

The Presidential Election Public Funding Program—A Commissioner’s Perspective

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The Federal Election Commission (“the Commission” or “the FEC”) has played a central role in sustaining the presidential public funding program. Under this program: (1) candidates seeking the nomination of a party may seek matching funds to supplement contributions being raised; (2) parties may receive grants to pay for their nominating conventions, fully in the case of major parties; and (3) candidates may receive grants to pay for the general election phase, fully in the case of major party candidates. The underlying purpose of the program is to reduce the instances where candidates and their party apparatus would be susceptible to requests for favors by those who would arrange for funding the campaigns and conventions. Relying on funds raised from millions of individuals earmarking \$3 of their taxes each year, rather than on funds raised from persons who can gather and forward batches of larger contributions, the candidates will encounter fewer *quid pro quo* situations as officeholders.

This paper will address several areas: (1) the extent to which the program is facing funding constraints and what remedies have been considered by the FEC; (2) the impact of the early primaries and the primary spending limit on candidates during the April to August ‘lull;’ (3) the administrative and other costs of the program weighed against the benefits derived from making funds available to participating candidates and parties; and (4) whether the FEC has been striking the right balance between guarding the public fisc on the one hand, and allowing participants in the program latitude to avoid excessive oversight on the other.¹

The funding shortage

The Commission has warned for years that the mechanism for funding the public funding program needs repair. The worst problem actually faced thus far is a delay in getting full payments to the primary candidates seeking matching funds. This is likely to occur again in the 2004 election, and the delay could extend for several more months than experienced in the 2000 election. Thus, whereas the shortfall in the primary season of 2000 (already about \$17 million with the January payouts) was ‘made up’ a few months later based on 2000 check off proceeds, in the 2004 election there may not be enough check off proceeds coming in during 2004 to fully make up for a shortfall, and the ‘make up’ payments may have to be made with 2005 check off proceeds. This would only occur, though, if President Bush decided to take an estimated \$15 million in public funding during the primary and the shortfall otherwise projected (already about \$19 million with the January payouts) grows beyond the likely check off proceeds for 2004. The \$60 million or so in 2004 check off proceeds would not be sufficient to cure the

¹ The views expressed within are those of the author. Assistance was provided by Jeffrey H. Bowman and Jennifer Epperson.

shortfall, and 2005 proceeds would have to be used.² Whatever the delay in ‘make up’ payments for the 2004 cycle, candidates affected may be able to avoid significant impact by obtaining bank loans secured by these expected ‘make up’ payments. Nonetheless, there is a financial cost involved for bank interest charges and the administrative complications.

The structural flaw

There are several factors at play. First, the statute indexes payouts under the program for inflation, so the entitlements have been growing over the years since the 1976 election when the amounts were first set. Thus, for example, whereas the base primary matching fund payout limit was about \$5 million for the 1976 election, it was about \$16 million for the 2000 election;³ whereas the general election major party payout was about \$22 million in 1976, it was about \$68 million in 2000. By contrast, the amount that taxpayers can check off for the public funding program is not indexed for inflation. While this amount was increased from \$1 per taxpayer to \$3 per taxpayer in 1993, it has remained static since then.

One can see that as long as inflation continues, the receipts side of the equation is bound to fall short of the payout side. For example, a static \$60 million per year check off amount that would be adequate to fund a program averaging out to a cost of \$60 million per year, simply would not be enough to fund a program that, due to inflation, averages out to \$70 million per year in a future presidential cycle. For the 2000 cycle, the program’s overall payouts of about \$240 million indeed averaged out to about \$60 million per year, and the check off proceeds for 1997 through 2000 indeed averaged a little over \$60 million per year. While receipts were closely matching outlays for the 2000 election, there is a horizon not far away where there will not be enough in the program’s accounts to pay for the entitlements.⁴

² Treasury Department regulations allow tax check off proceeds received through September 30 of the year after the election to be used to pay for the preceding election. The bulk of the check off proceeds flow into the Treasury accounts in the first six months of the calendar year when most returns are filed.

If one assumes that candidates other than President Bush would need a total of \$65 million in matching funds, a \$15 million payout to the Bush campaign would yield a total of \$80 million. The roughly \$15 million projected to be on hand January 1, 2004, plus the estimated \$60 million in 2004 check off proceeds would not be enough to meet this payout total. Thus, about \$5 million in 2005 proceeds would be needed. In reality, the FEC believes it most likely that President Bush will not seek matching funds. *See n. 4.*

³ The statute limits public funding under the matching payment program to 50% of the overall statutory spending limit, the base amount of which is set at \$10 million. (There is an additional allowance for fundraising expenses totaling 20% of the base spending limit.) Because the matching fund system allows a match of the first \$250 of an individual’s contribution, in theory a candidate could raise no more than \$250 from each contributor (\$1,750 less than the \$2,000 per election limit now applicable) and fund half of the primary campaign with public funds. In practice, most candidates have raised a significant amount of money from donors above the \$250 amount, and the public funding component of primary campaigns normally has ranged near 25%, not 50%. (This may change in the future in light of the new contribution limit set at \$2,000 for the primary, rather than \$1,000. Of course a statutory doubling of the matchable amount to \$500 probably would bring the public funding component back to its historical range.)

