The original documents are located in Box 15, folder "Federal Election Commission - Legal Challenge" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Campaign Federal Funds

COVINGTON & BURLING
888 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

TELEPHONE: (202) 452-6000
WRITER'S DIRECT DIAL NUMBER
452-6306

TWX: 710 822-0005
TELEX: 89-593
CABLE: COVLING

March 4, 1975

The President
The White House
Washington, D.C. 20500

Mr. President:

This is to advise you that plaintiffs in Buckley, et al. v. Valeo, et al., Civil No. 75-1061, now pending in the United States Court of Appeals for the District of Columbia Circuit, are challenging the constitutionality of the matching payment of federal funds to candidates for nomination for the office of President of the United States for the financing of their respective primary election campaigns under Chapter 96 of the Internal Revenue Code of 1954, as amended, 88 Stat. 1297.

Plaintiffs have asked, inter alia, that enforcement of major portions of Subtitle H of the Internal Revenue Code of 1954, including the aforementioned Chapter 96, be permanently enjoined. If it appears that a final disposition of this case cannot be made by January 1, 1976, plaintiffs will seek preliminary remedies to insure that the court's jurisdiction to grant relief is protected and funds are not unconditionally dispensed.

You are advised of this so that your planning may take the plaintiffs' intentions into account.

Sincerely yours,

Brice M. Clagett
Attorney for Plaintiffs

Campaign
Political
Funding

March 5, 1975

MEMORANDUM FOR: DUDLEY CHAPMAN

FROM: PHIL BUCHEN

Kindly check on this situation and suggest an acknowledgement for me to send the writer of the enclosed letter.

LL W. ELLISON
OMAS AUSTERN
RO C. WESTWOOD
LES A. HORSKY
LD HISS
T. SAPIENZA
S H. McGLOTHLIN
ST W. JENNES
LEY L. TEMKO
S C. McKAY
W. DOUGLAS
LTON CAROTHERS
NDOLPH WILSON
RTS B. OWEN
R F. CZARRA, JR.
AM H. ALLEN
B. ISBELL
B. JONES, JR.
WARD DUNKELBERGER, JR.
E McADOO CLAGETT
S. KOCH
RT E. O'MALLEY
VANDERSTAR
AN T. HALVORSON, JR.
Y M. APPLEBAUM
EL S. HORNE
HAN D. BLAKE
LES E. BUFFON
RT N. SAYLER
WARD BRUCE
N. BROWN
J. TAGLIABUE

JOHN G. LAYLIN
FONTAINE C. BRADLEY
EDWARD BURLING, JR.
JOEL BARLOW
J. HARRY COVINGTON
W. CROSBY ROPER, JR.
DANIEL M. GRIBBON
HARRY L. SHNIDERMAN
DON V. HARRIS, JR.
WILLIAM STANLEY, JR.
WEAVER W. DUNNAN
EDWIN M. ZIMMERMAN
JEROME ACKERMAN
HENRY P. SAILER
JOHN H. SCHAFER
ALFRED H. MOSES
JOHN LeMOYNE ELLICOTT
DAVID E. McGIFFERT
PHILIP R. STANSBURY
CHARLES A. MILLER
RICHARD A. BRADY
HERBERT DYM
CYRIL V. SMITH, JR.
MARK A. WEISS
HARRIS WEINSTEIN
JOHN B. DENNISTON
PETER J. NICKLES
MICHAEL BOUDIN
BINGHAM B. LEVERICH
ALLAN J. TOPOL
VIRGINIA G. WATKIN
RICHARD D. COPAKEN
CHARLES LISTER

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EDWIN S. COHEN
OF COUNSEL

March 4, 1975

The President
The White House
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Plaintiffs have asked, inter alia, that enforcement of major portions of Subtitle H of the Internal Revenue Code of 1954, including the aforementioned Chapter 96, be permanently enjoined. If it appears that a final disposition of this case cannot be made by January 1, 1976, plaintiffs will seek preliminary remedies to insure that the court's jurisdiction to grant relief is protected and funds are not unconditionally dispensed.

You are advised of this so that your planning may take the plaintiffs' intentions into account.

