



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 4, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

THIS LETTER WAS PICKED UP BY J.
FREEMAN ON SEPTEMBER 4, 1980

ADVISORY OPINION 1980-96

Mitchell Rogovin, Esq.
Counsel to John B. Anderson and
General Counsel for the National Unity
Campaign for John Anderson
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Dear Mr. Rogovin:

This is in response to your letter of August 11, 1980, requesting an advisory opinion on behalf of John B. Anderson and the National Unity Campaign for John Anderson. The Commission understands your request to pose the following question:

Whether John B. Anderson would be excluded from receiving post-election public funds by operation of the provisions of 9004(a)(3) of the Presidential Election Campaign Fund Act ("the Fund Act"), 26 U.S.C. 9001, et seq.

Your request together with other papers submitted to the Commission¹ set forth as pertinent the following facts and statements regarding Mr. Anderson:

On April 24, 1980, John B. Anderson publicly announced his intention to pursue an independent candidacy for the Presidency for the 1980 general election. Thereafter, he established the National Unity Campaign as his principal campaign committee to coordinate and further his candidacy and as a nationwide campaign organization. At the same time, Mr. Anderson stated that he would not seek to establish the elaborate machinery of a new nationwide political party to support his candidacy but would instead run as an independent candidate

¹ The Commission notes that you have not formulated precisely the question to which, you seek an answer. Your original request was comprised of the papers filed in support of the application for a preliminary injunction in Anderson v. Federal Election Commission, Civil Action No. 80-1911 (D.D.C.). The Commission deems all information provided in that suit, in particular plaintiff's answers to interrogatories dated August 21, 1980, to be relevant to your request.

appealing for support not only to those who did not currently identify themselves as party members but also to Democrats and Republicans dissatisfied with the candidates or programs being offered by their own parties. Mr. Anderson is presently certified to be on the ballot, or has met all of the requirements for ballot access, in more than 10 states as a candidate for President of the United States.

The National Unity Campaign ("NUC") is an unincorporated political committee which currently has a monthly payroll of over \$200,000 covering 259 employees and hundreds of additional volunteers. It is headquartered in Washington, D.C., now occupying several floors of an office building at 3255 K Street, N.W., Washington, D.C. 20007. The officers and principal supervisors of the NUC are located in the Washington office, as are over 100 employees and volunteers. The NUC has State and regional offices throughout the country in virtually every state and many large cities. State and regional coordinators report to the Washington headquarters of the NUC. Funds raised through the efforts of State and regional offices are transmitted to Washington. Among the NUC's purposes is to place Mr. Anderson's name on the general election ballot in every State and the District of Columbia.

The NUC has a platform which is still being formulated. Mr. Anderson's positions and statements have been gathered on a number of issues. Issue advisors, on the staff of the National Unity Campaign, have refined and further developed Mr. Anderson's, positions. In addition, Mr. Anderson has met on numerous occasions with campaign advisors and with supporters, advisors and experts on issues who are not directly working for the campaign, to shape and develop his substantive campaign positions and proposals and the platform. While the NUC has no formal or written rules regarding the manner in which campaign workers, advisors or others shall "input" their views into the platform, the NUC has sought such input from many individuals across the country.

The NUC does not presently intend to create or perpetuate a party apparatus with permanent state and local organizations and physical facilities, is not at this time supporting or endorsing other political candidates, and is not asking voters affiliated with other parties to renounce those affiliations and join a different party. Rather, the NUC is established to promote a particular set of political programs and views and a particular candidate, offering the voters a choice for national leadership which Mr. Anderson and his supporters do not believe is currently being offered by either of the major parties.

No consideration has been given as of this date to whether the National Unity Campaign will be terminated after November 4, 1980, and therefore there is no intention presently formed as to this matter one way or the other. However, should Mr. Anderson be elected it is anticipated that the National Unity Campaign would assist after November 4 in his transition to the office of the President in January 1981.