⁴ Because of Ross Perot’s success in the 1996 election as the Reform Party candidate, in the 2000 cycle the FEC certified payments of about \$2.5 million for the Reform Party convention, and certified about \$12.6

The decline in taxpayers checking YES

The second problem with the funding mechanism is that the number of taxpayers checking “YES” on their tax return has declined slowly over the years from about 40 million for 1980 returns to about 20 million for 2000 returns.⁵ Years ago, the FEC conducted focus groups to ascertain, among other things, why people did or did not check YES, and the most common variables were whether the persons involved understood what the program was about and whether those persons had a negative perceptions of politicians in general. Persons who didn’t know what the program was about were leery of checking YES, and persons who had a negative image of politicians in general seemed disinclined to check YES.⁶

Since the program’s inception, there has been only one effort to educate the public about the public funding program. The FEC’s public service announcements in 1991 (a fairly limited reach) and 1992 (about 145 million messages distributed) were rather bland descriptions of how the program was structured and made no attempt to urge taxpayers to check YES. The number of persons checking YES declined by about 140,000 in 1991 and by about 2.7 million in 1992.⁷

The Commission also has observed that some tax preparers and some tax preparation software packages either automatically default to NO or provide no guidance whatsoever regarding the purpose of the presidential public funding program. As early as 1991, it was reported that “[m]ost of the computer software programs which were used

million for Pat Buchanan’s general election effort. Since Mr. Buchanan did not receive at least 5% of the vote, similar Reform Party convention and general election candidate funding amounts will not occur in the 2004 presidential election. In addition, the FEC is assuming that President Bush again will decline public funding in the primary phase. Thus, while major party convention and general election payments will be slightly higher because of inflation, the overall payouts for the 2004 race are likely to be near the \$240 million mark set for the 2000 race. Overall, there probably will be enough check off proceeds from 2001 through 2004 to pay for 2004 presidential public funding entitlements.

⁵ There are many complications in using these figures, including the fact that some individuals who do not in fact owe any federal income taxes may be checking YES, but not causing any funds to be deposited as a result. Thus, changes in tax policy to remove individuals from the tax rolls tend to reduce the pool of persons who can fund the presidential public funding program. The numbers used above, however, reflect money actually deposited in the program accounts, and thus represent the individuals who checked YES and caused funds to flow to the accounts.

⁶ From this, one could surmise that educating the public about the program and its purposes might stem the decreasing participation. Some, of course, would surmise that if disgust with politicians were sufficiently strong, educating someone about the public funding program would only lead such person to steadfastly resist providing public funds to anyone running for the Presidency. Yet if the disgust for politicians stemmed from disgust for the role of campaign money in public policy, educating people about public funding’s goal of reducing the role of bundles of campaign money might indeed lead to more support of the program. One valuable contribution of the Campaign Finance Institute evaluation might be the encouragement of research on these very issues.

⁷ Critics of public funding would quickly assert that the public service announcements no doubt drove millions of people to stop checking YES in 1992, but given the political and economic climate in 1992, there probably were other reasons for the decline.

by more than a million taxpayers to prepare their 1990 federal income taxes came from the factory with the presidential campaign fund's \$1 check off question already answered 'no.'"⁸

Historically, the FEC has been comprised of at least three members who would block any effort to seek funding for an educational program designed to promote checking YES. The IRS Form 1040 instructions, already very cumbersome, describe the check off option in a very curt fashion, and surely do not promote the program.⁹ Thus, for political and institutional reasons, there has been little or no effort to use government resources to promote this government program.

The 'set aside' by Treasury

Another cause of the primary matching fund shortfall is the Treasury Department's construction of the statute that results in 'setting aside' all the funds that are projected to be needed to make the later payments for general election candidates. By literally setting aside the projected payouts to general election candidates (about \$147 million in 2000), and disregarding the estimated check off proceeds that will be flowing into program accounts from January to July that could be used for such later payouts (an average of about \$57 million in recent years), Treasury deprives the primary candidates seeking matching funds starting in January of significant resources. Indeed, if Treasury had made available for the primary candidates the \$57 million figure just noted, there would have been no temporary shortfalls in the 2000 matching fund program.