Sincerely yours,

Brice M. Clagett
Attorney for Plaintiffs

Campaign Law Support Decision Due

The Justice Department is expected to make up its mind today whether to defend in court the new campaign finance law.

Atty. Gen. Edward H. Levi reportedly told the new Federal Elections Commission that he would reach a decision today.

Commission Chairman Thomas B. Curtis said Levi told him yesterday that because of other duties he had not had time to settle upon a final position to take in a government brief due to be filed next Monday.

The law's constitutionality has been challenged in federal court by a group that reaches across the political spectrum. The case is now before the U.S. Court of Appeals here. A hearing is set for June 13.

THE COMMISSION, itself created by the new law, wants the Justice Department to go into court with a full-scale defense of all parts of the new law — including two provisions about which Solicitor Gen. Robert H. Bork has raised constitutional doubts.

One of those deals with the enforcement power given to the new commission, and the other deals with limits to be imposed for the first time on individuals' campaign donations.

Bork's objections caused the department to back off, at least temporarily, from a commitment it had made to a group of private organizations to join them in a full defense of the law.

When Curtis learned of that last Friday, he complained to the White House. He was given assurances that no final decision would be made by the department without consulting him and the White House.

CURTIS SAID yesterday that he had talked with Levi, and "firmed up my understanding, which was that the Justice Department has been representing us in defending this law, and that that would continue unless we hear differently."

The chairman added: "That is what has to be."

However, the commission has hired a special lawyer of its own to plead its case and plans to file its own brief.

Curtis said that the eight-member commission has taken the position, unanimously, that "we are going to do everything in our power to defend the constitutionality of the act."

The new law, besides putting limits on individuals' donations, puts ceilings on presidential and congressional candidates' spending and provides a federal subsidy of presidential campaigns. — Lyle Denniston

ATTY. GEN. LEVI
Promises decision

NEW YORK TIMES, MONDAY, MAY 19, 1975

New Voting Law Faces All-Out Legal Challenge

By R. W. APPLE Jr.

Special to The New York Times

WASHINGTON, May 18—likely to survive; or the courts

file

THE WHITE HOUSE

WASHINGTON

May 24, 1975

MEMORANDUM FOR PHIL BUCHEN

FROM: DON RUMSFELD

Don't forget to sort out that matter between Tom Curtis of the Election Commission and the role of the Department of Justice in defending them.

I don't know what the answer is, but I think it is important that there be communication between Curtis and Levi.

5/24 Telephoned Mr. Rumsfeld's office to advise Mr. B. had talked w/ Mr. Curtis.

THE WHITE HOUSE

WASHINGTON

May 24, 1975

MEMORANDUM FOR: DON RUMSFELD

FROM: PHILIP BUCHEN P.W.B.

SUBJECT: Justice Department's Position in Defense of New Campaign Financing Law and Powers of Federal Election Commission

From information I have obtained from the Justice Department, it appears that the newspaper accounts are erroneous as to any decision by the Justice Department not to defend portions of the above law and the powers granted by the law to the Federal Election Commission.

The Attorney General merely asked for draft briefs on both sides of the issue which he will take up with us before any decision is made.

I have tried to reach Tom Curtis at the number you gave me but, as yet, there is no answer.

Campaign Act Defense Lack Held a Rarity

By John P. MacKenzie
Washington Post Staff Writer

Federal Election Comm.

THE WHITE HOUSE

WASHINGTON

June 6, 1975

MEMORANDUM FOR: MR. PHILIP BUCHEN

FROM: WARREN RUSTAND WSR

SUBJECT: Approved Presidential Activity

Please take the necessary steps to implement the following and confirm with Mrs. Nell Yates, ext. 2699. The appropriate briefing paper should be submitted to Dr. David Hoopes by 4:00 p.m. of the preceding day.

Meeting: With Tom Curtis, Federal Election Commission

Date: Thurs. June 12, 1975 Time: 5:00 p.m. Duration: 30 minutes

Location: The Oval Office

Press Coverage: White House Photographer

Purpose: Mr. Rumsfeld and Mr. Buchen to sit in on meeting

cc: Mr. Hartmann
Mr. Marsh
Mr. Cheney
Dr. Connor
Dr. Hoopes
Mr. Jones
Mr. Nessen
Mr. O'Donnell
Mrs. Yates

Monday 6/9/75

Meeting
6/12/75
5 p.m.

