and members of his family had spent \$17,000,000 of their own money over the years on his various campaigns. H. ALEXANDER, 3d ed., *supra* note 9, at 26.

18. See generally H. ALEXANDER, 3d ed., *supra* note 9, ch. 2.

19. H. ALEXANDER, 2d ed., *supra* note 9, at xi (quoting G. THAYER, WHO SHAKES THE MONEY TREE? 25 (1973)).

concerns over large contributions, whether from wealthy individuals or special interest groups. Such legislation required disclosure of campaign finances, under the assumption that "Who gave it" and "Who got it" laws would help arm candidates and the press with information about each candidate's ties to various groups or individuals.²⁰

With the onset of Watergate and other political corruption investigations throughout the country, the federal and state legislatures began to enact other reforms. They gave formal structure to the regulation and control of campaign finances, often through special election or ethics commissions.²¹ They limited campaign contributions in an effort to cut down on big donations from single sources,²² including a candidate's personal wealth.²³ Similarly, they limited total campaign expenditures by each candidate.²⁴

B. Public Financing Laws

Even before Watergate, Congress acted to infuse federal tax dollars into presidential campaigns.²⁵ This trend accelerated with the adoption of public financing programs by no less than nineteen states.²⁶

The general absence of limitations on expenditures in state campaign financing acts resulted in part from the reaction of the Supreme Court, in 1976,²⁷ to the onslaught of campaign financing reforms and, in particular, to the federal government's prohibition of third-party indirect campaign expenditures in the presidential public financing law.²⁸

20. See generally *id.*

21. H. ALEXANDER, 3d ed., *supra* note 9, at 171-73.

22. *Id.* at 165-71.

23. *Id.* at 163-65.

24. *Id.* at 166-68.

25. *Id.* at 34-37.

26. These states are California, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oklahoma, Oregon, Rhode Island, Utah, Virginia, and Wisconsin. Oregon's experimental system expired in 1981 and was not renewed. Maryland has suspended the operation of its program until 1986. Oklahoma's statute does not currently conform to the state constitution. H. ALEXANDER, 3d ed., *supra* note 9, at 166-68. Eleven states (California, Idaho, Iowa, Kentucky, Maine, Massachusetts, Montana, Oklahoma, Oregon, Rhode Island, and Virginia) enacted public financing laws that did not attempt to limit expenditures. Four states (Michigan, Minnesota, New Jersey, and Wisconsin) enacted public financing acts that impose limitations upon expenditures by candidates who accept public funds. *Id.*

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

28. 26 U.S.C. § 9012(f) (1982). This section was held unconstitutional by the Supreme Court in *FEC v. NCPAC*, 105 S. Ct. 1459 (1985).

III. THE JUDICIAL RESPONSE TO THE REFORMS

A. *Does the Supreme Court Support a Constitutional Right to Buy Elections?*

The action of the Supreme Court regarding congressional limitations on contributions and expenditures in political campaigns has been mixed, but the Court's decisions suggest it is insensitive to the threat that campaign money can pose to the democratic process.²⁹ While limitations on contributions have generally been upheld, restrictions in the crucial area of independent expenditures have been struck down by the Court, undermining attempts to eliminate corruption or the appearance of corruption.

In the landmark case of *Buckley v. Valeo*,³⁰ the Supreme Court considered provisions of the Federal Election Campaign Act of 1971 (FECA)³¹ which limited contributions to a candidate for federal office and expenditures in support of such a candidacy. The Court found that the limitations operated "in an area of the most fundamental First Amendment activities."³² The Court dealt separately with the limitations on contributions and those on expenditures. The former were upheld, while the latter were held to be unconstitutional.³³

Even though they were upheld, the limitations on contributions restricted the freedom to associate and freedom of political expression and thus were subject to the closest scrutiny.³⁴ However, the Court found the Act's primary purpose of preventing corruption or the appearance of corruption sufficient to justify the \$1 thousand limit on contributions.³⁵ The Court stated that:

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.³⁶

29. See Forrester, *supra* note 7.

30. 424 U.S. 1 (1976).

31. 86 Stat. 3 (1973) (as amended 88 Stat. 1263 (1974)).

32. *Buckley*, 424 U.S. at 14.

33. *Id.* at 143.

34. *Id.* at 25.

35. *Id.* at 26, 29.

36. *Id.* at 26-27.

Rejecting the argument that the same objectives could be accomplished by less restrictive means of bribery laws and disclosure requirements, the Court found that Congress was within constitutional limits in determining that such measures were only partially effective and that contribution limitations were also needed.³⁷

The Court also considered the provisions of the Act limiting expenditures of a candidate and expenditures made on his behalf. The Court looked at three such provisions: (1) a cap on independent expenditures in favor of a candidate's campaign;³⁸ (2) limits on the amount of personal funds a candidate or his immediate family may spend on behalf of his campaign;³⁹ and (3) overall limitations on the total amount of money that may be expended by a candidate for federal office, with differing amounts set for different offices.⁴⁰

In striking down the limits on independent expenditures,⁴¹ which the authors prefer to include within the broader term of "private indirect expenditures," the Court found the independent character of these expenditures to be all-important: "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."⁴² Thus, the Court began to draw a curtain of unreality across the stage of political fundraising and expenditures.

Interestingly, the Court stated: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign."⁴³ After invalidating Congress' effort to address the problem, the Court's majority suggested nothing to stop such indirect expenditures. It was left to others to make those suggestions. As Justice White pointed out in dissent: "It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with

37. *Id.* at 27-28.

38. *Id.* at 39-51.

39. *Id.* at 51-54.

40. *Id.* at 54-59.

41. *Id.* at 51.

42. *Id.* at 47.

43. *Id.* at 45.

his approval but fail to limit the amounts that could be spent on his behalf."⁴⁴ Justice White favored relying on the determination of Congress—"those who know"⁴⁵—in upholding the Act's limits on independent expenditures. He described these restrictions as "essential to prevent transparent and widespread evasion of the contribution limits."⁴⁶

The Court similarly struck down the cap on the use of personal funds in a candidate's campaign.⁴⁷ The Court reasoned that the purpose of preventing corruption cannot be served where a candidate can rely on his own funds rather than someone else's.⁴⁸ This reason, however, begs the question of whether the democratic process is corrupted when one increasingly has to be personally wealthy in order to run for office, either state or federal.⁴⁹ Indeed, as Justice Marshall pointed out in dissent, the limitations on contributions upheld by the Court place "a premium on a candidate's personal wealth."⁵⁰

Finally, the Court invalidated the provision placing an overall limit on the amount of money a candidate for federal office can spend in his campaign.⁵¹ Unconvinced by the justifications advanced in support of the provision, the Court found that limiting the corrupting influence of large contributions and equalizing the financial power of competing candidates cannot justify an infringe-

44. *Id.* at 261 (White, J., dissenting).

Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it. Those supporting the bill undeniably included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years.

Id.

The records of the Federal Election Commission state:

There are now some 1702 corporate PACs, with incomes totalling \$39,539,381 during the first 18 months of the 1984 election cycle; 675 trade association PACs with incomes of \$35,934,635; and 417 union PACs with incomes of \$30,264,140. . . .

