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ELECTION LAW—DRAFT COMMITTEES: A LOOPHOLE IN THE FEDERAL ELECTION LAWS—Federal Election Commission v. Florida for Kennedy Committee, 681 F.2d 1281 (11th Cir. 1982)

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ELECTION LAW—DRAFT COMMITTEES: A LOOPHOLE IN THE FEDERAL ELECTION LAWS—*Federal Election Commission v. Florida For Kennedy Committee*, 681 F.2d 1281 (11th Cir. 1982).

I. INTRODUCTION

Federal Election Commission v. Florida for Kennedy Committee[1] involved Federal Election Commission (FEC) investigation into the activities of the Florida for Kennedy Committee (the Committee),[2] one of nine "draft-Kennedy" organizations[3] whose purpose was to convince Senator Edward M. Kennedy to declare his candidacy for the 1980 Democratic nomination for President.[4] The purpose of the investigation was to determine if the Committee was operating within the contribution guidelines of the Federal Election Campaign Act (FECA).[5] The Committee, however, disputed the FEC's jurisdiction arguing that draft committees, such as the Committee, were not political committees under the Act. The United States Court of Appeals for the Eleventh Circuit agreed with the Committee's interpretation and held that draft committees were not political committees within the meaning of the FECA and, as such, the activities of the Committee fell outside the jurisdiction of the FEC.[6] Thus, the

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1. 681 F.2d 1281 (11th Cir. 1982).

2. The Florida for Kennedy Committee (the Committee) was established by a group of Florida citizens who in mid-May of 1979 formed an association to demonstrate and encourage support for Senator Kennedy in Florida. Their primary goal was to influence the outcome of a nonbinding straw poll to be held at the November Florida State Democratic Convention for which they accepted contributions and made expenditures. As a result of these activities, the Committee voluntarily registered as a political committee with the FEC and submitted regular contribution and expenditure reports. Brief of Appellant at 2-3, Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281 (11th Cir. 1982).

3. The FEC defines a draft committee as an "unauthorized committee disavowed by the individual whose candidacy the committee promotes." 1979 FED. ELECTION COMM'N ANN. REP. 7.

4. Although he officially announced his candidacy on October 29, 1979, Senator Kennedy had expressly disavowed the activities of the Committee by a letter dated June 8, 1979. Brief of Appellant at 2-3, Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281 (11th Cir. 1982).

5. The Federal Election Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1982)).

6. *Florida for Kennedy Comm.*, 681 F.2d at 1282. The same result was reached by the United States Court of Appeals for the District of Columbia Circuit in Federal Election Comm'n v. Machinists Non-Partisan Political League 655 F.2d 380 (D.C. Cir. 1981),

Committee and all other draft committees are not subject to any of the requirements and restrictions, such as contribution limitations, imposed on political committees by the FECA. This note will address how the court, in determining that draft committees are not political committees under the Act, has provided a mechanism, by which the purpose, intent and effectiveness of the campaign finance laws, can be circumvented.

II. FACTS

On July 17, 1979, the Committee requested an advisory opinion from the FEC concerning the applicability of the Act's contribution and expenditure limits to draft committees.[7] The FEC ruled that because Senator Kennedy was not a candidate, the $5,000 individual contribution limitation for "other political committees" applied.[8] Had the Committee been supporting an announced candidate, however, such as Ronald Reagan or Jimmy Carter, the individual contribution limitation of $1,000 would have applied.[9]

Of further concern to the Carter-Mondale Presidential Commit-

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cert. denied, 454 U.S. 897 (1981). *See infra* notes 99-111 and accompanying text. *See also* Ifshin & Warin, *Litigating the 1980 Presidential Election*, 31 AM. U.L. REV. 485, 506-13 (1982).

7. 1979-40 FEC Advisory Opinion 1-3 (Aug 17, 1979), *summarized in* 1979 FED. ELECTION COMM'N ANN. REP. 78-79. Specifically, the Committee asked three questions:

> 1. May [the Committee] receive monies in excess of $1,000 but not more than $5,000 per calendar year, from an individual contributor, or other political committee, to be expended for "raising issues relevant to the 1980 Presidential Election and to cause Senator Kennedy to become a candidate for the Office of President?"
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> 2. Is there any limitation upon the amount of monies that [the Committee] may expend to cause the selection of delegates to the November, 1979 State party convention, who agree with the issues raised by [the Committee] and would express their preference for Kennedy in the non-binding straw ballot at the convention?
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> 3. In the event the answer to Question 1 is in the affirmative, what, if any, effect would the making of said contributions have on the right of the individuals to make contributions (a) to Senator Kennedy if he becomes a candidate; or (b) to an authorized committee; or (c) directly or indirectly on behalf of such candidate?

Id. at 2. The FEC is required to issue an advisory opinion to any person who submits a request for information concerning the Act's provisions. 2 U.S.C. § 437f(a)(1) (1982).

8. 1979-40 FEC Advisory Opinion 1, 2-3 (Aug. 17, 1979), *summarized in* 1979 FED. ELECTION COMM'N ANN. REP. 78-79. The FEC also answered the second question in the negative. *Id.* at 3. The Commission refused to answer the third question because of its hypothetical nature. *Id.*

9. 2 U.S.C. § 441a(a)(1)(A) (1982). Thus, an individual could contribute a maximum amount of $1,000 to a committee supporting a candidate such as Jimmy Carter, but because a draft committee does not support an announced candidate, the limit is $5,000.

tee was the fear that if the nine draft-Kennedy committees were found to be independent of each other, a $5,000 contribution could be made to each one without violating the FECA's contribution limitations.[10] Faced with this situation, on October 4, 1979, Carter-Mondale filed a complaint with the FEC alleging that (1) the draft-Kennedy groups were political committees under the Act;[11] (2) the nine draft-Kennedy committees[12] were affiliated[13] and therefore subject to an aggregate $5,000 contribution limitation;[14] and (3) the Machinists Non-Partisan Political League,[15] the political arm of the International Association of Machinists, had exceeded the $5,000 limitation by contributing over $33,000 to the allegedly affiliated political committees.[16] In response to this complaint, the FEC notified the Committee "that it had 'reason to believe'[17] that violations

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Ifshin & Warin, *supra* note 6, at 508 n.162 (citing FEC Informational Letter 1976-20 (Aug. 17, 1976)).

10. If, however, the committees were found to be affiliated they would be treated as a single committee and subject to the contribution limitations for single political committees. 2 U.S.C. § 441a(a)(5) (1982).

11. Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 383 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

12. Eight other political committees also were involved in the FEC subpoena: Citizens for Democratic Alternatives in 1980; New Hampshire Democrats for Change; Democrats for Change in 1980; National Call for Kennedy; Illinois Citizens for Kennedy; Committee for Alternatives to Democratic Presidential Candidate; Minnesota for a Democratic Alternative; and D.C. Committee for a Democratic Alternative. Brief for Appellee at 2 n.3, Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281 (11th Cir. 1982).

13. Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 383 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981). *See supra* note 10.

14. Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 383 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981).

15. The Machinists Non-Partisan Political League (MNPL) represents what the Act terms a "separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or cooperation without capital stock." 2 U.S.C. § 441b(b)2(C) (1982). For purposes of making contributions MNPL is classified as a multicandidate political committee: "a political committee which has been registered under section 433 of [Title 2] for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any state political party organization, has made contributions to 5 or more candidates for Federal office. *Id.* § 441a(a)(4).

16. The Act provides that: "No multicandidate political committee shall make contributions—(c) to any other political committee in any calendar year which, in the aggregate, exceed $5,000." 2 U.S.C. § 441a(a)(2)(C) (1982). The $33,000 given by MNPL to the allegedly affiliated draft committees violated the $5,000 contribution limit because contributions to affiliated political committees are subject to the limits of a single political committee. *See supra* note 10. Similarly, the Committee would have violated the Act by knowingly accepting the excess MNPL contributions. 2 U.S.C. § 441a(f) (1982).

17. The FEC cannot initiate an investigation on a complaint until it has made an

of the federal campaign laws had occurred."[18]

Upon receipt of the FEC's notification, the Committee moved on November 1, 1979 to dismiss the Carter-Mondale complaint arguing that the "[Committee] was a draft committee and not a political committee within the meaning of the Act"[19] and, as such, none of the Act's reporting or contribution requirements were applicable to it.[20] Before considering the Committee motion, the FEC, on November 5th, served the Committee with the subpoena which was the basis of the Committee's appeal.[21] The FEC subsequently denied both the Committee motion that draft committees were not subject to the Act's restriction and a later Committee motion to quash the subpoena.[22] Upon the Committee's refusal to comply with the subpoena, the FEC instituted the present action in the United States District Court for the Southern District of Florida.[23] The Committee countered by seeking a plenary hearing[24] to challenge the scope of the FEC's jurisdiction over draft groups.[25] The District Court, however, "ruled that the subpoena enforcement proceeding was not the proper forum in which to challenge the FEC's jurisdiction or to

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initial "reason to believe" determination that a violation of the Act has occurred. 2 U.S.C. § 437g(a)(2) (1982). An affirmative vote by four of the FEC's six voting members will satisfy the "reason to believe" test and the alleged violator must then be notified that such a determination has been made. *Id.* The FEC is then under a duty to conduct an investigation. *Id.*

18. 681 F.2d at 1282. The Carter-Mondale committee complaint was subsequently amended on November 2, 1979. It provided additional information for the affiliation claim and further alleged that Senator Kennedy had, in fact, become a candidate on September 1, 1979, two months before his official announcement. Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 383-84 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

19. 681 F.2d at 1282.