In addition to organizing the National Unity Campaign, Mr. Anderson, together with the NUC and local supporters, have established organizations in several states. One such organization is the Anderson Coalition Party, a new political party pursuant to Michigan Statutes Annotated §§6.1685, 6.1560(2) eligible to have its candidates for President and Vice President on the Michigan general election ballot for November 1980. To establish the Anderson Coalition

Party as a new political party in Michigan, supporters of John Anderson, in compliance with M.S.A. §6.1685, circulated petitions on behalf of the proposed political party, collecting more than 18,339 valid signatures. Those signatures were filed with the Secretary of State's office by May 5, 1980. On May 24, 1980, in compliance with M.S.A. §6.1686(a), county caucuses to elect delegates to the Anderson Coalition State Convention were held in each congressional district. The delegates so elected met on May 31, 1980 pursuant to M.S.A. §6.1686(a) in state convention where they selected John B. Anderson as their presidential nominee. A vice-presidential nominee and 21 electors were also nominated.

In compliance with M.S.A. §6.1686(a), the nominees of the state convention were certified to the Secretary of State on June 2, 1980. Also on June 2, 1980, the Michigan Board of State Canvassers certified the Anderson Coalition for ballot position as a new political party for the August 5, 1980 primary. On August 5, the Anderson Coalition Party received sufficient votes in the primary to achieve ballot position in the November 1980 general election ballot for its Presidential and Vice-Presidential nominees.²

The National Unity Campaign for John Anderson funded the petition drive to establish the Anderson Coalition as a new political party in Michigan. The National Unity Campaign has continued to provide funds for the Anderson Coalition's efforts to obtain a ballot position in November for John B. Anderson in Michigan. The Anderson Coalition has forwarded to the National Unity Campaign for John Anderson money that it has raised in Michigan.

Another such organization is the Independents for Anderson Party of North Carolina, established pursuant to North Carolina General Statute §163.96. Petitions for the establishment of the Independents for Anderson Party were circulated in North Carolina beginning in early May and the signed petitions containing 19,004 signatures were delivered to the county Boards of Election on May 15. The verified signatures were then filed with the State Board of Elections on June 2, and after a hearing on June 17, 1980, the Board certified the new party. Beginning on June 18, notices of the party convention were printed in the Ashville Citizens Times, the Charlotte Observer, the Greensboro Record, and the Raleigh News and Observer. Information packets concerning the convention were sent to supporters, and throughout the week of June 23, registration of party members was conducted at the county Boards of Election. The Independents for Anderson Party convention was held on June 28, with 108 delegates to the convention representing 45 North Carolina counties and each congressional district. John B. Anderson and James Clotfelter were nominated as President and Vice President, respectively, and their names were certified to the State Board by the party chairman on June 29 and received by the Board on June 30.

After a challenge was brought to the certification of the party and its nominees, the State Board of Elections ruled that John B. Anderson was ineligible to be the presidential nominee of the Independents for Anderson Party. However, on August 20, 1980, Federal District Judge Dupree of the Eastern District of North Carolina issued a permanent injunction preventing the

² The Commission notes that the Citizens' Party and the Libertarian Party also received sufficient votes in the August 5 Michigan primary to qualify their Presidential candidates for the ballot in the November general election in Michigan.

State of North Carolina from printing its general election ballot without the name of John B. Anderson as the presidential nominee of the Independents for Anderson Party of North Carolina.

A third such organization is the Anderson Party of Delaware, formed pursuant to 15 Delaware Code §§3001, 3301 et seq. which require that in order to nominate a presidential candidate, a new political party must have at least 131 registrants for that party on or before August 16, 1980. On August 16, 1980, voters registered as members of the Anderson Party of Delaware and representing 34 legislative districts met in convention. The caucuses from the legislative districts elected 34 delegates who unanimously nominated John B. Anderson as the party's presidential nominee. Pursuant to 15 Del. Code. §3303, the party's certificate of nomination for John B. Anderson must be filed with the Secretary of State by September 1, 1980.