This clearly represents a weighty accumulation of wealth that could substantially affect presidential elections.

Brief for Appellant Federal Election Commission, at 28, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 105 S. Ct. 1459 (1985).

45. *Buckley*, 424 U.S. at 261.

46. *Id.* at 262.

47. *Id.* at 54.

48. *Id.* at 53.

49. *See supra* notes 19, 22.

50. *Buckley*, 424 U.S. at 289 (Marshall, J., dissenting).

51. *Buckley*, 424 U.S. at 58.

ment of the first amendment. The Court opined that the people, not the government, must retain control of the "quantity and range" of debate in a political campaign;⁵² therefore, this section was struck because it unconstitutionally infringed on the ability of candidates to participate in and influence those debates to the full extent of their financial ability.⁵³

In *Citizens Against Rent Control v. Berkeley*,⁵⁴ the Supreme Court struck down a municipal ordinance that placed a \$250 limitation on contributions to committees supporting or opposing city-wide referendum issues. The Court found the restriction to be violative of freedom of association and freedom of speech under the first amendment.⁵⁵ The Court concluded: "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in cur-tailing debate and discussion of a ballot measure."⁵⁶

In *Federal Election Commission v. National Conservative Political Action Committee*,⁵⁷ the Court dealt a further blow, perhaps fatal in the absence of legislative response, to attempts to regulate the tremendous amounts of money being spent in attempts to capture national office. In an opinion written by Justice Rehnquist,⁵⁸ the Court struck down a restriction in the Presidential Election Campaign Fund Act (Fund Act)⁵⁹ which provided that if a presidential candidate of a major party chose to receive public funds for

52. *Id.* at 57.

53. In *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), the Court struck down a Massachusetts law restricting contributions and expenditures of banks and corporations designed to influence votes on questions submitted to voters, other than those questions affecting the "business, property, or assets" of a bank or corporation. *Id.* at 767-68, 795. The Court held that it was unconstitutional to restrict the speech of such entities on the simple basis of their being corporations, stating that "[i]f the speakers here were not corporations, no one would suggest that the state could silence their proposed speech." *Id.* at 777, 784-85. Justice White, dissenting along with Justices Brennan and Marshall, argued that the purpose of the statute was to prevent corporations from using their aggregation of wealth to unfair advantage in the political process: "The State need not permit its own creation to consume it." *Id.* at 809.

54. 454 U.S. 290 (1981).

55. *Id.* at 299.

56. *Id.*

57. 105 S. Ct. 1459 (1985).

58. Chief Justice Burger and Justices Blackmun, Powell, and O'Connor joined the opinion of the Court. Justices Brennan and Stevens joined in Part II of the Court's opinion. Justice Stevens filed a separate opinion, concurring in part and dissenting in part. Justice White filed a dissenting opinion, in Part I of which Justices Brennan and Marshall joined. Justice Marshall also filed a separate dissenting opinion.

59. 26 U.S.C. §§ 9001-9013 (1982).

his general election campaign,⁶⁰ then campaign financing limitations extended not only to his contributions and his expenditures,⁶¹ but also to independent expenditures by others on his behalf.⁶² The challenged provision provided that any such independent expenditures of more than \$1 thousand to a political committee in furtherance of a candidate's campaign constituted a criminal offense.⁶³

In discussing the Court's consideration of the constitutionality of these provisions of the Fund Act, it is important to first examine some basics pertaining to such provisions. The Act applies only if a presidential candidate accepts public financing of his general election campaign.⁶⁴ Thus, the Act imposes voluntary, not mandatory, limitations. A candidate may decline the "carrot" offered to secure his voluntary support for limitations on contributions and expenditures. Also, the Act covers only the period from the nominating convention to thirty days after the general election.⁶⁵

The voluntary nature of the limitations is of particular significance. If a candidate elects to receive public funds for his campaign, then he must agree that he will not accept other contributions.⁶⁶ This is in contrast to the FECA, not reviewed by the Court in *NCPAC*, which applies to all presidential campaigns, as well as to other federal elections.⁶⁷

As the Court noted in *NCPAC*, it had previously reviewed both the Fund Act and FECA in *Buckley*. The limitations on contributions to candidates were upheld in *Buckley* while the limitations on expenditures of independent organizations were struck down as being unconstitutional.⁶⁸

The specific challenged provision in *NCPAC* was section 9012(f)(1) of the Fund Act, which provides:

[I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential

60. *Id.* § 9003.

61. *Id.* § 9012(a).

62. *Id.* § 9012(f).

63. *Id.*

64. *Id.* § 9003.

65. *Id.* § 9002(12)(A).

66. *Id.* § 9003.

67. See *supra* notes 30-53 and accompanying text. The FECA is not a voluntary scheme. It applies to a candidate's campaign regardless of whether it is privately or publicly funded.

68. *NCPAC*, 105 S. Ct. at 1466.

election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding \$1,000.⁶⁹

“Political committee” is defined as “any committee, association, or organization, whether or not incorporated, which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.”⁷⁰ “Eligible candidates” are those presidential and vice-presidential candidates who are eligible and have chosen to receive public funds.⁷¹

The Court did not question that the Political Action Committees (PACs) were political committees, that the candidate whom they supported, Ronald Reagan, was a qualified candidate, and that the PACs’ expenditures came within the definition of “qualified campaign expense.”⁷² The remaining question was whether the statute was constitutional.⁷³

The Court found that the statute affected speech that is at the core of the first amendment.⁷⁴ The Court recognized, however, that the PACs were not “lone pamphleteers or street corner orators in the Tom Paine mold.”⁷⁵ The Court unquestionably understood that the PACs spend large amounts of money in order to get their position across to the public in election campaigns. While this large expenditure of money certainly made things different, the Court thought that “for purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than \$1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.”⁷⁶

The Court concluded that PACs such as these are entities which enable large numbers of people to make their voices heard more effectively. The Court rejected the idea that the manner of organization or the methods of solicitation of the PACs deprived them of

69. 26 U.S.C. § 9012(f)(1).

70. 26 U.S.C. § 9002(9).

71. *Id.* §§ 9002(4), 9003.

72. *NCPAC*, 105 S. Ct. at 1466.

73. *Id.* at 1467.

74. *Id.*

75. *Id.*

76. *Id.*

first amendment protection for their expenditures. The Court also rejected the argument that the contributions to the PACs do not constitute individual speech. The FEC asserted that if contributions are related to speech, then it is only "speech by proxy" because the individual contributors have no control over what the PACs say or how they say it.⁷⁷ The Court said that the statute limits expenditures by the PACs, not the contributions they receive.⁷⁸ Also, in the Court's view, the contributions by individuals to the PACs were predominantly small—an average of seventy-five dollars for NCPAC; twenty-five dollars for Fund For A Conservative Majority—and did not raise the same concerns as would large contributions.⁷⁹

Another reason the 'proxy speech' approach is not useful in this case is that the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.⁸⁰

The Court briefly noted that this was not a "corporations" case and that the Court did not reach the question of whether a corporation could constitutionally be restricted in the making of independent expenditures in such circumstances.⁸¹

The Court applied its standard first amendment analysis, looking at whether the restriction on freedom of speech could be saved by reason of a legitimate and compelling governmental interest.⁸² The Court noted that the only legitimate and compelling governmental interests thus far identified were those of preventing corruption or the appearance of corruption, as found in *Buckley* and *Citizens Against Rent Control*.⁸³

In a demonstration of what can only be described as either judi-

77. *Id.* at 1467-68.