The statute does provide that the primary matching fund account only receive deposits "after the Secretary determines that amounts for [general election payments] and for [convention payments] are available for such payments."¹⁰ While the FEC urged the Treasury Department to rely on estimates so that estimated check off proceeds in the presidential election year could be considered "available," Treasury adopted regulations that disregard such estimated proceeds. If Treasury were to change course now, and treat expected check off amounts as "available," the projected shortfalls for the 2004 cycle matching fund payouts could be avoided.

Commission recommendations for the funding problem

Over the last several years the FEC has made certain legislative recommendations to alleviate the funding shortage. First, it has recommended that Congress adjust the check off amount for inflation. That way, it would have a chance of keeping pace with

⁸ PACs & Lobbies at 10 (May 15, 1991).

⁹ The 2002 Form 1040 Instructions read: "This fund helps pay for Presidential election campaigns. The fund reduces candidates' dependence on large contributions from individuals and groups and places candidates on an equal financial footing in the general election. If you want \$3 to go to this fund, check the "Yes" box. If you are filing a joint return, your spouse may also have \$3 go to the fund. If you check "yes," your tax or refund will not change."

¹⁰ 26 U.S.C. § 9037(a).

the payouts from the fund, which already are indexed for inflation. Second, the FEC has recommended that Congress revise the statute so that Treasury would be authorized to rely on estimated check off proceeds as “available.” With such a change, the general election ‘set aside’ would not be so large that it deprives primary matching fund candidates of their full entitlement beginning in January.

The Commission never has pursued a public education program that actually promotes checking YES, nor has it recommended that Congress specifically fund such a program. It is likely that such a proposal would meet a 3-3 deadlock if put to a vote.

It is possible that the IRS could be persuaded to urge checking YES in its tax publications. It is possible that tax preparers and tax software providers could be persuaded to urge checking YES, or at least to urge taxpayers to understand what the program is and make a knowing choice. It is possible that outside groups could marshal their troops to check YES. Where this process begins is difficult to ascertain.

The impact of the early primaries and the spending limit (the April to August ‘lull’)

Another development noted by many is the impact of the early primary trend on candidates that spend almost to the limit in those early primaries, leaving little leeway for the campaign itself until the general election spending allowance becomes available. Some candidates have been pressed to move staff and consultants to party committee payrolls, to rely on the parties or other outside groups to pay for ‘issue ads’ to keep the message flowing, and to cut back on operations in almost every other respect.

Although the Clinton campaign faced this predicament in 1992, perhaps the best example to date was the Dole campaign in 1996. By the end of March 1996, the campaign had expended about \$29.3 million of its \$30.9 million limit. About 44 Dole campaign staffers went on the RNC payroll and about \$18 million worth of ‘issue ads’ (paid for in large part with soft money) were run by the Republican party. Not surprisingly, complaints came flying in the door alleging that the party assistance amounted to excessive spending by the Dole campaign. Although the FEC ultimately did little about the matter, its work in the audit and related enforcement case frame the question of whether the current spending ceiling is set at the appropriate level and whether it is good policy for the campaigns to be resorting to such outside assistance. As this is a dilemma primarily faced by candidates taking on an incumbent who can save primary campaign resources for the April to August ‘lull,’ the Democrats in 2004 are next likely to have this experience.

One could argue that the system is self-regulating and works just fine. That one party has a primary battle while the other does not is a matter of happenstance. If done properly and without subterfuge, moving staff to the party payroll should be allowed. Further, if the party committee wants to put out ads during the April to August ‘lull,’ there are legal ways to do so. For example, the national party committees each enjoy a general election coordinated expenditure allowance (\$13.7 million in the 2000 cycle) that

can be tapped even during the primary phase. Further, ads that do not refer to any particular candidate will not be treated as an in-kind contribution on behalf of any particular candidate, whether paid for by party committees or outside groups, according to the FEC's new 'coordination' regulations. Thus, generic ads saying, "Vote Democratic" or "Vote against candidates that aren't Pro-Choice" won't affect the presidential candidate spending totals.¹¹

Alternatively, one could argue that the primary matching fund program doesn't need an overall spending limit at all. If the program limited the amount of matching money that any one candidate could receive, perhaps retaining the current limit pegged to 50% of the current spending limit, the public fisc would be protected the same as now. Candidates—even those who reached the maximum public funding entitlement—would be free to use contributions raised under the existing limits to pay whatever they felt appropriate.

Yet another alternative approach would be to simply raise the current primary spending ceiling to allow enough spending to get candidates through to the convention. This would require some evaluation of what level would be appropriate. Subjective decisions would have to be made regarding the reasonableness of the legal options noted above and the amount really needed to address the seeming imbalance that occurs.

Comparing costs and benefits of the program

The costs

Looking at the FEC's budget figures over the four-year period of FY 2000 through FY 2003, the average base costs to administer the program are about \$3 million per year. Adding an appropriate share of overall management costs would yield a total of \$4.5 million per year. This \$4.5 million figure represents about 10% of the FEC's current annual budget.