20. *Id.*

21. *Id.* at 1282-83. The subpoena requested the Committee and its organizers to turn over all documents and materials concerning its involvement with the MNPL and other draft-Kennedy groups. *Id.* at 1283 n.3.

22. *Id.* at 1282-83.

23. Federal Election Comm'n v. Florida for Kennedy Committee, 492 F.Supp. 587 (S.D. Fla. 1980). *See* 2 U.S.C. § 437g(a)(6)(A) (1982) (enforcement provision for violations of the Act).

24. Relying on the first amendment's protection of free speech and association, the Committee claimed that (1) the subpoena was unconstitutional, and (2) the presence of the constitutional questions involved required the FEC to fully demonstrate its jurisdiction over draft groups before the subpoena could be enforced. 492 F.Supp. at 591. Although the district court determined that some unintended infringement of first amendment rights might occur from enforcement of the subpoena, it reasoned that the FEC's need for speedy investigations outweighed any potential infringement of the Committee's constitutional rights in this instance. *Id.* at 596-98.

25. *Id.* at 591. The FEC has exclusive civil jurisdiction over the enforcement of the Act. 2 U.S.C. § 437c(b)(1) (1982).

raise constitutional objections to the subpoena."[26] The court subsequently enforced the subpoena on November 6, 1980, and the Committee's appeal was filed.[27]

III. HISTORICAL BACKGROUND OF THE FECA AND STATUTORY REGULATION OF POLITICAL COMMITTEES

A. *Initial Attempts at Regulating Campaign Financing and Political Committees*

During the early 1900's, Congress[28] and the public became increasingly concerned about the presence of corruption in the electoral process, particularly the connection between the alleged corruption and corporate wealth.[29] This concern led to the adoption

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26. 681 F.2d at 1283.

27. *Id.* Favorable rulings enforcing FEC subpoenas in this investigation were also registered by the district courts in the other draft-Kennedy group cases. *E.g.*, Federal Election Comm'n v. Machinists Non-Partisan Political League, 210 App. D.C. 267 (D.D.C. 1980), *rev'd*, 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); Federal Election Comm'n v. Citizens for Democratic Alternatives in 1980, 210 App. D.C. 284 (D.D.C. 1980), *rev'd*, 655 F.2d 397 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); Federal Election Comm'n v. Wisconsin Democrats for Change in 1980, No. 80-C-124 (W.D. Wis. Apr. 24, 1980) (this group did not appeal the decision and chose instead to comply with the FEC subpoena). The other draft-Kennedy groups complied with the subpoena in the first instance. 1981 FED. ELECTIONS COMM'N ANN. REP. 24.

Whether the Committee could properly contest the subpoena issue in an enforcement proceeding was the first issue to be determined by the eleventh circuit. Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281, 1283 (11th Cir. 1982). The court noted that the FEC subpoena had "several characteristics that make it necessary for the court to be certain of the FEC's investigative authority before enforcing it . . . ." *Id.* at 1284. *See also* Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380, 386-90 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981). The FEC alleged that the "extra careful scrutiny" test attached to FEC subpoenas will seriously hamper the operation of the FEC. Petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 14-15, Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

28. In hearings before the House Committee on the Election of the President in 1905, one legislator described the purpose behind the early attempts at legislative regulation of campaign finances:

> The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or *indirectly*, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests against those of the public.

THE PRACTICING LAW INSTITUTE, THE POLITICAL ACTION COMMITTEE 54 (1976) (emphasis in original).

29. One of the more suspect methods of campaign fund raising concerned the efforts of Mark Hannah, the chairman of the Republican National Committee in 1896. Hannah set contribution quotas for banks, life insurance companies and other business

of the Tillman Act of 1907,[30] which prohibited all direct corporate and national bank contributions to political committees and campaigns regarding election to federal office. A second step, designed to curtail the corruption in federal elections, was the passage of the Federal Disclosure Act of 1910.[31] This statute required all interstate political committees to report campaign contributions and expenditures.[32]

Both the Tillman Act and the Federal Disclosure Act were incorporated into the Federal Corrupt Practices Act of 1925,[33] which represented the primary federal law on the subject of campaign finance. The Hatch Political Activities Act of 1939[34] was the first addition to the Corrupt Practices Act. The Hatch Act was enacted primarily to prohibit active political participation by federal employees, though several of its 1940 Amendments dealt with the issue of political committees. Specifically, the 1940 Amendments placed a $5,000 limit upon individual contributions to any one political committee or on behalf of any one candidate.[35] Expenditures by political committees were limited to 3 million dollars.[36]

A final piece of legislation, the War Labor Disputes Act of 1943,[37] extended the contribution prohibition from banks and corpo-

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organizations based on their ability to pay. For instance, the quota for banks was one-fourth of one per cent of their capital. The net result was a campaign chest of about $3.5 million for the Republic nominee William McKinley ($3 million coming from the New York City area) as opposed to only $675,000 for his counterpart William Jennings Bryan, This disparity was a major factor in McKinley's victory. H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 47 (2d ed. 1980).

30. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1982)). In part, the Act provided:

> That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential or Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator . . . .

Id. at ch. 420, 34 Stat. 864-65.

31. Act of June 25, 1910, ch. 392, 36 Stat. 822 (repealed 1925).

32. *Id.* at 36 Stat. 823-24.

33. Federal Corrupt Practices Act of Feb. 28, 1925, ch.368, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C. (1970)) (repealed 1972).

34. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147 (extended in Act of July 19, 1940, ch. 640, 54 Stat. 767 (1940) (codified as amended at 5 U.S.C. §§ 7321-27 (1982)).

35. Act of July 19, 1940, ch. 640, § 13, 54 Stat. 767, 770-71.

36. *Id.* at § 20, 54 Stat. 772.

37. Act of June 25, 1943, ch. 144, § 9, 57 Stat. 163, 167-68 (1943) (current version at 2 U.S.C. § 441b(a), (b)(1) (1982)).

rations to labor unions.[38] All of the combined provisions discussed represent the basic structure of federal campaign regulations prior to the enactment of the FECA in 1971.[39]

This basic structure, however, was totally ineffective in achieving comprehensive regulation of federal elections. One glaring loophole in the scheme involved the definition of a political committee.[40] A political committee was defined as an entity that operated in more than one state or that operated as a branch or subsidiary of a national party.[41] An individual could easily circumvent the Act's contribution limitations by giving a maximum gift of $5,000 to an interstate political committee and then contribute additional funds, in an unlimited amount, to an intrastate committee. By virtue of its operation in only one state, an intrastate committee did not qualify as a political committee under the Act.[42] Because most congressional campaigns involved primarily intrastate committees, the statutory restrictions had little effect on congressional elections.[43] The provision limiting political committees to three million dollars in expenditures was similarly ineffective. Once a political committee reached the limit, additional committees were formed until all available funds were utilized. Additionally, there were no expenditure limitations for primaries or conventions.[44]

Many of the other provisions regulating political activity, particularly those restricting business and labor, were also easily bypassed or constantly abused.[45] For instance, the disclosure provisions were

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38. Recodified in the National Labor Relations Act of 1947, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (1976 & Supp. V 1981)), the prohibition was expanded to apply to direct expenditures for primary elections, political conventions and caucuses. *Id.* at § 304, 61 Stat. 159-60.

39. For a detailed discussion of the legislation preceding the FECA, *see generally*, R. PEABODY, J. BERRY, W. FRASURE & J. GOLDMAN, TO ENACT A LAW: CONGRESS AND CAMPAIGN FINANCING (1972); Berry & Goldman, *Congress and Public Policy: A Study of the Federal Campaign Act of 1971*, 10 HARV. J. ON LEGIS. 331 (1973).

40. Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 365 (1977); Note, *Campaign Spending Controls Under the Federal Election Campaign Act of 1971*, 8 COLUM. J.L. & SOC. PROBS. 285, 288 (1972).

41. 18 U.S.C. § 591 (1970)(repealed 1972). *See infra* note 56 and accompanying text for the amended definition of a political committee.

42. Note, *supra* note 40 at 288 n.32.

43. *Id.* at 288.

44. *Id.* For example, in order to avoid the contribution and expenditure limitations, the 1968 Democratic Presidential team of Humphrey-Muskie created more than 95 different committees. D. ADAMANY & G. AGREE, POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA 45 (1975).

45. For a detailed discussion of the methods used by labor and business to circumvent the contribution and expenditure restrictions, see Epstein, *Corporations and Labor Unions in Electoral Politics*, 425 ANNALS 33 (May, 1976). The author concludes that

similarly ineffective because candidates were only required to report contributions received and expenditures made "by him or any person for him with his knowledge or consent."[46] Candidates interpreted "any person" as *not* including their local or interstate committees and this interpretation was accepted by the Department of Justice. This acceptance was so widespread that several candidates such as Senators Kennedy, Muskie, Bensten and Brock reported having received no campaign contributions in 1970.[47]

A final problem contributing to the ineffectiveness of the entire legislative scheme was the lack of enforcement. Since 1925, enforcement of the Corrupt Practices Act resulted in only one prosecution[48] and no convictions.[49]

Aside from the numerous loopholes and overall ineffectiveness of the pre-1971 legislation, several other factors existed that prompted Congress to institute new regulations governing campaign financing. One factor was evidenced by the dramatic increase in campaign related expenditures.[50] With the public becoming increasingly alarmed over increased campaign expenditures, it became difficult for candidates to publicly go on record as opposing efforts to improve the system.[51] Finally, an issue group entitled the National Committee for an Effective Congress outlined several of the initial proposals and helped insure the ultimate enactment of new legislation.[52] From virtually every perspective the pre-1971 campaign laws were a nullity and "[b]oth candidates and the public [had] come to regard the law as a dead letter."[53]

"[v]irtually no corporation or labor union that wished to do so was deterred de facto from making campaign contributions and expenditures." *Id.* at 38. *See also* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972) (discussing the history of the law on union contributions and expenditures and ultimately upholding the constitutionality of the educational expenditures made by the political action arm of unions and corporations as long as any contribution collected is voluntary in nature and these monies are separated from the organization's general treasury funds).