78. *Id.* at 1468.

79. *Id.* at 1467-68.

80. *Id.* at 1468.

81. *Id.*

82. *Id.* at 1469.

83. *Id.*

cial blindness or political naivete on the part of the majority,⁸⁴ the Court stated:

It is contended that, because the PACs may by the breadth of their organizations spend larger amounts than the individuals in *Buckley*, the potential for corruption is greater. But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.⁸⁵

The Court stated further that even were it determined that huge expenditures by PACs were corruptive, the statute could not survive constitutional challenge because it is overbroad. The majority found that it applied to NCPAC and to "informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate."⁸⁶ Nor could the statute be saved by a narrowing construction because it would be too difficult to draw lines between large PACs and the informal neighborhood groups.⁸⁷

In striking down the statute, the Court concluded:

Even assuming that Congress could fairly conclude that large-scale PACs have a sufficient tendency to corrupt, the overbreadth

84. The Court had much evidence of coordination of the supposed "independent" expenditures with campaigns of candidates before it. See *infra* note 128. It is the lack of coordination which is the basis of the Court's holding here and this was severely criticized by Justices White and Marshall in dissent. See *infra* notes 89-91 and accompanying text.

85. *Id.* at 1469.

86. *Id.* at 1470.

87. *Id.*

of § 9012(f) in this case is so great that the section may not be upheld. We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct.⁸⁸

The dissenters took issue with the majority on several points, among them the definition of the conduct of these PACs as speech⁸⁹ and the majority's assertion that the danger of corruption of candidates by the PACs was merely a hypothetical possibility. As Justice White stated:

The credulous acceptance of the formal distinction between coordinated and independent expenditures blinks political reality. That the PACs' expenditures are not formally "coordinated" is too slender a reed on which to distinguish them from actual contributions to the campaign. The candidate cannot help but know of the extensive efforts "independently" undertaken on his behalf. In this realm of possible tacit understandings and implied agreements, I see no reason not to accept the congressional judgment that so-called independent expenditures must be closely regulated.⁹⁰

. . . .

As in *Buckley*, I am convinced that it is pointless to limit the amount that can be contributed to a candidate or spent with his approval without also limiting the amounts that can be spent on his behalf.⁹¹

Agreeing with Justice White, Justice Marshall stated:

It simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available. And the possibility of such a reward provides a powerful incentive to channel an independent expenditure into an area that a candidate will appreciate. Surely an eager supporter will be able to discern a candidate's needs and desires; similarly, a willing candidate will notice the supporter's efforts. To the extent that individuals are able to make independent expenditures as part of a *quid pro quo*, they succeed in undermining completely

88. *Id.* at 1471

89. *Id.* at 1475 (White, J., dissenting).

90. *Id.* at 1476 (footnote omitted).

91. *Id.* (footnote omitted).

the first rationale for the distinction made in *Buckley*.⁹²

The NCPAC decision likely rendered ineffective all existing restrictions on expenditures by independent political committees. This result, in turn, will undermine attempts at public financing of campaigns and the limiting of contributions and expenditures. The task facing proponents of public financing now is how constitutionally to find other ways of restricting private indirect expenditures in political campaigns.

B. What Support for Campaign Financing Controls and Public Financing Exists Within State Court Decisions?

Generally, within the parameters laid out by the Supreme Court, state judicial opinions concerning limits on campaign contributions and public financing of campaigns for various offices have been favorable. The state courts which have ruled on such legislation have not taken it upon themselves to go beyond *Buckley* and its progeny to strike down either campaign financing limitations or public financing systems.

1. Florida

While Florida does not have any elections financed with public funds, its election laws include numerous and detailed provisions on campaign financing.⁹³ These include limitations on campaign contributions,⁹⁴ campaign expenditures,⁹⁵ and, in a post-*Buckley* provision, even independent expenditures.⁹⁶ Further, Florida has a fully staffed, active Commission on Ethics,⁹⁷ which functions along with other election officials to assure compliance with election laws.

In *Winn-Dixie Stores v. State*,⁹⁸ the Supreme Court of Florida struck down the campaign financing limitation pertaining to Winn-Dixie's expenditure of \$24 thousand in a referendum campaign in Dade County.⁹⁹ Winn-Dixie sought to defeat an ordinance that

92. *Id.* at 1481 (Marshall, J., dissenting).

93. FLA. STAT. ch. 106 (1983).

94. *Id.* § 106.08.

95. *Id.* § 106.11.

96. *Id.* § 106.071.

97. *Id.* §§ 112.320-.3241.

98. *Winn-Dixie Stores v. State*, 408 So. 2d 211 (Fla. 1981).

99. *Id.* at 212. The court held that FLA. STAT. § 106.08(1)(e) (1974) was unconstitutional as applied to the facts of that case to limit expenditures in issue-referendum campaigns. *Id.*

would have prohibited the sale of beverages in nonreturnable containers.¹⁰⁰ *Winn-Dixie* involved the same statute as did *Let's Help Florida v. McCrary*,¹⁰¹ although *Winn-Dixie* was decided nearly a year and a half after *McCrary* was settled in federal court. Although the Supreme Court of Florida found "the reasoning and the holding of *McCrary* to be directly applicable to the instant case,"¹⁰² it still reviewed the arguments—essentially the same ones presented in *McCrary*—before declaring the statute unconstitutional. Much of the court's opinion, in fact, consisted of quotations from *McCrary*.

The court did, however, note the statements made in *McCrary* concerning Florida's disclosure laws that are effective and constitutional:

Florida can and does effectively promote the disclosure of large contributors through measures that are less harmful to first amendment rights. For example, sections 106.03 and 106.07 of the Florida Election Code require political committees to register with the state and to file information about each contribution and contributor throughout the campaign. This information is available to the public and may be published through newspapers and other media. Section 106.143 requires disclosure of the source of payment for all political advertisements and campaign literature. Measures such as these provide adequate disclosure without directly restricting contributions or other important first amendment rights.¹⁰³

2. Other States

In an advisory opinion handed down shortly after *Buckley*, the Supreme Court of Michigan found unconstitutional the maximum expenditure limits on campaigns and by individuals imposed by statute.¹⁰⁴ However, it upheld the constitutionality both of the lim-

100. *Id.* at 211.

101. *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980). In this case, the Fifth Circuit held that FLA. STAT. § 106.08(1)(d), (e) (1977), was unconstitutional because, by prohibiting contributions of more than \$3 thousand to any political committee supporting or opposing any issue to be decided in a statewide election, the statute abridged the first amendment and could not be saved by reason of governmental interests in preventing corruption or promoting the disclosure of the identities of contributions to political campaigns. *Id.* at 201.

102. *Winn-Dixie*, 408 So. 2d at 213.