With \$4.5 million per year, the FEC handles the certification process for matching funds, works with Treasury to assure the proper amounts are retained in the respective public funding accounts and the proper amounts are paid to candidates and parties, issues clarifying regulations and manuals to explain for participants how the process works, conducts audits of all committees receiving presidential public funding (which as noted above represented \$240 million in the 2000 election cycle), undertakes repayment proceedings for committees that audits show owe repayments, commences enforcement cases where violations of law have arisen, and conducts litigation as necessary to administer and enforce the program. Stated this way, the taxpayer is getting a good deal.

¹¹ "Vote Democratic" ads coordinated with a party committee may be treated as an in-kind contribution to such party committee but, absent certain unique circumstances like a special election involving only federal candidates, generic ads will not count as a candidate-specific outlay.

The costs of administering the program, when added to the current annualized costs of the payouts, about \$60 million, yields a total annualized cost of around \$64.5 million. This overall amount needs to be evaluated amidst other very subjective considerations, such as what value the American public derives from the program: (1) removing large batches of \$2,000 checks and \$25,000 party donations from the presidential campaign process and (2) increasing the opportunities of some candidates.

The benefit of supplanting batches of \$2,000 checks and \$25,000 convention checks

While the primary matching fund program contemplates a continuation of the process of raising contributions within the \$2,000 per person limit, the general election program, at least for the major party nominees, contemplates the virtual elimination of such fundraising.¹² Moreover, the convention funding program contemplates an end to the raising of \$25,000 per year contributions to help showcase the major party nominees.¹³ Thus, what is at stake is the benefit derived from removing from the process the raising of those bundles of \$2,000 checks and those \$25,000 checks for the party conventions.

There is a legitimate argument that the party ‘soft money’ practice has put most presidential candidates right back in the thick of ‘big money’ politics. Thus, in the last few election cycles, it is fair to say the public funding ‘cure’ has been overtaken by another disease. Before saying public funding is a failure, though, one should be willing to examine what happens under the changes wrought by the Bipartisan Campaign Reform Act of 2002. If indeed the presidential candidates can be separated from the ‘soft money’ game, then the public funding game will have much more impact in improving our elected government. Under any circumstances, it is still significant that candidates will be liberated from the ties that raising about \$240 million can create.

The benefit of encouraging more candidates to participate

There is little doubt that the program brings into the presidential campaign process some persons who might not otherwise attempt a run for the White House. Names like Birch Bayh, Frank Church, Fred Harris, Ronald Reagan (in 1976), Morris Udall, George Wallace, Phil Crane, Gary Hart, Pat Robertson, Bruce Babbitt, Jack Kemp, Bob Kerrey, Paul Tsongas, Doug Wilder, Alan Keyes, Arlen Specter, and John McCain

¹² The FEC created the General Election Legal and Accounting Compliance Fund allowance years ago whereby the candidates may raise funds within the contribution limits to pay for legal and accounting costs incurred to comply with the campaign finance law. This has resulted in multi-million dollar fundraising by the major party nominees in recent election cycles, but the money cannot be used for such things as advertising or other active campaigning, and therefore has a limited value.

¹³ The contribution limit on giving to the national party committees is now set at \$25,000 per year for individuals and non-multicandidate PACs. Multicandidate PACs are allowed to contribute only \$15,000 per year to the national party committees.

might not have heard their calling without the prospect of public funding.¹⁴ At a minimum, the public funding program probably kept their message flowing for a few additional weeks or months.

One particular candidate, Lyndon LaRouche, who has obtained matching funds in five presidential elections, achieved notoriety for having been convicted of crimes relating to mail fraud.¹⁵ While it is true that some who might be labeled ‘fringe’ candidates have qualified for matching funds on occasion, it would be problematic to suggest that only ‘mainstream’ candidates should be able to qualify. One doesn’t have to go too far back in history to find ideas espoused by ‘fringe’ candidates taking hold in the ‘mainstream’ a few years later. Moreover, even looking at the \$1.4 million Lyndon LaRouche obtained in matching funds in 2000, that only represents about 2% of the matching funds issued that cycle, and about 6/10 of a percent of the total public funding for that cycle. And one cannot forget that 327,928 people voted for Mr. LaRouche in the Democratic primaries of 2000.

To address the concern that the matching fund qualification requirements might need to be tightened, the FEC for several years has recommended that the thresholds be raised. Whereas now a candidate can qualify for matching funds by raising \$5,000 in each of 20 states, a standard that has not changed since 1974, a candidate could be required to raise, say, \$15,000 in each of 20 states (corresponding to the over 200% increase in the base entitlement amounts since 1974). For many years the FEC also recommended Congress specify that a criminal conviction relating to fraud can serve as a disqualification for public funding under certain circumstances. These minor modifications could address most legitimate concerns regarding the use of public funds to support candidates that do not stand any chance of success with the electorate.

