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MEMORANDUM

TO: The plaintiffs in Buckley v. Valeo

FROM: Brice M. Clagett

The main purpose of this memorandum is to identify certain issues left open by the Supreme Court's decision in Buckley v. Valeo. Some of these could be raised by a petition for rehearing (which would have to be filed by February 24). We do not recommend such a petition for the reasons indicated below. It seems likely that most or all of these issues will have to be confronted in future litigation.

1. Expenditure limits on political parties. The Court rejected our challenges to 18 U.S.C. § 608(f), limiting the amounts which national and state committees of political parties may spend on behalf of their nominees, and to 26 U.S.C. § 9008(d), limiting the amounts that national committees of political parties may spend on presidential nominating conventions. The Court viewed our challenges to these sections as resting only on Fifth Amendment grounds, and rejected the challenges as so construed. The Court was plainly in error; we also challenged these limits on First Amendment grounds, and in view of the Court's holding that the other expenditure limits are unconstitutional under the First Amendment it is difficult to see how a First Amendment challenge to the party-expenditure limits could fail to succeed.

We assume it is not in the best interest of any of you to petition for rehearing in an attempt to correct the Court's error. These party expenditure limits are wholly academic in the case of independent candidates, and virtual ly so in the case of minor parties. Moreover, in the forth coming legislative struggle to rationalize what remains of the campaign financing laws, there may be some advantage if political parties are the only entities now limited in what they can spend on behalf of candidates for federal office. At the least, it might cause a healthy reawakening of the major parties' appreciation for First Amendment protections. If a major party does ultimately challenge these limits, we find it difficult to see how they could be sustained.

2. No inflation allowance in contribution limits. The Court nowhere addressed our argument that contribution limits are particularly onerous since there is no inflation adjustment. If the argument had been addressed, the Court presumably would have said that it was premature since no one knows whether there will be inflation in the future(!). If after several years inflation has continued at anything like recent rates, and Congress makes no adjustment in the limit, I should think a reasonable case might be made out that Congress, having decided in 1974 what the contribution limit should be, cannot allow that limit to become pro- gressively lower in real terms simply by failure to include a cost-of-living adjustment.

3. Discriminatory aspects of contribution limits. At pages 28-29 of the Opinion, the Court quite pointedly left it open for minor parties or challengers to renew constitutional objections to contribution limits if actual experience under the Act permits a showing that they are discriminated against in fact.

4. Imposition of unconstitutional condition on acceptance of subsidies. Perhaps the most extraordinary feature of the Court's decision is its holding that, even though expenditure limits are flatly and per se unconstitutional as an invasion of free speech, nonetheless the candidate may be required to accept such limitations in return for being given federal subsidies. It is hard to square this with a number of precedents indicating that entitlement to governmental benefits may not be made dependent on submission to an unconstitutional condition. The issue is presented in aggravated form here, since the contribution limits make it harder for a candidate to survive without accepting the subsidies and therefore the unconstitutional condition. Astonishingly, the Court never dealt with this question at all, but merely held that Subtitle H was severable from the expenditure limits. The proper question is whether the provisions of Subtitle H requiring acceptance of expenditure limits in return for subsidies are (1) constitutional and (2), if not, are severable from the rest of Subtitle H.

We have of course considered the pros and cons of a petition for rehearing directed to this issue. Several reasons lead us to recommend against it. First, it would appear that no appellant has standing to raise it as a separate issue, since no appellant has qualified or will imminently qualify for subsidies. Second, petitions for rehearing are almost never granted, and would appear particularly unpromising in a case like this one, where the decision presumably represents a hardfought compromise and the Court is unlikely to be willing to re-examine any aspect of it. Finally, the fact that the Court never did address the issue means that a future candidate having standing, and presenting the unconstitutional-condition argument as the sole focus of a new lawsuit, might have a reasonably decent chance at a favorable decision; that chance would be reduced if we now raised the issue and, as is over-whelmingly probable, the Court simply entered an order reading "petition for rehearing denied."

5. Discriminatory aspects of subsidies. Footnote 131 at page 91 of the opinion leaves the door open for a minor party to bring a subsequent lawsuit, after experience with subsidies, "to offer factual proof that the scheme is discriminatory in its effect."

6. Disqualification of candidates. The Court carefully left open the question whether a reconstituted FEC could be given the power to disqualify candidates; see pages

130-31, n.175. If Congress attempts to reactivate the disqualification provision, we think the chances of success of a challenge to it would be substantial.

7. Legislative veto. The Court also carefully refrained from deciding whether a properly constituted FEC could be subject to the legislative-veto provision of the FECA; see page 134, n.176. If Congress creates a new commission with rulemaking power and makes its rules subject to a legislative veto, that provision would be ripe for challenge. The Court is fully aware that the legislative-veto issue is one with implications far beyond the election laws.

After the expiration of the 30-day grace period for the FEC, we propose to apply for a declaratory judgment and injunction against those portions of the law which the Court held invalid. It is possible that we may be faced with an attempt by the FEC to extend the 30-day grace period. If so, we propose to resist it.

Enclosed is a statement of our disbursements through February 2, 1976, with certain additional information which some of you have requested. You will note that the balance outstanding is $18,905.52. It is possible that this may be reduced by up to $3,000 if we are successful in recovering from the defendants 50 percent of the cost of printing the appendix. We shall let you know promptly if such a reduction is obtained. In the meantime, we should much appreciate liquidation of the outstanding balance in excess of $3,000 as soon as possible.