103. *Id.* (quoting *McCrary*, 621 F.2d at 200-01).

104. Advisory Opinion On Constitutionality of 1975 PA 227 (Questions 2-10), 242

itations on the size of contributions to a campaign and of the Michigan system for public financing of gubernatorial races.¹⁰⁵

The court approved the public financing scheme and found the following "beneficial public purposes":

1. To allow gubernatorial candidates to become less dependent upon financial support from special-interest groups, thus promoting the appearance and reality of an executive with the welfare of the public at large in mind.

2. To encourage greater participation in gubernatorial campaigns by reducing financial obstacles for candidates with less fundraising abilities, and by enhancing the importance of smaller contributions.

3. To promote the dissemination of political ideas to the electorate by gubernatorial candidates who have been encouraged to campaign for the governorship.¹⁰⁶

In a brief opinion handed down at the beginning of 1977, the Supreme Court of Georgia struck down expenditure limitations in certain political campaigns, strictly following the *Buckley* opinion.¹⁰⁷

In *Common Cause v. New Jersey Election Law Enforcement Commission*,¹⁰⁸ the Supreme Court of New Jersey upheld a statute that prohibits all contributions greater than \$600 to candidates for governor in the general election.¹⁰⁹

In a 1981 advisory opinion,¹¹⁰ the Supreme Court of New Hampshire upheld the constitutionality of a proposed plan for partial public financing of campaigns for governor and governor's counsel which set spending limits only for those candidates who accept public financing. The court cited *Buckley*, saying that the Supreme Court had upheld such voluntarily assumed limitations.¹¹¹ The court specifically ruled that a proposed amendment to the bill which would have deleted the public financing, but left the spending limitation intact, would have been unconstitutional.¹¹²

N.W.2d 3, 10 (Mich. 1976).

105. *Id.* at 9-12.

106. *Id.* at 16.

107. *State Ethics Comm'n v. McDowell*, 231 S.E.2d 734 (Ga. 1977).

108. *Common Cause v. New Jersey Election Law Enforcement Comm'n*, 377 A.2d 643 (N.J. 1977).

109. *Id.* at 651.

110. *Opinion of the Justices*, 430 A.2d 1137 (N.H. 1981).

111. *Id.* at 1138.

112. *Id.* at 1139.

In a 1984 decision, the Court of Appeals of Michigan in *Jacobs v. Headlee*¹¹³ ruled that the restriction of the gubernatorial campaign public financing plan to candidates of major political parties did not violate the state constitutional rights of minor party candidates. The court concluded that the legislation was rationally related to legitimate governmental objectives and did not violate the plaintiff's rights of due process, equal protection, purity of elections, or free speech under the Michigan constitution.¹¹⁴

IV. EMPHASIS ON THE INTERRELATIONSHIP OF PUBLIC FINANCING AND THE GOALS OF CAMPAIGN FINANCING REFORMS

Approximately 500,000 public officials are elected in the United States during a four-year period.¹¹⁵ The sums spent on the campaigns are not insignificant.¹¹⁶ In fact, the amounts spent by the winning candidates alone show that the candidates and their supporters certainly do not pursue political office for the salaries paid by the jobs.¹¹⁷

The response by federal and state legislatures in enacting reforms to deal with the corrupting influences of large sums of money on elected officials and the counter-response by the judiciary may become a characteristic of American campaign financing for a number of years until it dynamically shapes public financing laws that will eventually become part of the accepted framework of elections in America. On the other hand, public financing as one of the weapons in the government's arsenal for combatting corruptive influences in politics may become a rusting artifact on some forgotten stockpile. The goals of the reforms of the 1970's are clear enough. All the reforms work together to reduce corruption or the appearance of corruption.

Several reforms have fared well with the courts.¹¹⁸ More importantly, the Supreme Court's ruling in *NCPAC* can only exacerbate the problems which must be solved. The potential for more corruption and, almost certainly, an increase in the appearance of corruption lie ahead for American elections in the near future because of the ever-increasing sums of special interest money being expended outside candidates' campaign treasuries.

113. *Jacobs v. Headlee*, 352 N.W.2d 721 (Mich. Ct. App. 1984).

114. *Id.* at 724-27.

115. H. ALEXANDER, 3d ed., *supra* note 9, at 180.

116. *See supra* note 12.

117. *Id.*

118. *See supra* notes 29-114 and accompanying text.

All the various reforms aim clearly at the evil influence of money, either directly or indirectly. Collectively, these reforms in campaign financing attack corruption or the appearance of corruption and have the following goals in mind:

- (1) achieving a well-informed electorate;
- (2) minimizing the influence of money on the outcome of an election;
- (3) minimizing the influence of money as a *quid pro quo* for certain action by a politician;
- (4) encouraging qualified candidates to run for office (regardless of their personal wealth or their willingness to sell themselves to groups who will pay to secure their election);
- (5) reducing the dollar cost of elections.¹¹⁹

Public financing works hand-in-glove with the other reforms to achieve these goals by providing a minimum or "floor" of funds for serious candidates to educate voters; by reducing the need for the candidate to secure funds from contributors, at whatever cost in terms of political ties and commitments; by helping candidates advertise their greater independence as a vote-getting strategy which compensates for rejected contributions; and by evening the financial differences between candidates regardless of personal wealth. Public financing may reduce the costs for campaigns in which the acceptance of public funds carries with it limitations on expenditures, especially when the limitations remain reasonable for the office sought and when failure to honor the limitations would result in a degree of public outrage which could defeat a candidate who relies too heavily on large contributions.¹²⁰

Because analyses of the various approaches of current public financing systems have already been conducted, it will suffice to say that many variables exist. These variables include questions pertaining to the particular elections to be financed; the source of funding; the amounts to be allocated; the manner of determining which candidates shall receive the benefits of public funding; how public funds may be spent; the administration of the public financing system; the timing of payments; the extent to which limitations on contributions and expenditures shall be conditions for receipt of public funds; the extent that legislative attempts will be made to

119. For further elaboration, see H. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM* (1st ed. 1976).

120. See, e.g., H. ALEXANDER, 3d ed., *supra* note 9.

regulate and control private indirect expenditures; and sanctions for violation of the public financing legislation.

V. THE PROBLEM OF PRIVATE INDIRECT EXPENDITURES

The Supreme Court's holdings on independent expenditures place a tremendous challenge before Congress and the state legislatures. If public financing of elections is to remain viable as one of the weapons for combating the corrupting influences of money in politics, then public financing legislation must recognize the depth of the problem.

The task is to determine if public financing of elections can work effectively either (1) with no accompanying attempt to impose limitations on private indirect expenditures or (2) only with new and more imaginative attempts to impose such limitations. Congress did enact a number of amendments to the Funding Act after the *Buckley* decision.¹²¹ Those amendments did not, however, sway the antilimitations majority of the Court in *NCPAC*.

Some states enacted public financing laws that do not seek to limit expenditures, while others imposed limitations only upon candidates who accept public funds.¹²² Thus, while many may share the philosophy expressed by the dissenters in *NCPAC*, public funding does continue to exist, notwithstanding the open door to private expenditures to undermine public funding systems.