As a final note in the cost/benefit analysis, if one assumes that some candidates like John Anderson, Jesse Jackson, Ross Perot (in 1996 with about \$29 million in general election public funding), Gary Bauer, Ralph Nader, and Pat Buchanan might not have entered or stayed in the presidential fray without public funding, one must admit that their presence certainly has enriched the public debate, raised issues that some candidates did not want to discuss, and given the electorate more choice. Whether we like the results they helped engineer, we must concede that there is value in hearing their voices.

Has the FEC been doing a good job?

In evaluating whether the public funding program should be salvaged, it is fair to ask whether the FEC is up to the task of making it work. Perhaps the question can best

¹⁴ Charts setting forth the recipients of public funding over the years appear at the end of this paper. In some instances, vote totals are provided to give some perspective on how popular some candidates were.

¹⁵ The FEC tried to deny Mr. LaRouche matching funds in 1992 after his criminal convictions, but a United States Court of Appeals ordered the FEC to certify Mr. LaRouche for funding. *LaRouche v. FEC*, 996 F.2d 1263 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 992 (1993). In essence, the FEC was told that his criminal matters were not clearly enough linked to his presidential public funding matters.

be answered by understanding how the FEC has dealt with some of the most vexing issues over the years. A review of these actions will provide context for those wondering whether the FEC can strike the right balance between protecting the public fisc and fostering a vibrant presidential election process.

Dealing with the complexities

Suffice it to say, the public funding statute and the Commission's regulations implementing it are so complex that no one can attempt to get through the process without an accountant and a lawyer. There are specifications as to what types of contributions can be matched, what types of documentation must be provided for the certification process, what can be paid for with public funds and what cannot, what can be paid for with primary funds and what can be paid for with general funds, how to allocate expenses among states during the primary, how to allocate and pay travel costs, what convention committees can pay for and what host committees or municipal funds can pay for, how some solicitation materials must be written, how to calculate net outstanding campaign obligations in order to receive more public funds or to calculate repayment obligations, how to value assets, and, so that lawyers and accountants will be happy, how to deal with legal and accounting costs. And this is just a short list of some of the nuances in the law.

To its credit, the FEC has tried to simplify and streamline the law in many respects. For example, in connection with the 1992 election, the FEC removed many of the harsh rules for calculating what expenses had to be counted toward the state-by-state spending ceilings under the primary matching fund program. (For years the FEC has urged Congress to do away with these state-by-state ceilings altogether because of their complexity and because the overall spending limit adequately serves the purpose of promoting the use of public rather than private funding.) The FEC's actions greatly reduced the games campaigns resorted to in avoiding the limits, such as renting rooms and cars across the New Hampshire and Iowa borders. The campaigns and the Commission also had to spend far less time with the accounting nightmares that emanate from coming close to these limits.

In a similar vein, getting ready for the 1996 campaign the Commission attempted to simplify the rules for deciding whether a particular expense should be treated as a primary campaign expense or a general election campaign expense. For campaign advertising, for example, rather than trying to divine whether a particular ad run after the early primaries but before the nominating convention is really for the general election, the FEC adopted the approach that the ad was considered a primary ad if it ran before the nomination. Similar straight-forward rules were adopted for other types of expenses. This greatly simplified the process for determining whether a particular campaign had overspent the limit, and whether a reimbursement to the other campaign was needed or a repayment to the Treasury was required because of overspending.

By contrast, the FEC has not done a very good job of defining what types of expenses can be paid for by a host committee in connection with a presidential nominating convention or how to allocate costs between the host committee, the party's publicly funded convention committee, and the party's other federal and non-federal accounts. Particularly in the 1996 cycle, this became an arduous task for the FEC during the audit process, and for the lawyers and accountants representing these various groups and accounts. An inordinate amount of time was spent trying to decide, for example, if the Chicago host committee should have paid for such things as remote video feeds during the convention, or whether the cost of some GOP TV programs should have been paid for by the RNC (using partly soft money), by the publicly funded convention committee, or by both according to some undefined allocation formula. The Commission did not undertake to try to revise its regulations to deal with all these fine points in preparation for the 2000 convention activity. Meanwhile, the underlying concern remains: if the party committees are to rely on public funding, rather than \$25,000 per donor sources or wholly unrestricted sources, to put on the conventions, lines need to be drawn to assure that host committees and regular party coffers are not being used to improperly subsidize convention costs.¹⁶

Determining whether to seek repayment from the candidates

On several occasions the FEC has grappled with recommendations from its staff to seek repayment from the candidates. Sometimes the staff has concluded that the candidate overspent in one state or another during the primary, or spent more than the overall ceiling allowed, or both. Sometimes the staff has determined that the campaign received matching funds to which it was not entitled by disregarding certain funds in its post-election net debt calculation. Sometimes the staff has wanted to treat spending by outside groups as an in-kind contribution that causes the candidate campaign to go well over its spending ceiling in the primary and/or general election. In most of these situations, the Commission has given the candidates a break, often on the basis that the rules were not sufficiently clear to give advance notice to the campaigns.