9:15 Checked with Nell Yates.

It is our responsibility to call Tom Curtis and notify him of the meeting with the President, Don Rumsefeld and you in the Oval Office on Thursday 6/12 at 5 p.m.

We will need to submit a briefing paper by 4 o'clock on Wednesday 6/11.

Will you want to call Mr. Curtis ---
or do you want me to call his office?

Yesterday's ltr to Pres.

THE WHITE HOUSE

WASHINGTON

June 6, 1975

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FROM: WARREN RUSTAND WSR

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cc: Mr. Hartmann
Mr. Marsh
Mr. Cheney
Dr. Connor
Dr. Hoopes
Mr. Jones
Mr. Nessen
Mr. O'Donnell
Mrs. Yates

Federal Elections

Monday 6/9/75

Meeting
6/12/75
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THE WHITE HOUSE

WASHINGTON

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cc: Mr. Hartmann
Mr. Marsh
Mr. Cheney
Dr. Connor
Dr. Hoopes
Mr. Jones
Mr. Nessen
Mr. O'Donnell
Mrs. Yates

THE WHITE HOUSE

WASHINGTON

June 11, 1975

MEETING WITH CHAIRMAN THOMAS B. CURTIS
AND SOLICITOR GENERAL ROBERT BORK

Thursday, June 12, 1975
5:00 p.m.
The Oval Office

From: Philip Buchen P.W.B.

I. PURPOSE

A. Chairman Curtis originally requested this meeting in order to communicate his concern with the litigating posture of the Department of Justice in defense of the constitutionality of certain provisions of the Act creating the Elections Commission and its anticipated impact on Congress (letter at Tab A).

B. Following receipt of the letter requesting this meeting, a discussion was held with the Attorney General and Chairman Curtis which resulted in tempering the problem.

C. Solicitor General Bork will attend in the absence of the Attorney General.

II. BACKGROUND

A. On October 15, 1974, you signed into law the Federal Election Campaign Act Amendments of 1974 (P.L. 93-433), noting some reservations with respect to First Amendment issues presented by the measure. (Signing Statement at Tab B)

B. On January 2, 1975, suit was filed in the D. C. District Court by a broad spectrum of individuals and organizations to enjoin the operation of certain provisions of the 1974 law (Buckley, et. al. v. Valeo, et. al.). The District Court immediately certified the case to the D. C. Court of Appeals.

C. On May 19, the Court of Appeals referred certain aspects of the case dealing with public financing to a Three-Judge court and retained the balance of the case for en banc review.

Original briefs were ordered by June 2; reply briefs by June 12; and oral argument was set for June 13.

D. During the final weeks of May, a controversy arose between Chairman Curtis and the Attorney General with regard to the nature of Justice's brief in support of the Commission (letters at Tab C).

E. On June 2, the Department of Justice filed a brief in the Court of Appeals and in the Three-Judge court supporting the Commission on all issues except those concerning the Commission's composition and enforcement powers. On these two issues, the Attorney General filed a separate brief in the nature of an amicus curiae presentation. The Commission also was supported with a brief filed by Special Counsel.

F. The Attorney General has indicated that upon review by the Supreme Court, the Department will file one brief in support of the Commission and a second amicus curiae brief on behalf of himself and the Solicitor General. I anticipate that the latter brief will give scholarly coverage to the Commission's composition and enforcement powers and will also raise certain First Amendment issues which much concern the Attorney General and Solicitor General.

III. TALKING POINTS

A. Chairman Curtis appreciates the position of the Department of Justice on the Constitutional issues under review but is concerned with the possibility of an adverse Congressional reaction which might take the form of legislation to create an "independent" counsel to represent the Government in this case.

B. The Attorney General and Solicitor General point to their particular responsibilities to the Federal courts, especially the Supreme Court, and urge that they are duty bound to present a scholarly analysis of fundamental Constitutional issues presented by the 1974 Act, notwithstanding the possibility of an adverse Congressional reaction.