Whether or not a state legislature makes a new attempt to prohibit coordinated private indirect expenditures when considering a particular system for public funding of elections, it can impose new disclosure laws to focus public attention on indirect expenditures by well-financed special interest groups. After the *Buckley* decision, for example, Congress required that independent expenditures of \$1 thousand or more made within fifteen days of an election be reported within twenty-four hours; required persons and PACs making independent expenditures of more than \$100 to file a report with the election commission; required the person or PAC making the report to state, under penalty of perjury, that the expenditure was not made in collusion with a candidate; and stiffened the penalties for violations of the law.¹²³

Legislatures should note, in considering new approaches to limiting indirect expenditures, that the Supreme Court did not recog-

121. H. ALEXANDER, 3d ed., *supra* note 9, at 42-45.

122. *See supra* note 25.

123. Pub. L. No. 94-283, 90 Stat. 475 (1976).

nize an absolute right to spend unlimited amounts.¹²⁴ Thus, after PACs figuratively have purchased their costly amplifying systems and put them into operation to make their voices heard throughout the public halls of America, they should not presume that the courts will invalidate all legislative efforts to control the decibel level of their political messages.¹²⁵

The Supreme Court will uphold legislative restrictions upon campaign financing if such restrictions prevent "corruption or the appearance of corruption."¹²⁶ The inconsistency lies in the Court's apparent simultaneous acceptance of NCPAC's expenditures as "uncoordinated with the candidate or his campaign."¹²⁷ This is contrary to the overwhelming evidence of coordination and even design to circumvent the limitations which the organization disliked.¹²⁸

124. The Court's opinion in *NCPAC* was premised on the finding that the PACs' spending was independent. A finding of non-independence could lead to a different result.

125. *NCPAC*, 105 S. Ct. at 1469.

126. *Id.*

127. *Id.*

128. The Democrats in *NCPAC* stated:

As the former Executive Director of FCM, a PAC which expended over two million dollars supporting a presidential candidate in 1980, is reported to have described it, the result is "a little dance." "[W]e dance around the law in a way that never breaks the letter but breaks the spirit of the law—but we don't agree with the law anyway."

Brief for Appellants Democratic Party of the United States and the Democratic National Committee at 3, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 105 S. Ct. 1459 (1985) (quoting remarks of Paul Dietrich in *THE NEW YORKER*, Dec. 13, 1982, at 91) (footnotes omitted).

The Federal Elections Commission in *NCPAC* stated:

[I]t is clear that the efforts of these independent committees were considered helpful by the candidate, and that the Reagan Administration was appreciative. For example, individuals associated with the committees received presidential appointments, and NCPAC was able to obtain closed door briefings with members of the Reagan cabinet, as well as the President himself, to aid in its fundraising efforts.

Brief for Appellant Federal Election Commission at 25, *id.* (citations omitted).

The joint appendix submitted by the parties stipulated that the press had reported meetings of several Reagan cabinet officers with NCPAC officials in off-the-record policy briefings. These cabinet officials at the time included John Block, Secretary of Agriculture, Richard Schweiker, Secretary of Health and Human Services, Drew Lewis, Secretary of Transportation, James Watt, Secretary of the Interior, and James Edwards, Secretary of Energy. Joint Appendix at 32-33, *id.*

As further evidence of coordination and close relations between the PACs and the candidates' campaigns, Frank Donatelli, a founder and former Director-at-Large of NCPAC, was the Midwest coordinator for the Reagan for President Committee in 1980. Roger Stone, a founder and the original treasurer of NCPAC, was the Northeast coordinator for the Reagan campaign in 1980. Joint Appendix at 36-37, *id.*

The Washington Post has quoted John T. Dolan, head of NCPAC, as saying: "[G]roups

The Court's emphasis on "absence of prearrangement and coordination of an expenditure with the candidate or his agent," which it felt undermined "the value of the expenditure to the candidate" and also alleviated "the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate," seems inappropriate in light of the history of NCPAC.¹²⁹ In 1979, the National Committee for an Effective Congress (NCEC) filed a complaint with the FEC about NCPAC and two other PACs formed respectively by three presidential candidates to complement their campaign committees. NCEC asserted that NCPAC and its candidate's campaign committee were one and the same because they were established, maintained, and controlled by the same people and because a substantial portion of the contributors to the presidential committee gave to NCPAC as well.¹³⁰ Professor Alexander summarized these events by saying: "By establishing qualified committees, the . . . presidential hopefuls and their supporters were able to avoid the individual contribution limits. . . . Moreover, the presidential hopeful could raise and spend without consideration for the maximum spending limits."¹³¹

Although one may join with the dissenting justices in *NCPAC* in near outrage at the majority's perspective, the most constructive approaches are linked with the majority's perspective. Little will be accomplished in terms of creating viable public financing systems if public financing advocates throw up their collective hands and wail that public financing cannot work under the parameters set by the Court.

If other cases, brought in state court instead of federal court, present similar instances of massive indirect private political expenditures of such magnitude that they frustrate one or more of the basic purposes for the existence of a particular state public financing system, and if similar evidence is offered on prearrangement or coordination, then state courts may make factual findings that justify different results. The result may be that the expenditures are not constitutionally protected because they were coordi-

like ours [NCPAC and other political committees making independent expenditures] are potentially very dangerous to the political process. We could be a menace, yes. Ten independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics." Joint Appendix at 35, *id.* (quoting Washington Post, Aug. 10, 1980, at F1, col.1).

129. *Buckley*, 424 U.S. at 47.

130. H. ALEXANDER, 2d ed., *supra* note 9, at 90.

131. *Id.* at 89.

nated with the candidate, who agreed in accepting public money to limit his expenditures. For this reason alone, candidates and interest groups who would subvert a public financing system at the state level may find that they must watch their steps. To make such favorable results in state courts possible, laws regulating private indirect expenditures should make clear that only those private indirect expenditures which are truly independent and uncoordinated will be protected. New laws should provide sanctions against persons or PACs whose indirect expenditures do not measure up to legislatively defined standards for "independent" expenditures. The role of the courts would then be to scrutinize the legislatively drawn lines.

A. *Distinguishing Between Types of Elections for a Public Financing System*

The campaigns for President of the United States receive the most attention because of the importance of the office, the ease of inserting numerous and varied issues into the campaign, and the large amounts of money required to run an effective campaign. It may be incorrect to assume that private indirect expenditures, whether or not truly "independent," are less threatening in campaigns for most elected public offices than in the presidential campaigns. However, public financing of certain elections will have inherently fewer problems with private indirect expenditures than other methods of financing. For example, elections of Florida's trial judges seem to provide one such example.

Florida elects its trial judges in nonpartisan campaigns.¹³² Florida's appellate judges do not face opponents in elections, but face merit retention elections.¹³³ The separate chapter of the Florida election laws dealing with these "non-partisan elections of judicial officers" imposes a number of "limitations on political activity" of candidates for judgeships.¹³⁴ In this particular type of election which seems to be less susceptible to subversion of public funding from private indirect expenditures, the additional high ethical standards have high visibility. The existing laws impose criminal sanctions for violations in order to prohibit partisan political activity by third parties on behalf of a candidate.¹³⁵

132. FLA. STAT. § 105.071 (1983).

133. FLA. CONST. art. V, § 10(a).

134. FLA. STAT. § 105.071 (1983).

135. *Id.* § 105.09.