46. Note, *supra* note 40 at 290 (quoting 2 U.S.C. § 246(a) (1970) (repealed 1972)).

47. *Id.* at 290-91, 290 n.47.

48. *Id.* at 291. *See* Burroughs & Canon v. United States, 290 U.S. 534, 545 (1934) (rejecting the violators claim that the disclosure provisions of the Act were unconstitutional).

49. Berry & Goldman, *supra* note 39, at 333.

50. Note, *supra* note 40, at 285 n.4.

51. Expenditures increased from $200 million in 1964 to $300 million in the 1968 campaign. *Id.* This increase differed substantially from the $25 million increase in 1968 over the cost of the 1964 elections. H. ALEXANDER, *supra* note 29, at 9.

52. Berry & Goldman, *supra* note 39 at 334-35.

53. Note, *supra* note 40 at 291.

B. *Implementation of the FECA and its Impact on Political Committees*

1. The Federal Election Campaign Act of 1971

The FECA of 1971[54] is comprised of four Titles,[55] with Title III the most important for purposes of this Note. In an effort to close the loopholes, Title III redefined a political committee as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calender year in an aggregate amount exceeding $1,000 . . . ."[56] In addition, both candidates and political committees were required to periodically file statements identifying all campaign contributions received over $100.[57] The 1971 Act, however, did not establish contribution limitations or an overall expenditure ceiling.

2. The Federal Election Campaign Act of 1974

The 1974 Amendments[58] dramatically altered the FECA of 1971. There were two primary reasons for the substantial revision of the original Act. The first reason concerned the numerous abuses of campaign financing demonstrated in the Watergate affair.[59] Sec-

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54. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1982)).

55. Title I restricted the amount of money which could be used for media advertising. 47 U.S.C § 315 (1972) (this portion of the Act was later repealed by the 1974 amendments). Title II limited the amount a candidate could contribute to his own campaign out of his or her family's personal funds, 18 U.S.C. § 608(a)(1) (1972) (repealed 1976), and contained a provision expressly allowing corporations and labor unions to establish separate segregated funds for political purposes. 18 U.S.C. § 610 (repealed 1976) (current version at 2 U.S.C. § 441b (1982)). These expenditures were already being made under the guise of educational expenditures by the political action arms of unions and corporations. *See supra* note 45. Title IV repealed the Corrupt Practices Act of 1925 Pub. L. No. 506, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C. (1970)) (repealed 1972).

56. This definition of a political committee remained the same in the Federal Election Campaign Act Amendments of 1974 and 1976, 2 U.S.C. § 431(d)(1976), and thus, is the one utilized by the *Florida for Kennedy Comm.* court. 681 F.2d at 1286. The definition was modified slightly under the 1979 Amendments. 2 U.S.C. § 431(4) (1982).

57. 2 U.S.C. § 434(b) (1976). This amount was increased to $200 by the 1979 amendments. 2 U.S.C. § 434(b)(3)(A), (5)(A) (1982).

58. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

59. While the disclosure provisions of the Act did contribute to the discovery of the Watergate abuses, the mere presence of the extensive misconduct surrounding Nixon's 1972 re-election campaign clearly showed that the present requirements were inadequate. D. ADAMANY & G. AGREE, *supra* note 44 at 5. The drive for reform was also spurred on by the public's reaction to Watergate. In 1965, a survey by the Research Center of the University of Michigan showed 71% of the respondents against the public financing of

ondly, a three judge district court in *American Civil Liberties Union v. Jennings*[60] declared several of the Act's provisions unconstitutional.[61] Congress' reconsideration of the FECA resulted in the constitutional issue being mooted before the case reached the Supreme Court.[62]

In response to the "orgy of big giving"[63] which took place in the 1972 Presidential campaign, Congress reinstated contribution limits in the 1974 Amendments. Individuals were limited to an annual contribution of $1,000 per candidate per election[64] and $5,000 to political committees not affiliated with the candidate.[65] Furthermore, an absolute limit of $25,000 was established as the aggregate amount that an individual could contribute to all candidates and political committees.[66]

The Act also limited to $5,000 the amount that political committees could contribute to candidates or their campaigns.[67] Political

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federal elections. By contrast, Gallup polls taken in 1973 and 1974 displayed support for public financing by 65% and 67% margins respectively. *Id.* at 61 n.3. For a discussion of the many abuses of the 1972 campaign as a basis for upholding the FECA's major provisions, *see*, Buckley v. Valeo, 519 F.2d 821, 839-40 nn. 36-38 (1975), *rev'd in part*, 424 U.S. 1 (1976).

60. 366 F. Supp. 1041 (D.D.C. 1973) (three judge court), *vacated as moot subnom.* Staats v. American Civil Liberties Union, 422 U.S. 1030 (1975).

61. *Id.* Because of the sponsorship requirements of the Act, the New York Times had rejected an advertisement proposed by the American Civil Liberties Union and other organizations expressing opposition to the Nixon Administration's proposed legislation to limit court-ordered busing. The advertisement included an "Honor Roll" of 102 congressmen and congresswomen who had previously opposed the antibusing policy. 366 F. Supp. at 1043-44. The court first held that Title I § 104(b) of the FECA and its accompanying regulations, that required the media to determine whether a proposed advertisement had satisfied the Act's certification and identification requirements, established impermissible prior restraints on open discussion of matters of public concern. *Id.* at 1050-51. Such restrictions are violative of the first amendment and, thus, unconstitutional. *Id.* at 1054.

The *Jennings* court found that the disclosure provisions of Title III of the Act were unconstitutional when applied to American Civil Liberties Union in the instant case. *Id.* at 1057. This aspect of the *Jennings* case will be discussed later in the note. *See infra* note 79 and accompanying text.

62. Staats v. American Civil Liberties Union, 422 U.S. 1030, 1030-1031 (1975).

63. D. ADAMANY & G. AGREE, *supra* note 44, at 54.

64. 2 U.S.C. § 441a(1)(A) (1982). Primaries, runoffs and general elections are considered separate elections except that the pre-nomination period in presidential campaigns constitutes a single election. *Id.* § 431(1)(A), (D).

65. *Id.* § 441a(1)(C).

66. *Id.* § 441a(a)(3).

67. *Id.* § 441a(a)(2)(A). The contribution limit is $5,000 rather than the $1,000 limitation for individuals as long as the committee meets certain requirements. *See supra* note 15. *See generally* Ifshin & Warin, *supra* note 6, at 492-95. Other changes in the 1974 amendments included limitations on expenditures. Individuals were limited on the

committees, however, were not limited regarding the total or aggregate amount that they could contribute to all candidates or committees in a given election.

3. *Buckley v. Valeo*

On almost the very day that the 1974 version of the Act went into effect, a major constitutional challenge[68] was made in *Buckley v. Valeo*.[69] The Court first determined that the regulation of monies used to generate political activity represented a regulation of speech and not conduct.[70] Thus, the provisions of the Act limiting contributions and expenditures restrained the fundamentally protected areas of political expression and association. The Court required the demonstration of a compelling governmental interest in order to withstand the necessary strict scrutiny involved in such first amendment issues.[71]

The Court ultimately held that only the prevention of corruption, and the appearance of corruption, were significantly compelling to justify the contribution limitations.[72] Even this governmental in-

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amount they could independently spend in support of a candidate. Candidates were limited in the amount which they or their authorized political committees could spend in their election effort. *Id.* Limitations on expenditures by candidates refusing public subsidies were declared unconstitutional restrictions on first amendment rights. Buckley v. Valeo, 424 U.S. 1, 59 (1976). *See infra* notes 72-76 and accompanying text. The 1974 revision of the Presidential Election Campaign Fund Act of 1971 provided public funding for Presidential Candidates. Pub. L. No. 92-178, § 801, 85 Stat. 563 (codified at I.R.C. §§ 6096, 9001-9013 (West 1982). Also, in an effort to insure compliance with the FECA, the 1974 amendments created the Federal Election Commission (FEC). 2 U.S.C. § 437(c) (1982). Until the creation of the FEC, the Justice Department was primarily responsible for enforcing the election laws. Ifshin & Warin, *supra* note 6 at 494 n.57. Finally, the 1974 amendments added to the disclosure requirements of the 1971 Act with most of these changes designed to improve the reporting aspects of the Act. *See generally*, D. ADAMANY & G. AGREE, *supra* note 44, at 92-3. The amendment required candidates to designate a principle campaign committee which is responsible for reporting all financial transactions made on the candidate's behalf, including those of his political committees. 2 U.S.C. § 432(f) (1982).

68. *See generally*, Clagett & Bolton, Buckley v. Valeo, *Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327 (1976).

69. 424 U.S. 1 (1976).

70. 424 U.S. at 17. The *Buckley* court's distinction was elaborated on by the District Court for the District of Columbia in Common Cause v. Schmitt, 512 F. Supp. 489 (1980) (three judge court) *aff'd per curiam by an equally divided court*, 455 U.S. 129 (1982).

71. 424 U.S. at 25.