In addition to states such as those described above in which a relatively elaborate political party mechanism was established pursuant to State law, there are a number of other states in which Mr. Anderson and his supporters have organized somewhat less formally to achieve the immediate object of ballot access. For example, in Connecticut, to obtain ballot access under state law, supporters of Mr. Anderson circulated petitions to nominate him for President as the nominee of the Anderson Coalition. He will appear on the ballot under the Anderson Coalition label. However, the Anderson Coalition did not hold any caucuses or conventions.

Similarly, in New York, petitions circulated for a presidential candidate are required to bear a party name and emblem. In New York, therefore, to comply with the statute, the petitions nominating Mr. Anderson bear the name of the Unity Coalition Party.

Another variation is the State of Washington where a candidate may be nominated for President by 159 registered voters meeting in convention, declaring their support for the candidate and then nominating him. The candidate, however, then appears on the ballot without any party affiliation being designated since the convention structure does not nominate the candidate as the nominee of a party but only of those voters. R.C.W. §§29.24.040; R.C.W. 29.24.030. A convention was held to nominate John B. Anderson for President on July 26, 1980 and it was attended by 775 registered voters.

The State of Hawaii presents yet another variation. In Hawaii, John Anderson's supporters are seeking to qualify him for the ballot as an independent candidate pursuant to H.R.S. §11-113(b)(2) which governs ballot access for all candidates except those of major parties. It requires that a candidate's supporters file petitions with the candidate's name signed by 2,927 registered voters, provided that the requisite signatures are certified by September 5. Mr. Anderson will appear on the general election ballot as an independent. Hawaii, however, provides no mechanism for choosing electors for independent candidates. The only provisions governing selection of electors is H.R.S. §14-21 which requires political parties to choose their electors at a convention. An Attorney General's Opinion issued May 23, 1980 to the Lieutenant Governor of Hawaii ruled that all groups nominating candidates pursuant to H.R.S. §11-113(b)(2) would be deemed political parties solely for purposes of choosing electors. Consequently, the Hawaii John Anderson for President Committee held a convention on August 14 at which four electors and first and second alternates were selected. The names of the electors

were then certified by the Chairman and Secretary of the convention to the Lieutenant Governor. The electors' names will not appear on the ballot, however. John B. Anderson will appear on the Hawaii general election ballot as an independent and not as the candidate of the convention which chose the electors.

* * * *

As you note in your request, no provision of the Fund Act directly provides for public funding for independent candidates. Rather, as the court of appeals observed in Buckley v. Valeo, 519 F.2d 821, 887 (D.C. Cir. 1975), the statute speaks only of providing funding to candidates of "political parties" - major, minor or new.³ The nature and extent of a candidate's entitlement to public funds turns largely on the performance of the candidate's party in the preceding presidential election. The presidential candidate of a "major party", defined as a party whose presidential candidate received twenty-five percent or more of the popular vote in the preceding election, is entitled to receive public funds prior to the general election to defray all of his campaign expenses. See 26 U.S.C. 9002(6), 9004(a)(1). The candidate of a "minor party", defined as a party whose presidential candidate received between five percent and twenty-five percent of the popular vote in the preceding presidential election, is entitled to receive public funds prior to the general election in a proportionally lesser amount than the major party candidates depending upon the popular vote his party's candidate received in preceding election. See 26 U.S.C. 9002(7), 9004(a)(2)(A). The candidate of a "new party", defined as party which is neither a major party nor a minor party, is entitled to receive post-election public funding in an amount proportionate to the number of popular votes he receives but only if the candidate receives five percent or more of the total popular vote cast for the office of President. See 26 U.S.C. 9002(8), 9004(a)(3).

Despite its consistent reference to candidates of "political parties", the Fund Act contains no separate definition of the term "political party". However, section 9002.15 of the Commission's regulations⁴ defines the term "political party" to mean:

an association, committee, or organization which nominates or selects an individual for election to any Federal office, including the office of President or Vice President of the United States, whose name appears on the general election ballot as the candidate of such association, committee or organization.

The issue raised by your request is, therefore, whether the organizations supporting Mr. Anderson fall within the meaning of a political party for the purposes of the Fund Act.