At the outset of any legislative consideration of the problems of the relationship between public financing and independent expenditures, proponents of a public financing system should examine the nature of the particular campaign being financed.¹³⁶ For example, electioneering by each candidate seeking to become a trial judge in Florida continues to present serious problems for the candidates, their contributors, and the general public in terms of the unfortunate opportunities for an appearance of corruption. Most candidates for judicial office and their contributors regret the fact that most of the money for such candidates comes from the very lawyers, courthouse personnel, court reporters, and other court-related businessmen who know the candidates. While these contributors provide an accurate measure of the strength of feeling of the people most involved with the judicial system on a day-to-day basis and also provide a measure of the competence and ability of the candidates, they are also the persons most able to benefit from corruption within the system, thus leading to an appearance of corruption.

The general public probably relies considerably on such judicial personnel and their opinions in deciding on how to vote; but, at the same time, the common voter also seems justified in raising an eyebrow when he knows that Lawyer *A* gave Judge *B* a \$1 thousand contribution and just happens to have a law practice that puts him in front of Judge *B* several days each month.

In nonpartisan judicial elections and others similar to them, public financing helps everyone involved: the candidates, the persons who provide most of the money for the campaigns, and the voters. It is possible to end forever the worry of the litigant who knows that the other party's lawyer contributed to the judge's campaign or that his own lawyer supported the judge's opponent.

B. Shifting the Burden to the Power Brokers

A shifting of the burden to the big spenders is appropriate. Leg-

136. The appendix to this Article continues the example of Florida's trial judges by proposing specific legislation for establishing a public financing system for these particular judicial officers. One of the co-authors of this Article, Tom Moore, was the prime sponsor of a similar bill, HB 614, in the 1977 Regular Session. That bill passed the House Committee on Elections. FLA. H.R. JOUR. 522 (Reg. Sess. 1977). The proposal in the appendix reflects updated thinking on how best to implement a public financing system following the more recent Supreme Court opinions and the experience of other public financing systems in general. The data available today is not likely to be different from that gathered in 1977 to support the basic arguments in favor of the public financing of elections for Florida's trial judges.

islative bodies can draw lines which reasonably safeguard public financing systems, such as through stronger disclosure provisions for indirect expenditures. There should be no assumption that those who make substantial private indirect expenditures in publicly financed elections do so without coordination of those expenditures with the candidate, or in a manner which does not make a mockery of the public financing system involved.

What is suggested here is more than simply that legislation should include sanctions against those who would frustrate the public funding through indirect expenditures which are not the independent expenditures protected by the first amendment. Every public financing law should include sections similar to the following that define and regulate private indirect expenditures and set forth statutory presumptions to aid in the prosecution of violations of the law:

Indirect expenditure.—Any expenditure not made from campaign funds of a candidate, other than an expenditure made directly to or in favor of a candidate as a campaign contribution, made by any person or political action committee in favor of or in opposition to any candidate, is an indirect expenditure for purposes of this Act.

Prohibition of coordinated expenditures.—It shall be unlawful for any person or political action committee to make any indirect expenditure which he or it coordinated with a candidate.

Presumptions as to coordination of expenditures.

(1) Any person or political action committee who or which makes an indirect expenditure or expenditures in any election in which he or it has actively campaigned for a candidate during and in such contest, shall be rebuttably presumed to be engaged in campaign financing activities coordinated with the campaign of the candidate.

(2) Any person or political action committee who or which contributes directly to a candidate and thereafter makes an indirect expenditure or expenditures in favor of election of that candidate or advocating defeat of his opponent, which when added together exceed the maximum amount allowed by law to be contributed directly to the candidate, shall be rebuttably presumed to be engaged in campaign financing activities coordinated with the campaign of the candidate.

The above distinction in the proposed statutory language between indirect expenditures and independent expenditures, the former including the latter, should be emphasized. The reason for

the distinction lies in the perceived need for regulation and control of all indirect expenditures, especially coordinated ones.¹³⁷

A citizen who simply exercises his constitutionally protected right to "independently" spend his money in excess of contribution limits has little to fear from such legislation and possible prosecution if his own testimony as to lack of coordination is credible. The target of criminal prosecution is the person whom the prosecutor can link closely with the candidate and who has said to state witnesses that he did coordinate his expenditure. Such circumvention of the campaign financing laws should not go unpunished, provided the public financing law appears to the court in all other respects to establish reasonable and proper levels of support for the candidate's campaign and his acceptance of limitations on expenditures.

By including the above proposed statutory provisions in a public financing act, the legislative body necessarily accepts that it must clearly spell out its intent if its provisions are to constitutionally restrict indirect expenditures. While the Supreme Court itself established the concept of "independent" expenditures "uncoordinated" with the candidate,¹³⁸ the legislative effort should tie the lack of independence and coordination to the goals of preventing corruption or an appearance of corruption in the publicly financed election process. The statutory presumptions are corollaries to the substantive provisions of the act defining the offense and are not unknown in criminal law.¹³⁹

No doubt many other variations for limitations exist. These variables are suggested as viable choices among those upon which the courts hopefully will look favorably.

137. The Florida Legislature, for example, thought that it had dealt with the problem of indirect expenditures in a 1977 post-*Buckley* amendment to its campaign financing laws. Florida's election code was amended to define "independent expenditures" and require a disclosure in the political advertisement by the person making the expenditure both of his name and address, together with his statement that the expenditure was made "independently of any candidate." FLA. STAT. § 106.071 (1983). Failure to include this disclosure constitutes a first-degree misdemeanor in Florida. *Id.* The problem, however, is that the Florida law very clearly defines an independent expenditure, as expected, as one that is "not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee." *Id.* § 106.011(5). Thus, while the intent of the existing Florida law may have been directed at imposing disclosure requirements upon all indirect expenditures, it does not clearly do so.

138. *Buckley v. Valeo*, 424 U.S. 1, 46-48 (1975).

139. *See, e.g.*, FLA. STAT. § 812.022 (1983) (possession of stolen property).

VI. CONCLUSION

With the *NCPAC* presidential public financing decision in March, 1985, the United States Supreme Court confirmed that it was listening to those whose money talks the loudest in America. Unfortunately, the Court almost flippantly accepted the expenditures by the PACs as independent—not coordinated with the presidential candidate's campaign—speech entitled to first amendment protection. Money does talk. Now, more clearly, freedom of speech and freedom of association, according to the Court's majority, permit big money to talk big to America's politicians.

The opinion of the Court exists as a challenge to Congress and the state legislatures to deal effectively with massive funding by powerful political action committees. It still remains to be seen whether public financing of elections has a real future in the American electoral process. There is doubt that any public financing system can work effectively without being substantially undermined by Court-protected "independent" expenditures. Nevertheless, some states are trying. Public funding without limitations on expenditures outside the candidate's campaign treasury (consistent with the Court's position) may help.