72. *Id.* at 29. Limiting contributions serves to eliminate the subsequent "favors" or *quid pro quos* often involved when a large contributor donates a substantial sum to a potential office holder. Because the potential favors to large contributors and the public

terest, however, was not sufficient to permit a limitation on expenditures.[73] In addition, the court noted that the Act's expenditure limitations represented substantial restraints on the "quantity and diversity of political speech"[74] as opposed to the contribution limitations which entailed "only a marginal restriction upon the contributor's ability to engage in free communication."[75] Thus, political committees are permitted to spend an unlimited amount in support of a particular candidate provided its expenditures are made independently of the candidate's campaign.[76]

With these initial determinations as a background, the *Buckley* court then discussed the definition of political committees under the Act.[77] The specific context in which the Court defined political com-

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perception of these practices tend to undermine the integrity of a representative democracy, the prevention of this type of corruption represents a compelling governmental interest substantial enough to overshadow first amendment restrictions. *Id.* at 26-29.

73. *Id.* at 45. The court concluded that expenditures made without the candidate's cooperation and consent "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive" to his efforts. *Id.* at 47. Thus, large independent expenditures do not present the same type of *quid pro quo* corruption identified with large contributors. *Id.* at 46. *But see*, Leventhal, *Courts and Political Thickets*, 77 COLUM. L.R. 345, 367-75 (1977) (expenditure limitations can be justified on self-government, equality, and promotion of discussion grounds); Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 340-44 (author proposes that the court's conclusion that independent expenditure limitations posed no danger of corruption was incorrectly reasoned).

74. 424 U.S. at 19.

75. *Id.* at 20-21. The Court's constitutional distinction can best be explained by classifying the two types of political participants as spenders and contributors. The former expresses himself directly and the latter, through his contributions, enables others to express his viewpoint. Expenditure limitations directly restrain the first amendment rights of spenders, substantially preventing them from speaking. In contrast, contribution limitations only marginally restrict the contributor from speaking, he can still express his views directly through expenditures. *See* Fleming, *Regulation of Campaign Financing* 1976 ANNUAL SURVEY OF AM. LAW 649, 656.

76. The Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, 479 (1976), defined what constitutes an independent expenditure as opposed to a contribution. Any expenditure made in "cooperation, consultation or concert with, or at the request or suggestion of a candidate, his authorized political committee or their agents" must be classified as a contribution. 2 U.S.C. § 441a(a)(7)(B)(i) (1982). The FEC regulations go a step further and define payments made as a result of information received from the candidate about his contribution plans or needs. 11 C.F.R. § 109.1(b)(4)(i)(A) (1982). *See also infra* note 117. For a more complete discussion of the 1976 amendments see *infra* note 87.

77. Buckley v. Valeo, 424 U.S. 1, 62-63 (1976). In addition to upholding the Act's contribution limitations and declaring the expenditure limitations unconstitutional, the Court upheld the Act's disclosure and reporting provisions. *Id.* at 64. Although these provisions do infringe on the privacy of associational rights guaranteed by the first amendment, the Court found three governmental interests compelling enough to overcome the strict scrutiny test:

mittees concerned a portion of the Act which required disclosure of contributions and expenditures.[78] While the Court noted that requiring disclosure of contributions was sufficiently related to the Act's goals of preventing corruption the provisions requiring disclosure of expenditures, if interpreted broadly, would require disclosure by those groups advocating specific issues as well as those supporting individual candidates.[79] To avoid potential constitutional problems

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(1) they tell the public where the money is coming from, (2) they deter actual corruption and lessen the appearance of corruption by exposing large contributions and expenditures, and (3) they provide an essential means of determining violations of the statutes provisions. *Id.* at 66-68. The Court, however, did note that there may be instances where the reporting and disclosure requirements may have such a chilling effect on a certain group that the organization would be exempt from these requirements.

Id. at 82 n.109. See, e.g., Brown v. Socialist Workers '74 Campaign Committee v. Federal Election Comm'n, 51 U.S.L.W. 4015 (1982) (Socialist Workers Party not required to disclose identity of contributors for to do so may subject them to threats, harassment and reprisals). Federal Election Comm'n v. Hall-Tyner Election Campaign Comm., 678 F.2d 416 (2nd Cir. 1982) (Communist Party not obligated to comply with FECA's disclosure and reporting requirements).

The public funding of Presidential campaigns was also upheld by the *Buckley* Court which noted that while acceptance of public funding required adherence to expenditure limitations, candidates are not required to accept public funding and, therefore, those who accept it must also accept any attached statutory restrictions. 424 U.S. at 57 n.65.

The *Buckley* Court did, however, hold that the selection of the FEC commissioners did not adhere to the Constitutional requirements of the appointments clause. U.S. CONST. art. II, § 2, cl.2. Thus, the commission, as presently constituted, could not exercise the duties granted it. 424 U.S. at 143-44.

78. 424 U.S. at 78-81.

79. In determining that political committees must be narrowly interpreted so as to exclude issue groups, the *Buckley* Court relied on the holdings of two earlier lower court decisions. 424 U.S. at 79 n.106 (citing United States v. National Committee for Impeachment, 469 F.2d 1135 (2nd Cir. 1972), and American Civil Liberties Union v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three judge court), *vacated as moot sub nom.* Staats v. American Civil Liberties Union, 422 U.S. 1030 (1975)).

National Committee for Impeachment involved an advertisement in the New York Times entitled, "A Resolution to Impeach Richard M. Nixon as President of the United States." 469 F.2d at 1143. The advertisement was paid for by the National Committee for Impeachment and listed the officers and sponsors of the committee, as well as an "Honor Roll" comprised of congressmen and congresswomen who supported the resolution. The advertisement also included a request for contributions and specifically noted that money obtained would be used to support the election of congressmen and congresswomen who favored Nixon's impeachment. 469 F.2d at 1138. The Justice Department claimed that the advertisement was made and purchased for "the purpose of influencing" the outcome of the 1972 presidential election and took action under the FECA of 1971 to require that the National Committee for Impeachment follow the disclosure provisions of the Act. *Id.* The Second Circuit held that if such groups were considered political committees under the Act, then "serious constitutional issues" would be presented. *Id.* at 140. The court reasoned that if the government's position was adopted and the Act interpreted broadly, then every organization advocating an issue, from the Boy Scouts to the Golden Agers, would be required to register with the government as a political commit-

of requiring every type of group to disclose every type of expenditure, the Court found that disclosure of expenditures by groups other than political committees or candidates must be narrowed to include only those expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.[80] This inter-

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tee, and be subjected to the many filing and disclosure provisions of the Act. Thus, in an effort to narrow the definition of a political committee, the court interpreted the statute as requiring two tests to define the phrase "made for the purpose of influencing." *Id.* at 1141. The first test defined the phrase as including any "expenditure made with the authorization or consent, expressed or implied, or under the control; direct or indirect, of a candidate or his agents." Under the second test, the Act applied "only to committees soliciting contributions or expenditures the major purpose of which is the nomination or election or candidates." The second circuit concluded that the National Committee for Impeachment did not qualify as a political committee under either test because there existed no "connection whatsoever between the National Committee and any candidate," and "the major purpose of the advertisement was to promote the impeachment movement and to condemn governmental policy on the Vietnam War, not to elect candidates." *Id.* at 1141. While the National Committee for Impeachment failed to satisfy either test, the Second Circuit did not comment on whether satisfaction of only one test would qualify the group as a political committee under the Act. *Id. See generally, Elections—Federal Election Campaign Act of 1971—A political committee is not required to disclose receipts, expenditures and names of contributors under the Federal Election Campaign Act of 1971, unless the major purpose of such a committee is the nomination or election of candidates and committee expenditures are authorized or controlled by a specific candidate*, 42 U. CIN. L. REV. 383 (1973) (an analysis of United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972), in which the author concludes that any group whose major purpose is to influence an election, not the nomination or election of a specific candidate, should be subject to the Act's provisions).

The *National Committee for Impeachment* interpretation was approved in *American Civil Liberties Union v. Jennings* where an advertisement sponsored by the ACLU expressing opposition to court-ordered busing was rejected by the New York Times because it did not contain the necessary identification required under the Act. 366 F. Supp. 1041, 1050-51 (D.D.C. 1973), *vacated as moot sub nom.* Staats v. American Civil Liberties Union, 422 U.S. 1030 (1975). *See supra* notes 60-61 and accompanying text. The enforcement of the Act's disclosure provisions in the present instance, the court reasoned, would involve a chilling effect on the ACLU's rights. The court, therefore, adopted the narrow *National Committee for Impeachment* test and concluded that the activities did not satisfy either test. If the Act were to include the plaintiffs as a political committee, the resulting first amendment violations would necessitate an invalidation of the Act's disclosure provisions. *Jennings*, 366 F. Supp. at 1054-57. Thus, to sustain the disclosure provisions of Title III, political committees must be defined only in terms of the *National Committee for Impeachment* test.

Both the *National Committee for Impeachment* and *Jennings* decisions are consistent with *Buckley* because both of the committees involved in those decisions were issue groups in which the potential for *quid pro quo* corruption was insufficient to justify the infringement on their first amendment rights. Draft committees, however, represent a different type of committee requiring a treatment distinguishable from that of the committees in *National Committee for Impeachment* and *Jennings*. Classification of the Florida for Kennedy Committee and other draft committees as political committees may be accomplished, however, without violating the holdings or rationales of the two lower court cases and *Buckley*. *See infra* notes 112-37 and accompanying text.