The definition of a political party adopted by the Commission in 11 CFR 9002.15 breaks down into three essential components: (1) an association, committee, or organization (2) which nominates or selects an individual for election to Federal office, including the office of President

³ See 26 U.S.C. 9002(2), (4), (6), (7), (8), (11) (12); 9003; 9004; 9005(a); 9006(b), (c); 9007; 9012.

⁴ On June 1, 1980, the Commission adopted amendments to the regulations under the Fund Act and transmitted these amendments to Congress on June 13, 1980. On August 26, 1980, the 30 day legislative review period expired. See 26 U.S.C. 9009(c).

or Vice President of the United States, (3) whose name appears on the general election ballot as the candidate of such association, committee or organization.

With respect to the first component, the National Unity Campaign is the principal campaign committee of Mr. Anderson and conducts a wide range of activities involving numerous paid staff members and volunteers in virtually every state. As such, the National Unity Campaign clearly constitutes an "association, committee, or organization" under 11 CFR 9002.15. Similarly, state organizations such as the Anderson Coalition Party, the Independents for Anderson Party of North Carolina, the Anderson Party of Delaware, the Anderson Coalition and the Unity Coalition Party each constitute an "association, committee, or organization" for the purposes of 11 CFR 9002.15.

The regulation does not require that a political party be organized in a particular manner, that it refer to itself as a "party", or that it have existed or intend to exist for a stated period of time. The only specific activity which the regulation requires a political party to engage in is set forth in the second component, namely, that it nominate or select an individual for election to any Federal office, including the office of President or Vice President of the United States. The terms "nominate" and "select" are not defined in the Fund Act, the Presidential Primary Matching Payment Account Act (26 U.S.C. 9032-9042), the Federal Election Campaign Act (2 U.S.C. 431-435), or in the regulations promulgated thereunder. While the two major parties, as well as several minor parties, engage in complex nominating procedures involving primary elections and national conventions, the Fund Act does not require that any political party - major, minor or new - utilize such procedures.⁵ Rather, the definition of the term "candidate" as set forth in 26 U.S.C. 9002(2) indicates that the Fund Act intended to accommodate the wide range of procedures prescribed by the laws of the various states regulating ballot access:

The term "candidate" means with respect to any presidential election, an individual who –

(A) has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party, or

(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election ballot) as the candidate of a political party for election to either such office in 10 or more States.... (emphasis added)

The Commission notes that the requirements for gaining access to the general election ballot vary considerably from state to state. Non-major party convention nominations are recognized in but a few states; generally the petition process is the only method available. See Ballot Access, sponsored by Clearinghouse on Election Administration, Federal Election Commission (August, 1973) pp. 66-75. Thus, the terms "nominate" or "select" mean, for the purpose of 11 CFR 9002.15, complying with the procedures and satisfying the requirements of state law to qualify a candidate for the ballot in that state.

⁵ At no point in previous advisory opinions has the Commission undertaken to specify any procedure which a political party must follow in order to satisfy the requirement of "nominating" or "selecting" a candidate. See Advisory Opinions 1980-3, 1980-56, 1976-95, 1975-129 (see discussion of these opinions infra).

With respect to the National Unity Campaign for John Anderson, the Commission notes that one of its major activities and purposes is to place Mr. Anderson's name on the general election ballot in every State and the District of Columbia. The National Unity Campaign has conducted successful petition drives in several states to qualify Mr. Anderson for the ballot and is actively pursuing ballot access for Mr. Anderson in many other states. The Commission therefore concludes that the National Unity Campaign has met the requirement of "nominating" or "selecting" Mr. Anderson as a candidate for President of the United States. The Anderson Coalition Party, in accordance with Michigan law, circulated petitions, held county caucuses to elect delegates to its state convention who in turn selected Mr. Anderson as their presidential nominee, qualified itself for the August 5 primary election, and received sufficient votes in the primary to achieve a ballot position for Mr. Anderson in the 1980 general election. Thus, the Anderson Coalition Party has met the requirement of "nominating" or "selecting" Mr. Anderson as its candidate for President of the United States. By virtue of complying with similar procedures in the States of North Carolina and Delaware, the Independents for Anderson Party of North Carolina and the Anderson Party of Delaware have satisfied the requirement of "nominating" or "selecting" Mr. Anderson as their candidate for President of the United States. Similarly such organizations as the Anderson Coalition and the Unity Coalition Party, by engaging in successful petition drives, have "nominated" or "selected" Mr. Anderson as their presidential candidate.