Some public financing systems may succeed where others fail simply by virtue of the nature of the elections being publicly funded, such as nonpartisan elections of trial judges in Florida. Perhaps as the result of new legislative offensives, it will be possible, with judicial support, to distinguish between truly "independent" expenditures and those expenditures coordinated with a candidate. Future judicial decisions may support such legislatively backed reasonable candidate-accepted limitations on contributions and expenditures.

Until then, *Buckley* and *NCPAC* remain as significant legal impediments to the goals of campaign financing reforms. It appears that campaign financing limitations on expenditures outside the campaign fund of the candidate, while more controllable in state public financing systems, will not be upheld without careful draftsmanship.

Florida should consider public financing as a still viable weapon for combatting corruption and the appearance of corruption in the electoral process; but, it should cautiously proceed in areas that are less controversial and less likely to produce large PAC indirect

expenditures.¹⁴⁰

As PACs speak more loudly in future elections, the political reverberations may become deafening. Campaign financing excesses, when equated with free speech, too often produce merely clanging cymbals. Perhaps when the noise becomes unbearable, jurists will proclaim another version of Justice Holmes' famous passage about yelling "Fire!" in a crowded theater.¹⁴¹

140. A proposed bill pertaining to public financing of nonpartisan elections of Florida's trial judges appears as an appendix beginning on the next page.

141. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Justice Holmes stated:

[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Id. (citations omitted).

APPENDIX

Proposed Bill
A bill to be entitled

An act relating to campaign financing; creating part II of chapter 106, Florida Statutes, the "Florida Trial Judges Campaign Financing Act," providing for partial public financing of nonpartisan elections of trial judges; stating legislative intent; providing definitions; creating the Florida Trial Judges Campaign Trust Fund and providing that all qualifying fees paid by candidates for judicial office shall be deposited therein; providing for expenditure limitations on candidates for trial judge who accept public moneys; prohibiting coordination of indirect expenditures; creating a presumption pertaining to coordination of expenditures; providing powers and duties of the Secretary of State; providing procedures, including a petitioning process, whereby such candidates may become qualified to direct that payment be made from the Fund for certain qualified campaign expenditures; providing for verification of petitions as provided by law and for reimbursement of verification costs as provided by law; providing for determination of qualification by Secretary of State; providing for disbursement of funds; amending s. 105.031(3), Florida Statutes, relating to qualification fees for candidates for judicial office, to conform to this act; providing for relationship to other laws; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 106, Florida Statutes, is designated as part I of chapter 106, and part II of chapter 106, Florida Statutes, consisting of sections 106.50, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61, Florida Statutes, is created to read:

106.50 Short title.—This part shall be known and may be cited as the "Florida Trial Judges Campaign Financing Act."

106.51 Legislative Intent.—The Florida Legislature recognizes both (a) the existence of constitutionally protected rights of citizens to spend their private funds to promote the election of candidates whom they support; and (b) the need to minimize the corrupting influence of money in the election of public officials. By its

enactment of this part, the Legislature seeks to achieve the latter without infringement upon the former, as both relate specifically to candidates for trial judge. The Legislature affirms its intent to safeguard the independence of the trial judges of this state, which independence the Legislature finds to be of great importance in maintaining the highest possible degree of integrity in our legal system. The Legislature supports the continuation of our system of nonpartisan elections of trial judges, including the provisions of chapter 105 which establish limits upon campaign financing activities in elections for judicial office which limitations are in addition to those limitations provided in part I of this chapter. The Legislature intends through this part to reduce the pressures on candidates for trial judge to raise campaign funds from private sources, to assist such candidates in funding their campaigns consistent with the extra limitations imposed on candidates for judicial office and to broaden the spectrum of citizen participation and candidate-voter contact in the selection of trial judges in this state.

106.52 Definitions.—As used in this part, unless the context clearly indicates otherwise:

(1) “Recipient candidate” means any candidate who has received certification from the Secretary of State as having complied with the requirements of the petitioning process of this part.

(2) “Qualified expenditure” means any expenditure subject to direct payment by the state from public funds upon direction of a recipient candidate, and limited to the following:

(a) Payments to the news media, including newspaper, television, and radio establishments, for political advertisement of the candidacy of the recipient candidate.

(b) Payments to printers, artists, publishers, and the like, for creation and production of political literature for the political advertisement of the candidacy of the recipient candidate.

(c) Payments to a Board of County Commissioners or other appropriate county government official to secure voter lists for use in distributing political literature about the candidacy of the recipient candidate.

(d) Payments to any United States postmaster for costs of postage for mailing political literature about the candidacy of the recipient candidate to prospective voters.

(3) “Public funds” means those funds collected from candidates for election to nonpartisan judicial offices from qualification fees required by law and deposited with the Secretary of State into the Florida Trial Judges Campaign Trust Fund, established pursuant

to s. 106.53.

(4) "Secretary" means the Secretary of State or such official within the Department of State as he may designate to perform his functions under this part.

(5) "Indirect expenditure" means any expenditure not made from campaign funds of a candidate, other than an expenditure made directly to or in favor of the campaign of a candidate as a campaign contribution, made by any person or political action committee in favor of or in opposition to any candidate for trial judge.

(6) "Coordinated expenditure" means any indirect expenditure made by any person or political action committee which he or it coordinated with a candidate for trial judge.

106.53 Florida Trial Judge Campaign Trust Fund.—

(1) There is created the Florida Trial Judge Campaign Trust Fund. All qualifying fees paid to the Department of State pursuant to s. 105.031(3) by candidates for election to nonpartisan judicial office shall be deposited in the fund.

(2) The Secretary of State shall have supervisory duty and authority over the fund. The secretary shall cause all moneys paid into the fund to be maintained in a separate account for disbursement in accordance with this part.

(3) No public funds administered under this part by the secretary shall be disbursed directly to any candidate. All payments from the fund shall be to the person to whom payment is directed by a recipient candidate for qualified expenditures or to a Board of County Commissioners for reimbursement of verification costs in accordance with s. 106.58.

106.54 Limitation on total expenditures by candidate.—No candidate for election to trial judge who receives benefits under this part, nor any person acting on behalf of such candidate and with his knowledge, shall expend any funds or incur any obligation on behalf of his election in excess of an amount equal to one-half of the annual salary of the office sought. Such limitation on total expenditures during the campaign applies to all funds spent on behalf of the election of the candidate, including public moneys spent in accordance with his direction as set forth in this part.

106.55 Prohibition of coordinated expenditures.—

(1) It shall be unlawful for any person or political action committee to make any indirect expenditure which he or it coordinated with a candidate for trial judge.

(2) Violation of this section shall constitute a first degree misde-

meanor, punishable as provided in s. 775.082 or s. 775.083.

106.56 Presumptions as to coordinated expenditures.—

(1) Any person or political action committee who or which fails to publicly assert at the time of making an indirect expenditure that it is being made independently of any candidate shall be rebuttably presumed to be engaged in campaign financing activities coordinated with a candidate.

(2) Any person or political action committee who or which contributes directly to a candidate for trial judge and thereafter makes an indirect expenditure or expenditures in favor of election of that candidate or advocating defeat of his opponent, which, when added together, exceed the maximum amount allowed by law to be contributed directly to the candidate, shall be rebuttably presumed to be engaged in campaign financing activities coordinated with the campaign of the candidate.