80. 424 U.S. at 80.

pretation would avoid first amendment problems of vagueness because only expenditures that expressly advocated a particular election result would necessitate disclosure.[81]

In its discussion, the Court stipulated its interpretation of what constituted a political committee for purposes of the Act. As emphasized, the Court was concerned that the Act's contribution and expenditure definitions were so vague as to include "issue groups."[82] They noted:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress.[83]

The Court's concern with the inclusion of issue groups is based on the fact that infringement upon a group's first amendment rights of political expression and association[84] can only be justified if the means employed involve the compelling governmental interest of preventing *quid pro quo* corruption or the appearance of such corruption.[85] Thus, the *Buckley* Court used the word "candidate" to

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81. *Id.* at 76-82.

82. Ultimately, the Court struck down the expenditure limitations although they did uphold the Act's contribution limitations and disclosure provisions. *See supra* notes 71-77 and accompanying text.

83. 424 U.S. at 79 (footnotes omitted).

84. *See infra* note 71 and accompanying text. *But see supra* notes 72-77 and accompanying text (infringement upon first amendment associational rights justifiable if a sufficiently compelling governmental interest exists). Federal Election Comm'n v. National Right to Work Committee, 51 U.S.L.W. 4037 (1982) (associational rights asserted are overridden by Congress' interests in enacting legislation which restricts some operations of segregated funds, solicitations of contributions by corporations in this instance, which must be limited to avoid actual or apparent corruption).

85. 424 U.S. at 81. The *Buckley* Court also noted that not only had the contribution limitations been justified because of the potential *quid pro quo* corruption involved, but also contribution limitations are, in general, less restrictive of political activity than expenditure limitations. *Id. See supra* note 75 and accompanying text. *See also*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 301 (1981) (Marshall, J., concurring) (contribution limitations are less restrictive of the first amendment right to political expression than are limitations on expenditures).

protect the first amendment rights of issue groups whose expenditures contained little potential for the type of *quid pro quo* corruption that the court believed was significant to justify infringement of the rights to free political expression and association.

Therefore, the *Buckley* Court determined that there were two types of political groups. On the one hand, there are those committees that advocate and support particular issues. Under the *Buckley* rationale, these groups are not considered political committees within the meaning of the FECA. At the other extreme are those committees whose purpose is the election of an announced candidate. Such committees are clearly included under the express provision of the Act[86] and their inclusion is justified by the compelling governmental interest of eliminating *quid pro quo* corruption.[87]

4. *Citizens Against Rent Control v. City of Berkley*

The *Buckley* rationale for the different treatment regarding issue and candidate group was echoed in another recent Supreme Court case involving election law: *Citizens Against Rent Control v. City of Berkley*.[88] *Citizens* involved a city ordinance limiting the

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86. 424 U.S. at 81. Prior to the 1979 amendments, the FECA required "each treasurer of a political committee supporting a candidate or candidates for election to federal office," to report to the FEC. 2 U.S.C. § 434(a)(1) (1976) (amended version at 2 U.S.C. § 434(a)(1) (1982)).

87. The decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), forced Congress to repeal the Act's unconstitutional provisions and to reappoint the FEC commissioners in accordance with constitutional requirements. *See supra* note 77. In addition to these adjustments, Congress also defined the role of and limitations on separate segregated funds established by corporations and labor unions now commonly referred to as political action committees or Pacs. 2 U.S.C. § 441a(a)(1)(C) (1982), *see also supra* note 45. The 1976 revisions explicitly established a $5,000 per election limit on contributions to individual Pacs and all Pacs administered by the same union or corporation were considered affiliated and treated as a single political committee. Corporations were allowed to solicit contributions only from stockholders and executive or administrative personnel and not all employees as was previously the case. *Id.* § 441(b). *See* International Association of Machinists and Aerospace Workers v. Federal Election Comm'n, 678 F.2d 1092 (D.C. Cir. 1982) (en banc) *aff'd mem.*, 103 S.Ct. 335 (1982) (upholding the constitutionality of the Act's provisions regulating the solicitation of funds by corporations and unions).

Originally, Pacs represented only those political committees associated with labor unions or corporations. Today, however, the term Pac applies to almost every committee engaged in soliciting funds for political purposes. Ever since labor and corporate Pacs were authorized by Congress, they have become an increasingly important means of influence in political elections. They represent an effective means of utilizing campaign funds because they are well organized and administratively efficient. Ironically, it was the impact of labor and corporate wealth which Congress first tried to eliminate when it began regulating campaign financing. *See supra* notes 28-45 and accompanying text.

88. 454 U.S. 290 (1981). For other cases examining the first amendment consequences of contribution limitations in referendum campaigns, see First National Bank of

amount that an individual could contribute to a committee in support of, or in opposition to, ballot measures.[89] The Court held that the ordinance violated the plaintiff's first amendment rights of political expression and association.[90] In reaching this conclusion, the Court noted that the corruption by potential large donors represented the only justification for allowing an infringement upon first amendment rights.[91] Chief Justice Burger, speaking for the majority, stated that "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the first amendment. The exception relates to the perception of undue influence of large contributions to a *candidate*."[92]

Citizens is important for the purposes of this note because it exemplifies the types of groups that the *Buckley* court was attempting to protect by narrowly defining a political committee.[93] The activities of such groups exist only to advocate certain specific issues or ballot questions. They do not exist for the purpose of electing a specific individual. As the concurring opinion noted:

> In *Buckley*, this Court upheld limitations on contributions to candidates as necessary to prevent contributors from corrupting the representatives to whom the people have delegated political decisions. But curtailment of speech and association in a ballot measure campaign, where the people themselves render the ultimate political decision, cannot be justified on this basis.[94]

Infringement upon speech and associational rights simply can not be justified "in a ballot measure campaign, where the people themselves render the ultimate political decision" and the potential for corruption is not present.[95] Further, the *Citizens* court explained that any corruption could be prevented, or at least discovered, by the city's disclosure ordinances.[96] Under the *Florida for Kennedy Committee* opinion, not even this protective device would be available to regu-

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Boston v. Bellotti, 435 U.S. 765 (1976), and Let's Help Florida v. McCary, 621 F.2d 195 (5th Cir. 1980).

89. *Id.* at 293. The amount was limited to $250 per contributor, yet the group collected $20,850 from only nine contributors, or $18,600 more than if none of the contributions had exceeded $250.

90. *Id.* at 299.

91. *Id.* at 296-97.

92. *Id. But see supra* note 85.

93. *See supra* notes 78-87 and accompanying text.

94. *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun & O'Connor, JJ., concurring).

95. *Id.*

96. *Id.* at 298.

late draft committees.[97]

Thus, in defining a political committee for purposes of the FECA, the Supreme Court has created a distinction between those committees advocating particular issues and those supporting announced candidates. Draft committees, however, fall somewhere in between these two types of committees. A draft committee does more than advocate or support a particular issue, yet draft committees, by definition, do not support individuals who have officially announced their candidacy. Instead, draft committees seek to encourage an individual who is not yet an officially announced candidate for political office to become one. Once that individual does announce his candidacy, the draft committee ceases its activities.[98]

5. *Federal Election Commission v. Machinists Non-Partisan Political League*

The first step in determining whether draft groups are political committees for purposes of the Act was taken by the United States Court of Appeals for the District of Columbia in *Federal Election Commission v. Machinists Non-Partisan Political League*.[99] The *Machinists Non-Partisan Political League* case evolved from the same Carter-Mondale complaint which initiated the FEC litigation against the Committee.[100] Specifically, FEC believed that Machinists Non-Partisan Political League [MNPL] may have exceeded the contribution limitations of the Act by its financial support of the allegedly affiliated draft-Kennedy committees.[101] MNPL claimed, however, that none of the draft-Kennedy groups to which it contributed money, including the Committee, were political committees as defined by the Act, and thus, the FEC lacked subject matter jurisdiction necessary to conduct the investigation.[102] The issue, therefore, was whether draft committees, such as the Committee, were political committees under the FECA.

Before reaching a decision on the FEC's jurisdiction over draft groups, the *Machinists Non-Partisan Political League* court deter-

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97. The *Florida for Kennedy Comm.* court found that draft committees were not subject to either the contribution limitations nor the disclosure provisions of the Act. The 1979 amendments, however, have since required draft committees to report to the FEC, although they are still not bound by the contribution limitations. *See infra* note 111 and accompanying text.

98. *See supra* notes 2-4 and accompanying text.

99. 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

100. *See supra* notes 10-18 and accompanying text.

101. 655 F.2d at 383.

102. *Id.* at 390.

mined that the district court had erred in enforcing the FEC subpoena against MNPL.[103] The court then held that draft committees were not subject to the Act's provisions.[104]

Citing *Buckley*, the *Machinists Non-Partisan Political League* court held that the Act only encompassed those "*organizations that [were] under the control of a candidate or the major purpose of which [was] the nomination or election of a candidate*."[105] Because draft committees do not support a "candidate", they are outside of the Act's restrictions. The *Machinists Non-Partisan Political League* court refused to extend the *Buckley* definition to include draft committees. They noted that the only justification in *Buckley* for upholding the Act's contribution limitations, given the fundamental first amendment activities involved, was the elimination of the actual or apparent corruption that exists between large contributors and candidates.[106] Furthermore, *Buckley* requires that the "actuality and potential for corruption" be identifiable.[107] The *Machinists Non-Partisan Political League* court, however, concluded that this type of potential or actual corruption is not identifiable with draft groups because draft groups may exist for the purpose of encouraging a whole field of candidates rather than just a single individual.[108]

Although relying primarily on *Buckley*, the *Machinists Non-Partisan Political League* court also noted that a reading of the statutory language and legislative history of the FECA,[109] the FEC's treat-

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103. *Id.*

104. *Id.* at 396.

105. *Id.* at 391 (quoting Buckley v. Valeo, 424 U.S. 1, 79 (1976)) (emphasis in original).