The next question, therefore, is whether the third component of 9002.15 has been satisfied, *i.e.*, whether Mr. Anderson's name "appears on the general election ballot as the candidate of such association, committee, or organization." The Commission notes that Mr. Anderson will appear on the ballot as the candidate of the Anderson Coalition Party in the November 1980 general election in Michigan. In North Carolina, pursuant to the permanent injunction issued by Federal District Court Judge Dupree of the Eastern District of North Carolina on August 20, 1980, Mr. Anderson will appear on the November ballot as the presidential nominee of the Independents for Anderson Party of North Carolina.⁶ In New York and Connecticut, Mr. Anderson appears on the ballot as the candidate of the Unity Coalition Party and the Anderson Coalition, respectively. With respect to these states, Mr. Anderson certainly "appears on the general election ballot as the candidate of" these organizations. In Advisory Opinion 1980-3, the Commission held that the Citizens' Party would attain political

⁶ Mr. Anderson's appearance on the Delaware ballot is contingent upon the Anderson Party of Delaware certifying its nomination of Mr. Anderson by September 1, 1980.

party status under the Federal Election Campaign Act⁷ upon receipt of verification from the appropriate State election official that the name of a Citizens' Party candidate for Federal office will appear on that State's ballot as the candidate of the Citizens Party.⁸ Therefore, the Commission concludes that upon receipt of verification from the appropriate State election officials that the name of a Federal candidate, including Mr. Anderson, will appear on those States' ballots as the candidate of the Anderson Coalition Party, the Independents for Anderson Party of North Carolina, the Anderson Party of Delaware, the Anderson Coalition, the Unity Coalition Party, or of any other organization meeting the requirements of 11 CFR 9002.15 as discussed above, then these organizations will attain political party status under the Fund Act.

The remaining issue, then, is whether Mr. Anderson is a "candidate" for purposes of the Fund Act. As noted above, 9002(2) provides that the term "candidate" means, as relevant herein, an individual who –

(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election ballot) as the candidate of a political party for election to either such office in 10 or more States.

Subsequent to its ruling regarding the Citizens' Party's status as a political party⁹, the Commission held in Advisory Opinion 1980-56 that if the Citizens' Party candidate for President of the United States receives 5% or more of the total number of votes cast for the Office of President in the 1980 election, he may be entitled to payment under 26 U.S.C. 9006 if otherwise eligible pursuant to Chapter 95 of Title 26. The Commission further concluded that the appropriate payment under 9006 would be computed by totalling all of the popular votes received by a new party candidate in the 1980 presidential election, including those votes cast for the candidate whose name appears on a state ballot as an independent candidate, rather than as the candidate of a political party. See also 26 U.S.C. 9004(a)(3). At the time of its ruling in Advisory Opinion 1980-56, the Commission had received verification that the presidential candidate of the Citizens' Party was on the ballot as the candidate of the Citizens' Party in one state.¹⁰ Therefore, the Commission concludes that Mr. Anderson is a "candidate" under the Fund

⁷ 2 U.S.C. 431(16) defines the term political party as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." See also 11 CFR 100.15. In adopting the definition of "political party" for purposes of Title 26, the Commission stated:

9002.15 Political Party

While the term "political party" is not defined in Title 26, it is used throughout that Title. To make clear that this term has the same meaning as under Title 2 the Title 2 definition has been added here. Thus, this definition follows 2 U.S.C. 431(16). (emphasis added).

See Explanation and Justification of Regulations, 45 Fed. Reg. 43373 (June 27, 1980).