IV. RECOMMENDATION

The Attorney General and Solicitor General should continue to consult with Chairman Curtis and to keep him advised in timely fashion. The Elections Commission and the Department of Justice should cooperate in developing a better understanding within Congress of the adequacy of current representation on both sides of these issues.

V. PARTICIPANTS

Mr. Rumsfeld, Mr. Buchen and Mr. Hills to sit in on meeting.

VI. PRESS COVERAGE

White House photographer only.

FEDERAL ELECTION COMMISSION

WASHINGTON, DC 20463

June 9, 1975

Honorable Gerald R. Ford
President of the United States
Washington, D. C.

Dear Mr. President:

This is to advise you of the status of the pending litigation Buckley et al v. Valeo et al, Civil #75-0001 (D.D.C.), #75-1061 (D.C. Cir.) which challenges the constitutionality of certain provisions of the Federal Election Campaign Act Amendments of 1974. Companion letters are being sent to the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

A serious question has developed in respect to the legal representation which will be afforded the Federal Election Commission in its efforts to defend the constitutionality of the Act against these challenges of the plaintiffs, by the Department of Justice.

The Commission had assumed that the Department of Justice would fully defend the constitutionality of an Act passed by the Congress and signed by the President as an advocate. However, recognizing that certain challenges involved the prerogatives of the executive branch of government v. the legislative branch in respect to the composition and enforcement powers of FEC and that the Department of Justice might be in an ambivalent position, the Commission employed special counsel to assist in presenting the arguments of constitutionality based upon the legislative powers granted in the Constitution. Special Counsel was instructed to work closely with the officials in the Justice Department in preparing the total defense for the FEC which was done.

Briefs were to be filed in the U. S. Court of Appeals by June 2, 1975. To the surprise of the FEC, it learned that the Justice Department was considering limiting in a serious way the scope of its representation of the FEC in the law suit. In spite of FEC pleas to the contrary, the Justice Department concluded it would represent the Commission before the U. S. Court of Appeals and three judge District Court on all issues except those concerning the Commission's composition and

enforcement powers. On those issues it would file a separate brief for the Attorney General who was also a party defendant. This was done and the brief is more antagonistic to the FEC position than it is a defense of the Attorney General. The Attorney General went on to say, in his letter to the Chairman of the FEC dated May 30, 1975, that it was his intention and that of the Solicitor General to file a separate amicus curiae brief at the Supreme Court level "which will set forth all sides of the constitutional issues."

The FEC is of the opinion that this is less than adequate defense and, although damage has already been done, is seeking to have the Justice Department assume the full role of advocacy on the constitutionality of the Act. Furthermore, the FEC is of the opinion that it was premature and damaging to the suit for the Attorney General to publicly state the position he would take when the matter reached the U. S. Supreme Court, if indeed it did.

The Commissioners feel this matter is of such far-reaching consequences that the Congress and President should be made aware of it. I am enclosing copies of the pertinent correspondence between the FEC and the Department of Justice along with copies of the two briefs filed by the Department of Justice and the brief filed by the Commission's Special Counsel in the U. S. Court of Appeals.

Respectfully,

Thos B Curtis

Thomas B. Curtis
Chairman

TBC:me

cc to The Attorney General

Enc.
Letter dated May 19, 1975 to Rex E. Lee from Thomas B. Curtis
Letter dated May 27, 1975 to the Attorney General from Thomas B.Curti
Letter dated May 30, 1975 from Attorney General to Thomas B. Curtis
Letter dated June 5, 1975 to the Attorney General from Thomas B.Curti
Three briefs

EMBARGOED FOR RELEASE
UNTIL 4:00 P.M., EDT

OCTOBER 15, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

Today I am signing into law the Federal Campaign Act Amendments of 1974.

By removing whatever influence big money and special interests may have on our Federal electoral process, this bill should stand as a landmark of campaign reform legislation.
In brief, the bill provides for reforms in five areas:

--It limits the amounts that can be contributed to any candidate in any Federal election, and it limits the amounts that those candidates can expend in their campaigns.

--It provides for matching funds for Presidential primaries and public financing for Presidential nominating conventions and Presidential elections through use of the $1 voluntary tax checkoff.