106. *Id.* at 392.

107. *Id.*

108. *Id.*

109. The *Machinists Non-Partisan Political League* court conceded that the lack of any specific mention of draft committees prior to 1979 was not surprising because such groups, until recently, were a relatively unknown phenomenon in the federal campaign process. 655 F.2d at 394. Congressional silence with regard to these groups, however, does not necessarily indicate a Congressional intent to exclude them from the statutory restrictions. This is especially true where the overall purpose and intention of Congress in enacting the FECA and the plain language of the Act's provisions are circumvented by such a technical omission. For instance, in Gemsco v. Walling, 324 U.S. 244 (1945), the Court upheld a labor department restriction disallowing the use of "industrial homework" to circumvent the minimum wage provisions of the Fair Labor Standards Act, even though the statute made no reference to "industrial homework." 324 U.S. at 263. The Court gave no weight to the statutory omission because the statute's purpose and language were designed to prevent such circumvention of the mandated guidelines. *Id.* at 259-63. The omission of draft committees from the FECA's provisions provides an analogous situation which dictates an analogous result under *Florida for Kennedy Comm.*, 681 F.2d at 1292 (Clark, J., dissenting).

ment of draft committees,[110] and the 1979 amendments to the FECA,[111] supported their conclusion that draft committees were not

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110. The *Machinists Non-Partisan Political League* court also noted that the FEC did not consider draft committees to be political committees and, therefore, they were not subject to the Act's provisions. 655 F.2d at 395. The court cited the FEC's 1975-1979 annual reports which have consistently recommended to Congress that draft committees should be subject to the Act's contribution limitations and reporting provisions. *Id.* The annual reports reveal that the FEC has always considered draft committees to be political committees and subject to the contribution limitations. *See, e.g.*, 1975 FED. ELECTION COMM'N ANN. REP. 79. The FEC was concerned that the contribution limits which apply to draft committees should be the same as those applying to committees supporting a candidate. As noted earlier, draft committees were allowed higher contribution limitations than candidate committees. *See supra* notes 8-9 and accompanying text. These recommendations do not demonstrate that the commission believed draft committees fell outside of the Act's restrictions, but rather they indicate the opposite result: that draft groups were always considered by the FEC to be subject to the Act's provisions.

Although the FEC has always considered draft committees to be subject to the disclosure provisions of the Act, early in its existence, it did ask Congress to affirm that proposition. 1976 FED. ELECTION COMM'N ANN. REP. at 75-6. Because Congress remained silent until the 1979 amendments, the FEC has always felt that draft committees were subject to the disclosure requirements. This fact is evidenced by an FEC advisory opinion submitted to the National Committee for a Democratic Alternative: a draft Kennedy group. The opinion stated that:

> A group soliciting funds and making expenditures which are expected to be in excess of $1,000 for 1979, as would appear to be the case of the Committee, would qualify as a political committee for purposes of the Act and is subject to all registration and reporting requirements as well as all other provisions of the Act.

1979-41 FEC Advisory Opinion 3 (1979), *summarized in*, 1979 FED. ELECTION COMM'N ANN. REP. 8.

111. *Machinists Non-Partisan Political League*, 655 F.2d at 394-95. The 1979 amendments were generally designed to be "non-controversial." H. ALEXANDER, *supra* note 29, at 37. The basic purposes were: to simplify the Act's recording and record keeping provisions; increase the role of state and local political parties; reduce the procedural requirements of the enforcement process; and, provide increased opportunity for respondents to present their defenses. *Id.* In the 1979 amendments, however, Congress did adopt the FEC's recommendation that draft committees be subject to the Act's disclosure provisions. H.R. REP. No. 96-422, 96th Cong., 1st Sess. 15, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2860.

The *Machinists Non-Partisan Political League* court noted that this addition demonstrated that Congress did not consider draft committees subject to the Act's provisions and now desired them to be only subject to the disclosure provisions. 655 F.2d at 394-96. The legislative history of the 1979 amendments, however, indicates that Congress considered draft committees to be subject to the Act's jurisdiction prior to 1979. Brief for Appellee at 16, Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281 (11th Cir. 1982). The change was made simply to insure that draft committees report. It does not indicate that they were considered exempt from all of the Act's provisions.

In addition, Congress' failure to specifically require draft committees to be subject to certain contribution limits, does not automatically demonstrate that Congress did not consider and did not want draft groups subject to the contribution limits. Rather, this omission can be read as a demonstration of agreement concerning FEC's present handling of the matter. For instance, Congress may feel that draft groups should have

political committees. Because draft committees were not subject to the Act's provisions, the FEC could not investigate the activities of MNPL regarding the draft-Kennedy groups.

IV. ANALYSIS

A. *The Presence of* Quid Pro Quo *Corruption and Draft Committees*

In *Florida for Kennedy Committee*, the eleventh circuit held that draft committees were not subject to the FECA's restrictions because draft committees did not support a clearly identified candidate.[112] In reaching this conclusion, the *Florida for Kennedy Committee* court based its conclusion upon the definition of a political committee enunciated in *Buckley* and adopted by the *Machinists Non-Partisan Political League* court.[113]

As previously noted, an important aspect of the *Buckley* decision concerned the presence of, or even the appearance of, *quid pro quo* corruption in the political process. It is only when this corruption is present that limitations on political activity can be justified, despite the infringement upon first amendment rights which result from such restrictions.[114] The absence of such corruption with issues and referenda groups led the Court to narrowly define political committee so as to exclude these groups from the FECA's restrictions.[115] Draft committees, such as FKC, however, should not be excluded from the FECA's restrictions because they do, in fact, present the same potential for corruption as candidate committees. The conclusion by *Machinists Non-Partisan Political League* that the "actuality and potential for corruption" is not "identifiable" with draft committees because draft groups may exist for the purpose of encouraging a whole field of candidates rather than a single individual,[116] overlooks the facts of the two cases. Both MNPL and the Committee were concerned with nomination of a single individual, and as such,

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higher limitations than those supporting a candidate due to the importance of early money and exposure to a campaign, particularly when there still exists some doubt as to whether the individual will actually run or not. If Congress felt that the current direction of the FEC in this area was incorrect or that additional clarification was necessary, it could have specifically changed the provisions involved. Absent such a change, the FEC's treatment of draft committees should remain intact.

112. 681 F.2d at 1288.

113. *Id.* at 1287.

114. *See supra* notes 72-76 and accompanying text.

115. *See supra* notes 77-85 and accompanying text.

116. *Machinists Non-Partisan Political League*, 655 F.2d at 392.

the potential for *quid pro quo* corruption between Senator Kennedy and these groups did exist.

The significant connection between the Committee and Senator Kennedy can be demonstrated in a variety of ways.[117] The two most obvious connections are the committee's name and its stated purpose of causing Senator Kennedy to accept the Democratic Nomination to the office of the President.[118] Further evidence of an identifiable connection involves an FEC advisory opinion.[119] In this opinion, several officers and personnel of the Virginia Democrats for Leadership and Commitment, a draft-Kennedy committee, asked if they could communicate and cooperate with the Kennedy Presidential Campaign without causing the draft committee to be related to the Kennedy campaign committee for purposes of the Act's requirements.[120] The FEC ruled that as long as the draft committee had become inactive (Kennedy having declared his candidacy) and the individuals would not be simultaneously working for both groups, the individuals could indeed participate in the Kennedy campaign without connecting the draft group to any of the restrictions for candidate committees.[121] Similarly, individuals who contributed to draft-Kennedy groups were also likely to be the same individuals contributing to his campaign.[122] Thus, the Committee and the other

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117. The issue of how clearly an independent group is connected with a candidate or potential candidate has also been discussed in relation to independent expenditures. For example, on September 26, 1980 Common Cause filed a complaint with the FEC alleging that a certain group supporting Ronald Reagan was not really independent of his campaign committee. In the complaint, Common Cause submitted the following factors to be used in determining when a group's expenditures are really separate from, and uncoordianted with, an individual's campaign:

-membership of committees and steering bodies;
-conscious parallelism of activities;
-indirect communications;
-interlocking consultants, vendors, and suppliers;
-coordinated events;
-use of candidate's name; and
-use of material provided by a candidate.

Wertheimer & Huwa, *Campaign Finance Reforms: Past Accomplishments, Future Challenges*, 10 N.Y.U. REV. L. & SOC. CHANGE 43, 64 n.198 (1980-81). *See also* Note, *Making Campaign Finance Law Enforceable: Closing the Independent Expenditure Loophole*, 15 U. MICH. J.L. REF. 363 (1982). *See supra* note 76 and accompanying text.

118. Brief of Appellant at 2, Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281 (11th Cir. 1982). *See supra* note 2 and accompanying text.

119. 1979-65 FEC Advisory Opinion, 1-3 (1979), *summarized in*, 1979 FEC ANN. REP. 9.

120. 1979-65 FEC Advisory Opinion (1979), *summarized in*, 1979 FED. ELECTION COMM'N ANN. REP. 83.

121. *Id.*

122. 1980-81 FEC Advisory Opinion, 1-3 (1980), *summarized in*, 1980 FED. ELEC-

draft-Kennedy groups would seem to be clearly identified with Senator Kennedy regardless of the technical status of his candidacy.

The group's close identity with Senator Kennedy and his subsequent campaign organization seems to indicate the potential for the very same type of *quid pro quo* corruption that concerned the *Buckley* Court.[123] The fact that an individual has not yet officially declared his candidacy does not significantly diminish the potential of a large contributor being rewarded for his efforts. The only difference is that the contribution is a little riskier because the possibility exists that the candidate may ultimately choose not to run.