One of the first examples of Commission action in the repayment area, though, had little to do with the foregoing issues, and instead had to do with an illegal scheme to qualify for matching funds in the first place. After ascertaining that the Milton Schapp campaign had relied on contributions impermissibly made in the names of donors who didn't actually put up the money, the FEC in 1977 ordered the campaign to return all

¹⁶ One interesting issue regarding conventions still looms on the Commission agenda. Under BCRA, national party operatives are not to solicit, receive, or direct any funds not subject to the federal contribution restrictions. When promulgating regulations to implement this provision the Commission passed over the extent to which this will prevent traditional efforts to route large donors to the host committee or municipal fund of the convention city. BCRA also places restrictions on federal candidates and officeholders soliciting, receiving, or directing funds "in connection with an election for Federal office." 2 U.S.C. § 441i(e)(1)(A). The Commission also passed over how this restriction will apply to traditional efforts to raise host committee or municipal fund proceeds. Just recently the Commission indicated it nonetheless will attempt through regulations to address these issues by midyear 2003.

\$299,066 in matching funds previously obtained. The campaign and several of the fundraisers involved also were subjected to enforcement actions.

In the 1984 cycle, the FEC confronted the legal issue of how to calculate repayments where the candidate seemed to have exceeded both the state-by-state limits and the overall limit in the primary. While the staff, in essence, recommended counting a particular expense twice so that it caused a repayment for the state limit overage and again for the overall overage, the Commission, after a 3-3 deadlock, eliminated any 'double counting' and only sought repayment for the net overage.¹⁷

The 1992 election cycle saw another 3-3 deadlock relating to the staff's recommendations in the Clinton campaign audit. The staff viewed contributions that were made after the date of the nomination and set aside for the General Election Legal and Accounting Fund as funds that the Clinton campaign should include as available primary funds in their post-primary net debt calculations. The staff thus would have required the Clinton campaign to repay about \$2 million in post-primary matching funds it had received, on the theory that the campaign's real primary net debt was about \$2 million smaller. The 3-3 deadlock, though, meant that the Clinton campaign could treat these funds as legitimate General Election Legal and Accounting Fund donations and did not have to repay the \$2 million amount suggested by staff.¹⁸

In the 1996 election cycle, the big issue was whether to treat the massive advertising efforts by the party committees as in-kind contributions and hence as expenses that would count toward the presidential campaigns' spending limits. The staff recommended treating about \$44 million in Democratic party ads as part of the Clinton campaign's spending, and about \$18 million in Republican party ads as part of the Dole campaign's spending. Oddly, because the staff treated most of the Dole ads as general election spending, where a dollar overage results in a dollar repayment, and treated most of the Clinton ads as primary spending, where a dollar overage results in about a 25 cent repayment, the recommended Dole repayment was larger than the recommended Clinton repayment.

One of the first things the Commission did was reach a consensus that the ads needed to be allocated as primary ads or general ads depending on when they ran, not whether the content seemed to suggest an attack against a likely general election opponent. Such approach coincided with the straight-forward rules the FEC had

¹⁷ This issue occurred in the Mondale campaign audit among others. As a hypothetical, in one of the early primary states a campaign might have exceeded the state limit by \$100,000. It might have exceeded the overall limit by a total of \$300,000. Assuming 25% of the campaign's proceeds consisted of public funds, the staff would have recommended seeking a repayment of 25% of \$400,000, whereas the Commission decided to 'net out' the double counting (the \$100,000 that is attributable to both overages) and seek only a repayment of 25% of \$300,000.

¹⁸ The Commissioners disagreeing with the staff recommendation relied on Commission precedent establishing that post-election donations were deemed for the next upcoming election unless the donor designated the funds to be for the prior election. To be effective, such designations had to be on a writing signed by the donor. The record in the audit did not establish that the funds at issue met this standard to be treated as primary contributions.

developed for campaigns dividing up the cost of their own advertising (see above). This meant that the vast majority of ads would be analyzed as primary ads. This also meant that the repayment rules relating to the primary matching fund program would be paramount.