(3) Any person or political action committee who or which makes an indirect expenditure or expenditures in any election for trial judge in which he or it has actively campaigned for a candidate during and in such contest, shall be rebuttably presumed to be engaged in campaign financing activities coordinated with the campaign of a candidate in such election.

106.57 Entitlement to public funds; petitioning process.—

(1) Each candidate for election to trial judge may seek the benefits to his candidacy offered under this part.

(2) No candidate shall receive benefits under this part unless he shall have first qualified as a candidate under s. 105.031.

(3) Each candidate seeking benefits under this part shall file a written statement with the Secretary of State, stating that he intends to seek certification from the secretary as a recipient candidate under this part.

(a) Such statement shall be filed at any time after noon of the 112th day prior to the first primary, but no later than noon of the 63rd day prior to the first primary.

(b) The secretary shall prescribe the form to be used in administering and filing such statement. No signatures shall be obtained by a candidate on any petitions hereunder until he has filed the statement prescribed herein.

(4) When a candidate has filed the statement prescribed in subsection (3), the secretary shall forthwith provide the candidate with forms in sufficient numbers to facilitate the gathering of signatures. The candidate may immediately seek signatures thereon to entitle his candidacy to the benefits of this part.

(5) Only signatures of electors registered to vote in the geographical entity represented by the office sought shall count toward obtaining the minimum number of signatures prescribed. A separate petition shall be circulated for each county from which signatures are sought.

(6) The secretary shall prescribe the form of the petitions, which shall include the following:

- (a) The name of the candidate.
- (b) The office sought.

(c) The fact that such petition is being circulated to entitle the candidacy of the person circulating the petition to the benefits of use of public funds for payment of qualified expenditures in his campaign for the office sought.

(d) The county within which the particular petition is being circulated.

(7) The signatures of the requisite number of registered electors of the geographical entity represented by the office sought must be obtained in order for a candidate to become certified by the secretary as a recipient candidate under this part. The requisite number of registered electors whose signatures must be obtained is the lesser of:

(a) For the office of judge of a Circuit Court: 4,000;

(b) For the office of judge of County Court: 3,000; or a 3 percent of the total number of registered electors of the geographical entity represented by the office sought. The total number of registered electors of the geographical entity represented by the office sought is that number shown by the compilation of the Department of State at the most recent general election.

(8) Each candidate shall file his petitions with the supervisor of elections of the county in which such petitions were circulated, such filing to occur not later than the first date for qualifying for office.

106.58 Entitlement; verification of petitions.—

(1) Each supervisor of elections to whom a petition is submitted pursuant to s. 106.57(8) shall file a report with the secretary no later than 5 days after the last date for qualifying of candidates.

(2) Such report shall contain:

(a) A list of all candidates filing petitions under this part.

(b) A verification of the number of registered electors of the particular geographical entity represented by the office sought whose signatures are on the petitions submitted by each candidate.

(c) The cost of verification of each candidate's petitions.

(3) Petitions shall be verified as provided by the elections law. 106.59 Entitlement; certification.—

(1) The secretary shall determine whether the required number of authorized signatures have been obtained to entitle a candidate to certification as a recipient candidate under this part. Such determination shall be made and reported to each affected candidate within 10 days after the last date for qualifying of candidates. The notice to each candidate shall include information on the amount of public funds which may be used to benefit his candidacy as determined under s. 106.61.

(2) It shall be a valid determination that the number of required signatures have been obtained if the numbers reported to the secretary total the required number for the geographical entity represented by the office sought.

(3) It shall be a valid determination that the number of required signatures have not been obtained if the numbers reported to the secretary do not total the required number for the geographical entity represented by the office sought.

106.60 Verification costs; reimbursement.—

(1) No fee shall be charged to any candidate filing a petition pursuant to this part, except as may be provided by law.

(2) The secretary shall reimburse the cost of verification of petitions required by this part to the Board of County Commissioners of each county whose supervisor filed a report on verified petitions with the secretary. The reimbursement shall be in an amount equal to 10 cents for each registered voter whose signature was verified to the secretary as appearing on petitions submitted to the supervisor of such county, or the actual cost of verification, whichever is less.

(3) The sums reimbursed shall be paid from the Florida Trial Judges Campaign Trust Fund, unless such fund should be exhausted by disbursements to recipient candidates under s. 106.61. In the latter event, reimbursement shall be from the General Revenue Fund.

106.61 Public funds; disbursement.—

(1) Public funds shall be disbursed by the secretary according to the office sought and according to group where multiple judicial offices are to be filled. If two or more recipient candidates contest the same office against each other, then the secretary shall evenly divide the public funds apportioned to the election for that office between the recipient candidates seeking that office. Apportionment of public funds, according to the office sought, shall be made

as follows for each contest in which one or more of the candidates received certification by the secretary as a recipient candidate:

(a) Each contested election for the office of judge of a Circuit court: \$15,000.

(b) Each contested election for the office of judge of a County Court: \$10,000.

(2) Each recipient candidate shall provide written directions to the secretary no later than 5 days prior to the first nonpartisan election, specifying:

(a) The names and addresses of the payees to whom the secretary shall direct public funds.

(b) The amount of public funds to be paid to each specified payee.

(c) The nature of the qualified expenditure, in sufficient detail to identify the particular political advertisement or expenditure.

(3) The secretary shall disburse public funds in accordance with the written directions of each recipient candidate, upon the secretary's satisfaction that the payees, amounts, and nature of qualified expenditures are in accord with the requirements of this part, and all other provisions of the election code.

(4) No later than December 1 of each general election year, or within 30 days after any special election for a nonpartisan judicial office affected by this part, the secretary shall pay, or cause to be paid, the reimbursements for verification costs as authorized by s. 106.60.

(5) The secretary shall promulgate rules consistent with this part to govern partial public financing of any special nonpartisan election for judicial office not governed by existing provisions of this part.

Section 2. Subsection (3) of section 105.031, Florida Statutes, is amended to read:

105.031 Qualification; filing fee; oath of office.—

(3) QUALIFYING FEE.—Each candidate qualifying for judicial office shall pay the Division of Elections a qualifying fee of 5 percent of the annual salary of the office to which he seeks election. The Division of Elections shall *deposit all such qualifying fees in the Florida Trial Judges Campaign Trust Fund in accordance with s. 106.52.* ~~forward all such qualifying fees to the Department of Revenue for deposit in the General Revenue Funds.~~

Section 3. Nothing in this act shall preclude the application of the provisions of chapter 105 or chapter 106, part I, Florida Statutes, to nonpartisan elections for trial judges, unless such provi-

sions are clearly inconsistent with the provisions of this act.

Section 4. No public funds shall be disbursed under this act until the sums received as qualifying fees from candidates for judicial office have been deposited into the Florida Trial Judges Campaign Trust Fund in an amount which exceeds that amount which is required by this act to provide partial public financing for the benefit of all recipient candidates who have qualified as candidates for election to trial judge.

Section 5. This act shall take effect January 1, 1987.