--It tightens the rules on any use of cash, it limits the amount of speaking honorariums, and it outlaws campaign dirty tricks.

--It requires strict campaign financial reporting and disclosure.

--It establishes a bipartisan six-member Federal election Commission to see that the provisions of the act are followed.

Although I support the aim of this legislation, I still have some reservations about it--especially about the use of Federal funds to finance elections. I am pleased that the money used for Federal financing will come from the $1 checkoff, however, thus allowing each taxpayer to make his own decision as to whether he wants his money spent this way. I maintain my strong hope that the voluntary contribution will not become mandatory and that it will not in the future be extended to Congressional races. And although I do have reservations about the First Amendment implications inherent in the limits on individual contributions and candidate expenditures, I am sure that such issues can be resolved in the courts.

I am pleased with the bipartisan spirit that has led to this legislation. Both the Republican National Committee and the Democratic National Committee have expressed their pleasure with this bill, noting that it allows them to compete fairly.

The times demand this legislation.

There are certain periods in our Nation's history when it becomes necessary to face up to certain unpleasant truths.

We have passed through one of those periods. The unpleasant truth is that big money influence has come to play an unseeming role in our electoral process. This bill will hep to right that wrong.

I commend the extensive work done by my colleagues in both houses of Congress on this bill and I am pleased to sign it today.

# # #

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

May 27, 1975

The Honorable Edward H. Levi
The Attorney General
of the United States
The Department of Justice
Washington, D. C. 20530

Dear Mr. Attorney General:

I am writing on behalf of the Federal Election Commission with regard to the role to be played by the Department of Justice in Buckley v. Valeo. As you know, the Department of Justice has represented the Commission and the other federal defendants since the inception of the litigation. The Commission does now have its own General Counsel (John G. Murphy, Jr.), and it has retained special counsel (Professors Ralph S. Spritzer and Paul Bender of the University of Pennsylvania) to aid it in the conduct of the litigation.* Our counsel have been in close touch with attorneys in the Civil Division of your Department and have been proceeding on the understanding that there would be a division of labor between the Commission, the Department and counsel for the intervening defendants in presenting the arguments in defense of the constitutionality of the Federal Election Act Amendments of 1974. This letter is to urge upon you that this arrangement be continued in effect.

We recognize, of course, that the case raises points on which lawyers and judges may well disagree. Also, we appreciate your reasons for believing that the case is one of great importance and that it merits your most serious personal consideration. We sincerely believe, however, that the balance of considerations should lead the Department to continue rather than withdraw its support of the legislation.

The Act in question is undoubtedly one of the most significant pieces of federal legislation in recent years. Following recurring abuses, most recently those arising out of the 1972 Presidential election campaign--and with a view to the growing mistrust by the American people of those in political life--Congress devoted a massive amount of time and energy to its enactment. The President--albeit with constitutional reservations--signed it into law. We believe it would be a serious departure from the traditional allocation of responsibilities within our

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* The Commission's special counsel were retained principally to treat questions arising out of the manner of appointment of the Commission - as to which there may be an institutional conflict from the Department of Justice's point of view.

government if the Department of Justice provided less than a spirited and wholehearted defense of this legislation. Moreover, it seems to us, that there should be the strongest kind of presumption in favor of the Department's performing its accustomed role of defending the constitutionality of an Act of Congress.

We would also suggest that there was far more reason to doubt the constitutionality of an earlier change in this country's election laws. When Congress was considering whether to lower the voting age to 18 in all federal and state elections by statute--rather than constitutional amendment--the Deputy Attorney General testified that such a statute would be unconstitutional. Lowering the Voting Age to 18, Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Congress, 2d Session 81 (1970). President Nixon expressed his firm personal view that such legislation "represents an unconstitutional assertion of Congressional authority . . . and that it therefore would not stand the test of a challenge in the courts." Letter to the Speaker, the Majority Leader, and the Minority Leader of the House of Representatives, 6 Presidential Document 588 (1970). When the Congress nevertheless passed the legislation, the President reiterated his unqualified view that "Congress has no power to enact [18-year-old voting in all elections] by simple statute," although he signed the bill because of the importance of the Voting Rights Act Amendments to which it had been attached. Statement of the President, 6 Presidential Document 805 (1970). Nonetheless, the President "directed the Attorney General to cooperate fully in expediting a swift test," id., and the Solicitor General signed the brief and argued the case in the Supreme Court. Oregon v. Mitchell, 400 U.S. 112 (1970).