Then, though, the Commission split on the question of whether excessive primary election spending could even result in a repayment. Despite years of FEC practice, and an FEC regulation specifically listing primary overspending as a basis for seeking repayment, three commissioners indicated that they read the statute not to allow seeking repayment for primary overspending. Without four votes, there simply was not to be any repayment resulting from primary overspending, whether caused by the party ads or any other outlay.¹⁹

The Commission next took up the more substantive question of whether the party ads should be treated as spending by the candidates.²⁰ On this, three commissioners were unwilling to treat any of the ads as subject to the candidates' spending limits, whether for primary or general.²¹ Two were willing to treat almost all the ads as candidate spending, and one was willing to treat almost all the ads that ran after January 1 of the election year as candidate spending.²² The end result was that none of the ads were treated as spending by the candidates involved, and no repayment was extracted as a result of such ads.²³

The foregoing examples of the FEC's efforts to deal with repayment issues demonstrate, above all else, the FEC's sensitivity about taking back large sums of public funding from candidates when the rules in play were not crystal clear or other issues of fair application exist. It must be noted that the FEC in some cases later undertook to

¹⁹ The primary election funding statute indeed does differ from the general election funding statute. The latter specifically mentions repayments for having "incurred qualified campaign expenses in excess of the aggregate payments to which [the candidates] were entitled . . ." 26 U.S.C. § 9007(b)(2). The primary funding statute speaks in terms of repayments for having used matching funds "for any purpose other than . . . to defray the qualified campaign expenses with respect to which such payment was made." 26 U.S.C. § 9038(b)(2)(A). There is an argument that the statute suggests excess spending is a qualified campaign expense in the general election provision, and therefore treating it as a non-qualified expense in the primary election context would be inconsistent. The Commission adopted regulations many years ago, though, flatly interpreting excess spending in the primary election context as a form of non-qualified campaign expense. 11 C.F.R. §§ 9034.4(b)(2); 9038.2(b)(2)(A).

²⁰ In a sense, it was an academic question in view of the fact that no repayment for primary excessive spending could issue due to the new statutory interpretation of three commissioners. Nonetheless, since the issue would resurface in the enforcement track, and because commissioners needed to explain their reasons for disagreeing with the staff's repayment recommendations, the underlying substantive issue was addressed.

²¹ For the most part, these commissioners believed either that the legal test the Commission had been using for years when treating party ads as in-kind contributions was too fuzzy, or that the Commission's application of that test had been unevenly applied.

²² The "almost" refers to the fact that some of the ads the staff wished to treat as primary election or general election spending by the candidates in fact qualified as legitimate party coordinated spending under the separate allowances given the national parties at 2 U.S.C. § 441a(d)(2). None of the commissioners wanted to deprive the parties of the legal ability to claim some of the ads as coordinated expenditures which do not count toward the benefiting candidates' spending limits.

²³ It is worth noting that when this matter came to the Commission later in the enforcement track, the Commission reached the same deadlock.

clarify some of the rules at issue. For example, the Commission clarified exactly what committees must do to assure that funds taken in after the nomination can be treated as General Election Legal and Accounting Fund donations. Further, in connection with its BCRA-related efforts to redefine what ads will be considered coordinated with a candidate, the FEC provided parties and candidates guidance as to what kinds of ads will and will not be treated as in-kind contributions. Thus, on balance, while the FEC has been ‘kind and gentle’ on some repayment issues over the years, it has shown balance and a willingness to clarify murky areas for the benefit of future participants.

1976 Presidential Election

Candidate	Funds Received (\$)	Percentage of all funds (%)
Primary		
Birch Bayh (D)	545,710.39	2.2
Lloyd Benson (D)	511,022.61	2.0
Edmund Brown, Jr. (D)	600,203.54	2.4
Jimmy Carter (D)	3,886,465.62	15.6
Frank Church (D)	640,668.54	2.6
Gerald Ford (R)	4,657,007.82	18.7
Fred Harris (D)	639,012.53	2.6
Henry Jackson (D)	1,980,554.95	7.9
Ellen McCormack (D)	247,220.37	0.9
Ronald Reagan (R)	5,088,910.66	20.4
Terry Sanford (D)	246,388.32	0.9
Milton Shapp (D)	299,066.21	1.1
Sargent Shriver (D)	295,711.74	1.0
Morris Udall (D)	2,020,257.95	8.1
George Wallace (D)	3,291,308.81	13.2
Total Primary Funds	24,949,510.06	
Convention Committees		
Democratic Committee	2,185,829.73	52.7
Republican Committee	1,963,800.00	47.3
Total Convention Funds	4,149,629.73	
General		
Jimmy Carter (D)	21,820,000.00	50.0
Gerald Ford (R)	21,820,000.00	50.0
Total General Funds	43,640,000.00	