An office seeker would be extremely indebted to a person who contributed to a draft committee, especially when, under the *Florida for Kennedy Committee* opinion, an unlimited amount could be contributed. For if the office seeker does announce his candidacy, the contributor has provided an opportunity for the candidate to receive valuable early exposure. Such initial exposure can be particularly important given the present Presidential primary system in which success in an early primary may be instrumental in assisting the candidate in raising the necessary funds for later primaries.[124] As the FEC has stated, "the very essence of a draft committee is to influence the nomination of a person to federal office. It stretches credibility to argue, as [the Committee] does, that attempting to influence someone to become a candidate is not an attempt to influence that person's nomination for election."[125] A similar conclusion was reached by the Federal District Court for the District of Columbia, which stated:

> [This] court could not, merely on the basis of the [the Committee's] assertions, definitively hold that Senator Kennedy was never a "candidate" until his public announcement. Nor could it hold that the activities of the various draft committees were efforts solely to convince the Senator to run, rather than help elect him. These issues would require a factual investigation very much

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TION COMM'N ANN. REP. 101 (determining whether a certain individual's contributions made to a draft committee count against his $25,000 aggregate limit in 1979 or his 1980 limit, both contributions going to pro-Kennedy groups). *See also*, Ifshin & Warin, *supra* note 6 at 509 n.167 (Kennedy fundraising efforts were impaired because many contributors were unsure whether contributions to draft committees counted as contributions to Kennedy's campaign committee).

123. 681 F.2d at 1293 (Clark, J., dissenting). *See supra* notes 72-76 and accompanying text.

124. H. ALEXANDER, *supra* note 29, at 20.

125. Brief for Appellee at 14, Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281 (11th Cir. 1982).

> along the lines which the Commission [FEC] proposes to follow.[126]

Thus, the *Florida for Kennedy Committee* opinion provides a mechanism for the type of unlimited contributions that the FECA sought to avoid.[127] This fact is particularly disturbing because the contribution limitations of the Act have succeeded in reducing the influence of "big-givers."[128] By contributing unlimited amounts to draft committees, these individuals can once again yield substantial influence in political campaigns.

B. *Draft Committees and the First Amendment Right of Association*

A discussion of the First Amendment right of association also clarifies the difference between draft committees and issue or referenda groups. The *Florida for Kennedy Committee* court expressed the belief that serious constitutional questions would arise if draft groups such as the Committee were subject to the Act's requirements.[129] This concern, also expressed in the *Buckley* decision,[130] is not present with the draft-Kennedy groups. These groups do not involve the potential chilling effect that is present in issue or candidate groups that support candidates or political views outside those

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126. Federal Election Comm'n v. Florida for Kennedy Comm., 492 F. Supp. 587, 595 (S.D. Fla. 1980).

127. This rational is furthered demonstrated by a 1979 FEC advisory opinion. The opinion allows an individual to form his own committee to "test the waters" regarding his chances for success, and allows the committee to be exempt from the Act's restrictions on political committees. The ruling, however, points out that if the individual does officially declare his candidacy, contributions given to his earlier committee must be subsequently disclosed and will count against the contribution limitations of his supporters. This eliminates any chance of a person contributing over the Act's limits. 1979-26 FEC Advisory Opinion 1-3 (1979), *summarized in*, 1978 FED. ELECTION COMM. ANN. REP. 75.

128. H. ALEXANDER, *supra* note 29, at 64.

129. Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281, 1287-88 (1982). The majority cites the case of EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 285 (5th Cir. 1981), for the proposition that ambiguous statutes which present a significant risk that a first amendment right will be infringed, must be construed narrowly, in such a manner so as to avoid such potential constitutional problems. *Id.* at 1287. Based on this interpretation they conclude that the FECA should be read as excluding the Committee and other draft committees to avoid creating any constitutional problems. *Id.* at 1287-88. This determination misses the mark for two reasons. First, the statute is not ambiguous, *see infra* notes 138-144 and accompanying text. Second, enforcement of the statute poses no threat to the committee's constitutional rights. 681 F.2d at 1291 (Clark, J., dissenting); *see infra* notes 130-33 and accompanying text.

130. *See supra* notes 84-85 and accompanying text.

of the mainstream of American politics. As the *Florida for Kennedy Committee* dissent explains:

> The appellant [the Committee] has not raised even a colorable associational freedom claim. It was supporting the candidacy of an individual who narrowly lost the presidential nomination of one of the two major parties. No stigma could be attached to such efforts. Fear of a "chilling effect" upon such committees is simply so wild as to be baseless. The appellant has brought forth no facts or reasons which demonstrate how a "chilling effect" would come about. Thus, the threshold requirements of an associational rights claim have not been met in the instant case, as no reasonable likelihood that political association will be discouraged has been established.[131]

Even if *Florida for Kennedy Committee* were able to demonstrate a colorable associational claim, such infringement must be balanced against the compelling governmental interest of preventing corruption.[132]

These two factors, the potential for corruption and relatively minor infringements on associational rights, tend to severely weaken the *Florida for Kennedy Committee* court's claim that the Act must be read as excluding draft committees in order to avoid constitutional problems. The problems feared simply do not exist in the present situation.[133]

Thus, given the concerns of the *Buckley* Court, in excluding issue groups from the Act and including those supporting a candidate, draft committees should be accorded the same treatment as the latter groups. *Buckley* was concerned only with excluding issue groups whose first amendment rights of political expression would be violated if subject to the Act's provisions or fringe-political groups whose first amendment right to association might also be infringed. The *Buckley* Court did not intend to omit all groups that did not support an officially announced candidate from the Act's restrictions.[134] The mere fact that a group is not sponsoring a candidate, in the technical sense, does not mean that the purposes that caused the

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131. 681 F.2d at 1294 (Clark, J., dissenting).

132. *See supra* notes 84-85 and accompanying text.

133. 681 F.2d at 1294-95 (Clark, J., dissenting).

134. The *Buckley* court in dicta implied that not all political committees would require the presence of a candidate to be subject to the Act's provisions. In a footnote, they stated that "[s]ome partisan committees—groups within the control of a candidate *or* [those] *primarily organized for political activities*" . . . will be subject to the disclosure provisions of the Act. 424 U.S. at 80 n.107 (emphasis supplied). Because the Committee

Court to narrowly define political committee, exist in draft committees.[135] Adhering to such a restrictive interpretation would not only fail to satisfy the concerns of *Buckley*, the elimintation of *quid pro quo* corruption,[136] but also would defeat much of Congress' intention in implementing the FECA.[137]

C. *Statutory Definition and Legislative History of "Political Committee"*

Since the *Buckley* decision did not warrant the conclusion reached by the *Florida for Kennedy Committee* court, what that court termed "FEC's technical argument," utilizing the plain language of the statute, becomes increasingly important. The Act defines a political committee as a committee which receives contributions or makes expenditures in excess of $1,000 per year.[138] The key elements in defining a political committee are expenditures[139] and contributions.[140] Both are defined in terms of making payments "for the pur-

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is primarily organized for the purpose of electing an individual to political office, it would seem to represent the type of "other partisan committee" discussed by the court.

Also, in accepting the restrictive interpretation of the earlier lower courts, *Buckley* used the words "nonpartisan organizations" in describing political committees which were outside the Act's provisions, as opposed to excluding committees which did not support a "clearly identified candidate." 424 U.S. at 79 n.106. This could imply that the court did not want to define political committees as only those groups supporting a candidate. Additional support for a broader definition of political committee by the Court can be inferred from their statement that "dollars given to another person or organization that are earmarked for political purposes are contributions under the Act." *Id.* at 24 n.24. Under this definition, the Committee would seem to qualify as a political committee.

Furthermore, an argument can be made that the *Buckley* court in defining political committee, did not use the word candidate in the technical FECA sense, but rather it was to be given its broader every day meaning. 681 F.2d at 1292 (Clark, J., dissenting). The *Florida for Kennedy Comm.* dissenting opinion reaches this conclusion through two observations. First, the *Buckley* court consistently used words such as "clearly identified" and "particularly Federal" to modify the word candidate. If the technical definition of candidate was intended, the use of these additional words would have been unnecessary. Secondly, the Court placed words like *political committee, expenditure* and *contribution* in quotes when referring to their technical FECA definition. The word *candidate* never appeared in quotes. *Id.* at 1292-93 (Clark, J., dissenting). This broader reading of the term candidate would cause draft committees to be covered by the Act, because the *Buckley* Court only intended to trim the vague fringe areas of the statute which would involve constitutional violations while still maintaining what it considered the core of the Act. *Id.* at 1293 (Clark, J., dissenting).

135. *See supra* notes 79-83 and accompanying text.
136. *See supra* note 85 and accompanying text.
137. *See supra* notes 50-59 and accompanying text.
138. *See supra* note 56 and accompanying text.
139. 2 U.S.C. § 431(9)(A) (1982).
140. *Id.* § 431(8)(A) (1982).

pose of influencing the election [of any *person*] for Federal office."[141] The use of "person" rather than "candidate" represents a conscious choice by Congress to give the FEC authority over all types of groups whose purpose is to influence federal elections.[142]

The legislative history of the term political committee and general canons of statutory construction support this broad interpretation. The House of Representatives defined a political committee as "any committee, association or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of one or more *candidates* for Federal elective office."[143] The bill, as passed however, did not contain the word candidate.[144] Congress, thus, impliedly rejected a legislative proposal that would have limited political committees solely to those supporting a candidate.