We also note that in the pending case of Staats v. ACLU, Sup. Ct. No. 73-1413, involving provisions of the 1971 federal election law, the Department supported the legislation although the Solicitor General, presumably because of his personal doubts, chose to withdraw from participation in favor of his Deputy.

We are aware that on rare occasions the Department has argued both sides of a question. But this is not a case like St. Regis Paper Co. v. FTC, 368 U.S. 208 (1961), in which there was a dispute between independent federal agencies. And even in cases of this kind, "[w]here basic policy considerations involving competing statutory or economic interests are involved, the Solicitor General considers it his responsibility to resolve the conflict himself." Note, Government Litigation in the Supreme Court: The Roles of the Solicitor General, 78 Yale L.J. 1442, 1456 (1969). Nor is this the kind of case in which confession of error has been employed;

such cases involve misconduct or a misconstruction by a federal official, and "almost invariably involve appeals of criminal convictions . . . ." See Id. at 1468 n.114.

In summary, we think it would be unfortunate if, in a case of this magnitude and public importance, the Department of Justice were to speak with a divided voice. We trust that you may not find it necessary or advisable to adopt that course. We urge you to see that the Department provides a full and vigorous defense of Buckley v. Valeo.

Sincerely yours,

Thos B. Curtis

Thomas B. Curtis
Chairman

May 30, 1975

Mr. Thomas B. Curtis
Chairman
Federal Election Commission
Washington, D.C. 20463

Dear Mr. Curtis:

This is in response to your letter of May 27 concerning representation of the Federal Election Commission by the Justice Department in Buckley v. Valeo. The Civil Division will represent the Commission before the United States Court of Appeals and three-judge District Court on all issues except those concerning the Commission's composition and enforcement powers. On those issues, we will file a separate brief on behalf of the Attorney General who is also a party. We understand that the Commission's position on those issues will be presented by special counsel.

Before the Court of Appeals and three-judge District Court, no briefs will be filed by the Justice Department other than the two identified above.

We will also represent your interest (again with the exception stated above) when the case is appealed in the Supreme Court.

Your position on these issues will be vigorously represented by the Department in a brief filed on your behalf.

It is my intention, however, and I understand it is also the intention of the Solicitor General, that a separate amicus curiae brief will be filed at the Supreme Court level which will set forth all sides of the constitutional issues.

Sincerely,

Edward H. Levi

FEDERAL ELECTION COMMISSION

WASHINGTON, DC 20463

June 5, 1975

Honorable Edward H. Levi
The Attorney General
Washington, D. C.

Dear Mr. Attorney General:

I am in receipt of your letter of May 30 regarding proposed court action by the Department of Justice in the case of Buckley v. Valeo, Civil No. 75-0001 (D.D.C.), No. 75-1061 (D.C.Cir.). While I know you have expressed yourself in this matter in good conscience and with a strong sense of principle, I must nevertheless state as forcefully as I possibly can my belief that the course you have set for the Department in this litigation is dangerously wrong. The predicate for this judgment embodies two points: First, that the procedures followed by the Department in reaching the conclusions stated in your letter, and in filing as it has with the U.S. Court of Appeals, involved serious disregard of the Department's obligation to adequately consult with this Commission in a matter of vital importance to the Commission; and second, that the decision to file an amicus curiae brief in the Supreme Court which will set forth all sides of the constitutional issues is not only premature, but represents a remarkable and, in my view, unacceptable departure from the Department's tradition of supporting the adversary process through participation as an advocate, rather than as a dispassionate observer, when a law of the United States is at stake; and that this departure has institutional ramifications for the future role of the Department, with regard to its duty to uphold and defend the law, which far transcend the immediate concerns of this Commission.