⁸ On April 11, 1980, the Commission received verification from the Kentucky State Board of Elections that candidates of the Citizens' Party would appear on the general election ballot in that state as candidates of the Citizens' Party.

⁹ See discussion supra regarding Advisory Opinion 1980-3.

¹⁰ See discussion supra at footnote 8.

Act so long as he has, as you state in your request, qualified to be on the ballot in 10 or more States.

The foregoing construction of the "10 state" requirement of 26 U.S.C. 9002(2)(B) is consonant with the overall purpose of this provision. In Buckley v. Valeo, 424 U.S. 1, 104, fn. 140, the Supreme Court upheld the 10 state requirement, noting that:

Success in Presidential elections depends on winning electoral votes in States, not solely popular votes, and the requirement is plainly not unreasonable in light of that fact.

Thus, the 10 state requirement advances the governmental interest in affording public financing only to those candidates who, by virtue of the breadth of their support, enjoyed at least the theoretical possibility of capturing a large number of votes in the electoral college.

Indeed, the legislative history reflects that Congress' concern focused primarily on how well a candidate performed in the general election, rather than on under what label a candidate appeared on the ballot in a given number of states. At several points in the floor debates, members of the Senate stated that the Fund Act would provide Federal subsidies to minor or new party candidates who receive 5 percent or more of the total popular vote cast for President without regard to whether the candidate ran under one label or under several labels. The issue of candidates who appear on state ballots under more than one label arose on several occasions with respect to Governor George Wallace, who appeared on various state ballots as an independent or as the candidate of eight different parties and captured nearly 14 percent of the vote in the 1968 presidential election. As Senator Pastore explained:

The Senator from Alabama raised the question about the minority candidate. He mentioned the name of Wallace, but it could be any minority party that runs as a candidate for presidency under two or different party labels. In allocating whatever he may be entitled to if he comes under the provisions of this law, it ought to be predicated on the total vote of the individual candidate.

117 Cong. Rec. 18934 (daily ed. Nov. 18, 1971). See also 117 Cong. Rec. 18882-3 (daily ed. Nov. 17, 1971) (colloquy between Senators Allen and Pastore); 120 Cong. Rec. 5847 (daily ed. April 11, 1974) (remarks of Senator Kennedy).

The Commission therefore concludes that Mr. Anderson would not be excluded from receiving post-election public funds as a candidate of a new party pursuant to 26 U.S.C. 9004(a)(3) if he receives 5 percent or more of the total popular votes cast for President in the 1980 general election, including votes cast for him in states where he appears on the ballot as a candidate of a political party as well as in states where he appears on the ballot as an independent candidate. However, the Commission expressly conditions its opinion on Mr. Anderson satisfying all other eligibility requirements set forth in the Fund Act. Therefore, the Commission need not reach the issue of whether the National Unity Campaign is, as you suggest, the "functional equivalent of a political party" for purposes of the Fund Act. Nor does the Commission decide whether the National Unity Campaign or any of the other organizations

which have nominated Mr. Anderson constitute a "national committee of a political party" pursuant to 2 U.S.C 431(14).¹¹

This response constitutes an advisory opinion concerning application of the Presidential Election Campaign Fund Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Max L. Friedersdorf
Chairman for the
Federal Election Commission

Commissioner Reiche voted to approve the issuance of this opinion but will file a separate concurring opinion at a later date. Vice Chairman McGarry voted against approval of this opinion and will submit his dissenting opinion at a later date.

¹¹ Whether or not an organization is the "national committee of a political party" involves considerations wholly distinct from the requirements for "political party" status. An organization wishing to avail itself of those provisions of Title 2 regarding national committees must demonstrate that it operates at the national level by nominating candidates for Federal office in numerous states; engaging in such activities on an on-going basis, rather than with respect to a particular election, as supporting voter registration and get-out-the-vote drives, providing speakers, organizing volunteer workers, and publicizing issues of importance to the party and its adherents throughout the United States. See Advisory Opinions 1980-3, 1978-58, 1976-95, 1975-129, copies enclosed.