In addition, the Supreme Court has consistently stated that "the starting point in every case of statutory interpretation is 'the actual language employed by Congress.' "[145] This general principle of statutory construction was recently employed by the Supreme Court in another election law case, *Bread Political Action Committee v. FEC*.[146] *In Bread Political Action Committee*, the Court noted that absent a "clearly expressed legislative intention" to the contrary, the plain language of the statute was controlling.[147] In the present case, not only is there no legislative history to the contrary, but the legislative history actually supports inclusion of draft committees into the Act.

Therefore, both a review of the relevant legislative history and

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141. 2 U.S.C. § 431(8)(A), (9)(A) (1982) (emphasis supplied).

142. 681 F.2d at 1290-91 (Clark, J., dissenting).

143. H.R. Doc. No. 11060, 92d Cong., 1st Sess. at 3 (1971). The definitions of contribution and expenditure were slightly revised by the 1980 amendments. The most recent definitions eliminate the phrase "of any person" and replace it with "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A), (9)(A) (1982). Although these changes do not alter the main thrust of the Act, they do demonstrate Congress' intent to regulate those contributions and expenditures designed to impact on federal elections. *Florida for Kennedy Comm.*, 681 F.2d at 1289 (Clark, J., dissenting).

144. *See supra* note 56 and accompanying text.

145. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 6 n.6, Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981) (citing CBS, Inc. v. Federal Communications Comm'n, 453 U.S. 367, 385 (1981), quoting Reiter v. Sonotone, 422 U.S. 330, 337 (1979)).

146. 455 U.S. 577 (1982).

147. *Id.* at 581.

general canons of statutory construction support the view that Congress intended draft committees to be subject to the Act's restrictions.

V. EFFECT AND IMPACT OF THE *FKC* DECISION

Under the 1979 Amendments to the FECA, draft committees are subject to the Act's disclosure requirements. *Florida for Kennedy Committee* and *Machinists Non-Partisan Political League*, however, indicate that because draft committees are not political committees, such groups are not subject to the Act's contribution limitations.[148] The Supreme Court's refusal of the *Machinists Non-Partisan League* petition, along with the lack of further Congressional action,[149] indicates that the present situation will remain. For these reasons, an analysis of the effect of the exclusion of draft committees from many of the Act's requirements is appropriate.

While draft committees are a relatively new phenomenon used extensively in only Presidential elections, there is reason to believe that their presence in all elections will increase. Furthermore, the adoption of the Presidential primary system with its public funding and expenditure limitations has increased the number of potential candidates actively seeking their party's nominations.[150] Utilization of draft committees has increased accordingly. Because draft committees are not under FEC jurisdiction, many of the problems and issues regarding draft committees will remain unanswered,[151] thus providing a vehicle for circumvention of many of the Act's requirements. There is a potential for *quid pro quo* corruption between draft groups and the individual.[152] The FEC's petition of the *Machinists Non-Partisan Political League* decision, however, briefly highlights the potential scenario:

> Draft committees, not subject to FECA's contribution limitations, will have the potential of funnelling large aggregations of money, including corporate and union treasury funds, into federal campaigns. Such committees, able to accept unlimited funds, will be in direct competition with those committees supporting candi-

148. *Machinists Non-Partisan Political Comm.*, 655 F.2d at 396 (the court admitted that the post 1979 treatment of draft groups is unclear).

149. Three bills were introduced during the 97th Congress which would subject draft committees to the contribution limits of the Act: S. 1851, 97th Cong., 1st Sess. (1981), S. 1899, 97th Cong., 1st Sess. (1981) and H.R. 6479, 97th Cong., 2nd Sess. (1982). Extensive hearings were held on S. 1851 which discussed the Act's applicability to draft committees. The hearings, however, have not resulted in subsequent legislation.

150. H. ALEXANDER, *supra* note 29, at 135.

151. Ifshin & Warin, *supra* note 6, at 513.

152. *See supra* notes 112-28 and accompanying text.

> dates. A proliferation of draft committees will severely damage the statutory scheme enacted by Congress and may completely circumvent the provisions of FECA. Such a result was certainly not the intent of Congress when it enacted FECA, and the appellate court's judgments facilitating this result must be reversed.[153]

Certainly, potential office seekers are not hesitant to take advantage of such a situation. For instance, during the 1972 Presidential campaign, Richard Nixon received a substantial percentage of his contributions, particularly from business and wealthy individuals, *before* the disclosure provisions of the 1971 Act became effective.

Although the disclosure and reporting requirements of the 1979 Amendments may prevent some individuals from contributing large amounts,[154] the *Buckley* Court noted that disclosure alone was insufficient to preserve the integrity of the system.[155] The necessity of contribution limitations to preserve the FECA's statutory scheme is evidenced by the *Machinists Non-Partisn Political League* decision which allows business and labor political action committees (commonly referred to as Pacs) to contribute unlimited amounts to draft committees. It should be remembered that the potential influence of such large aggregations of capital first prompted government regulation of federal campaigns back in the early 1900's.

Furthermore, the extensive role of Pacs, even in areas where they are regulated, has been criticized by numerous commentators.[156] Much of this criticism has centered around two factors. The first criticism is that while contribution limitations have minimized the influence of the "big-givers", the money has simply shifted to Pacs where the contribution limitations are slightly higher and the

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153. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 5-6, Federal Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

154. In addition to eliminating the potential for *quid pro quo* corruption, contribution limitations also support the "one-man, one-vote" principle: each individual should be able to influence federal elections only to the extent of the next, just as each individual's vote should count equally. Large unlimited contributions, however, enable some individuals to exhibit a disproportionate amount of influence. D. ADAMANY & G. AGREE, *supra* note 44, at 185. *See also* Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

155. California Medical Association v. Federal Election Comm'n, 641 F.2d 619 (9th Cir. 1981) (en banc), *aff'd*, 453 U.S. 182, 199-200 n.20 (1981) (citing Buckley v. Valeo, 424 U.S. 1, 27-28 (1976)).

156. H. ALEXANDER, *supra* note 29, at 146-47; Wright, *supra* note 154, at 614-20. *See generally*, Adamany, *PACS and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569 (1980).

groups more capable of spending the money effectively.[157] A second criticism of the Pac phenomenon involves the connection between a Pac's contributions and expenditures and the subsequent votes of Congressmen who were the beneficiaries of these efforts—exactly the type of corruption feared in *Buckley*.[158]

Pacs, however, have been only a minor participant in Presidential elections.[159] This is probably due to the presence of public funding in Presidential elections. Because funds are provided for both general elections and primaries, Pac money is not as essential to a Presidential office seeker as it is to congressional and senatorial candidates, who have no public funding available and no expenditure limits.[160] The *Florida for Kennedy Committee* ruling, however, creates a situation by which Pacs can have a substantial impact upon Presidential campaigns. They can contribute millions of dollars to those draft committees supporting individuals whose policies they favor and nothing to those they oppose. The influx of such potentially large funds will provide important seed money and early exposure to certain office seekers, creating a potentially crippling disadvantage for those who do not favor Pac concerns.[161]

The *Florida for Kennedy Committee* decision thus provides a complete mechanism by which FECA requirements can be legally circumvented. At a time when the average contribution to a Presidential candidate is $27.50, the doors are now open for contributions resembling the 2 million dollars given by W. Clement Stone to Richard Nixon in 1972.[162] The only condition to such a gift is that it take place before an individual officially declares his candidacy. Unlimited contributions to draft committees also provide for an increase in

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157. H. ALEXANDER, *supra* note 29, at 66. *See also* Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395, 399 (1982).

158. *Running with the PAC's*, TIME MAG., Oct. 25, 1982 at 20. While many Pacs may be considered issue groups and thus, protected by the *Buckley, National Committee for Impeachment* and *Jennings* rationales, others support specific individuals. Excluding these latter types, such as the Committee, from the Act's provisions enables them to spend substantial sums of money simply because the individuals they support are not announced candidates. If draft committees were considered political committees under the Act, the amount which these groups could contribute would be limited, and thus, their impact lessened.

159. H. ALEXANDER, *supra* note 29 at 86.

160. *Id.* at 147.

161. The assumption that individuals not supported by corporate Pacs will receive funds from labor Pacs is not always valid for both groups often support the same individual, thus placing their opponent at a substantial financial disadvantage. Adamany, *supra* note 154 at 591.

162. H. ALEXANDER, *supra* note 29 at 96.

corporate and labor influence in the election process—the type of situation the Act was designed to eliminate.

Even while subjected to a $5,000 contribution limitation, *Florida for Kennedy Committee* still amassed a total of $267,018[163] and it represented only one of nine draft-Kennedy groups. Without such limits, one can only speculate on the potential accumulation of such groups. The creation of such a situation surely does not represent the intentions of Congress in enacting the FECA, yet it is precisely the scenario that the *Florida for Kennedy Committee* decision has created.

VI. CONCLUSION

Efforts to regulate the influence of affluent interests in federal elections have not always been successful. The complete elimination of corruption in federal elections can probably never be achieved, at least not without destroying the fundamental values of political expression and association guaranteed by the first amendment. Yet Congress, in enacting the FECA, has succeeded in at least closing some of the loopholes that existed in earlier efforts to regulate federal elections. The *Florida for Kennedy Committee* decision, however, provided a new loophole through which the intentions and purposes of Congress' efforts can be completely circumvented.

Excluding draft committees from the Act's provisions cannot be justified by a reading of the appropriate statutory provisions involved. Nor does the opinion in *Buckley* mandate the decision by the eleventh circuit in *Florida for Kennedy Committee*. To avoid circumvention of the FECA, that decision should be re-examined.

Kenneth R. Plumb

163. Brief for Appellee at 2 n.1., Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281 (11th Cir. 1982).