Before addressing these points further, I should briefly review the recent events which have led us to the present situation. Letters exchanged between Department officials and the Commission in April and May of this year, together with consultation between our General Counsel, our Special Counsel and legal personnel in the Department's Civil Division, establish beyond serious question that as of May 22nd the Department of Justice was serving as the Commission's lawyer in Buckley v. Valeo, except on the separation of powers question, with respect to which the Commission had retained outside counsel. On Friday, May 23rd, the press informed the Commission that the Department was considering withdrawing its support for the legislation at issue, or at least filing a separate amicus curiae brief in the United States Court of Appeals which would analyze both sides of the issues presented. A Department spokesman confirmed this late the same day. The Commission had in no way or manner been previously informed of this development.

On Tuesday, May 27, I, accompanied by Commissioner Harris, the Commission's General Counsel and the Commission's Special Counsel, met at 5:30 p.m. with the Solicitor General, Mr. Bork. Mr. Bork indicated that no final decision had been made on the Department's posture in the Court of Appeals, that that decision would be yours, but that grave constitutional reservations were held within the Department regarding certain of the First Amendment issues raised by the litigation, as well as the Commission's enforcement powers. A full and useful discussion ensued. The meeting concluded with the understanding that you would make the final decision, that I would discuss the matter with you as well as with other officials of the executive branch, and that at some point the Commission would have to report to Congress on the matter.

I was frankly optimistic that the meeting had been productive and that the Department had moved closer to the view held by the Commission. My telephone conversation with you on Thursday, May 29th certainly did nothing to erode that optimism. I was thus most pleased when on the afternoon of the 29th the Assistant Attorney General for the Civil Division telephoned with the news that the Departmement would vigorously defend us in the Court of Appeals on all issues other than the separation of powers question, with respect to which the Department was reserving the right to file some kind of document with the Court reflecting the Department's doubts.

It came as an enormous surprise, therefore, when on Friday morning, May 30, the press informed the Commission that the Department of Justice had announced it would file a separate amicus curiae brief in the Supreme Court in which both sides of all issues would be set forth. Then on Monday, June 2 the Department filed two briefs in the United States Court of Appeals, in one of which, regarding the separation of powers question, the Department argues the unconstitutionality of the Commission's enforcement powers, notwithstanding the fact that 1) Mr. Bork had seemed mollified on this point during our May 27th meeting, and 2) we had not been further consulted on the matter.

I cannot adequately express my disappointment at this turn of events, and I sincerely urge you to re-evaluate the entire process to date with a view to restoring an effective relation between our respective agencies. As I told the Solicitor General, I cannot avoid what I see to be the ethical implications in the failure of the Department to consult with us fully and freely before making and announcing decisions which damage not only this Commission but the Department itself.

Moreover, the institutional implications of what you propose in this case are in my view terribly grave. In my letter to you of May

27th, I outlined all the legal reasons why the Department's neutrality or hostility toward the Commission in this litigation would be unprecedented and unwise. Against the background of the distinguishable precedents which I there cited, the decisions since taken by the Department can have only one meaning: That from time to time, and in conformity with no discernible procedure or order, the Attorney General alone or acting together with the Solicitor General will divert the entire Department from its constitutional duty to vigorously defend laws duly passed by the Congress and signed by the President, simply because these ranking officials believe, in good conscience, that the law was a mistake.

Mr. Attorney General, I submit that there are other, wiser remedies with respect to laws which you consider of doubtful validity. The Department is free to oppose any bill in Congress and to counsel the President that any bill should be vetoed; individual Department officials, acting on principle, may, as many have, decline to sign a brief supporting a law; and the Department is further free to argue before Congress that any law should be repealed.

These steps seem to me so plainly preferable to the one you propose and in part have acted upon. I look in vain for any justification here for detaching the Department from its great and historic role as defender of the law. Personally apprised as I am of your deeply principled dedication to the law and its institutions, I must believe that upon reflection you will agree that a reconsideration of the current situation is urgently in order. I look forward warmly to any opportunity we may make to work together more effectively.

I want to say as well that the Commission has the greatest confidence in the Department's ability to advocate our cause cogently and persuasively. The brief filed this week by your Civil Division attorneys regarding the First and Fourteenth Amendment issues is of the very highest quality. The Commission is greatly appreciative of that effort.

With kindest personal regards,

Sincerely,

Thos B Curtis

Thomas B. Curtis
Chairman

TBC:me