1980 Presidential Election

Candidate	Funds Received (\$)	Percentage of all funds	Votes received
Primary			
John Anderson (R)	2,733,077.02	8.7	1,572,174
Howard Baker (R)	2,635,042.60	8.4	112,219
Edmund Brown, Jr. (D)	892,249.14	2.8	573,636
George Bush (R)	5,716,246.56	18.2	2,958,093
Jimmy Carter (D)	5,117,854.45	16.3	9,593,335
Phillip M. Crane (R)	1,899,631.74	6.0	97,793
Robert Dole (R)	446,226.09	1.4	7,298
Edward Kennedy (D)	4,134,815.72	13.2	6,963,625
Lyndon LaRouche (D)	526,253.19	1.7	177,784
Ronald Reagan (R)	7,330,262.78	23.3	7,709,793
Total Primary Funds	31,431,659.29		
Convention Committees			
Democratic Committee	4,416,000.00	50.0	
Republican Committee	4,416,000.00	50.0	
Total Convention Funds	8,832,000.00		
General			
John Anderson (I)	4,242,304.00	6.7	5,720,060
Jimmy Carter (D)	29,440,000.00	46.6	35,483,883
Ronald Reagan (R)	29,440,000.00	46.6	43,904,153
Total General Funds	63,122,304.00		

1984 Presidential Election

Candidate	Funds Received (\$)	Percentage of all funds (%)
Primary		
Reubin Askew (D)	976,179.04	2.7
Alan Cranston (D)	2,113,736.44	5.6
John Glenn (D)	3,325,382.66	9.1
Gary Hart (D)	5,333,785.31	14.6
Ernest Hollings (D)	821,599.85	2.2
Jesse Jackson (D)	3,053,185.40	8.4
Sonia Johnson (C)	193,734.83	0.1
Lyndon LaRouche (D)	494,145.59	1.4
George McGovern (D)	612,734.78	1.7
Walter Mondale (D)	9,494,920.93	25.9
Ronald Reagan (R)	10,100,000.00	27.7
Total Primary Funds	36,519,404.83	
Convention Committees		
Democratic Committee	8,080,000.00	50.0
Republican Committee	8,080,000.00	50.0
Total Convention Funds	16,160,000.00	
General		
Walter Mondale (D)	40,400,000.00	50.0
Ronald Reagan (R)	40,400,000.00	50.0
Total General Funds	82,800,000.00	

1988 Presidential Election

Candidate	Funds Received (\$)	Percentage of all funds (%)
Primary		
Bruce Babbit (D)	1,078,939.44	1.6
George Bush (R)	8,393,098.56	12.4
Robert Dole (R)	7,618,115.99	11.3
Michael Dukakis (D)	9,040,028.33	13.4
Pete DuPont (R)	2,550,954.18	3.8
Lenora Fulani (NA)	938,798.45	1.4
Richard Gephardt (D)	3,396,276.37	5.0
Albert Gore (D)	3,853,401.56	5.7
Alexander Haig (R)	538,539.20	0.8
Gary Hart (D)	1,124,708.09	1.7
Jesse Jackson (D)	8,021,707.31	11.9
Jack Kemp (R)	5,984,773.65	8.9
Lyndon LaRouche (D)	825,576.99	1.2
Pat Robertson (R)	10,410,344.83	15.4
Paul Simon (D)	3,774,344.77	5.6
Total Primary Funds		
	67,550,247.72	
Convention Committees		
Democratic Committee	9,220,000.00	50.0
Republican Committee	9,220,000.00	50.0
Total Convention Funds		
	18,440,000.00	
General		
George Bush (R)	46,100,000.00	50.0
Michael Dukakis (D)	46,100,000.00	50.0
Total General Funds		
	92,200,000.00	

1992 Presidential Election

Candidate	Funds Received (\$)	Percentage of all funds (%)
Primary		
Larry Agran (D)	269,691.68	0.6
Edmund Brown (D)	4,239,404.83	9.9
Pat Buchanan (R)	5,199,987.25	12.1
George Bush (R)	10,658,520.94	24.9
Bill Clinton (D)	12,536,135.47	29.3
Lenora Fulani (NA)	2,013,323.42	4.7
John Hagelin (NLP)	353,159.89	0.8
Tom Harkin (D)	2,103,361.85	4.9
Bob Kerrey (D)	2,195,529.81	5.1
Paul Tsongas (D)	2,995,449.27	7.0
Doug Wilder (D)	289,026.67	0.7
Total Primary Funds	42,853,591.08	
Convention Committees		
Democratic Committee	11,048,000.00	50.0
Republican Committee	11,048,000.00	50.0
Total Convention Funds	22,096,000.00	
General		
George Bush (R)	55,240,000.00	50.0
Bill Clinton (D)	55,240,000.00	50.0
Total General Funds	110,480,000.00	

1996 Presidential Election

Candidate	Funds Received (\$)	Percentage of all funds	Votes received*
Primary			
Lamar Alexander (R)	4,573,443.84	7.8	501,071
Patrick Buchanan (R)	10,983,474.85	18.8	3,229,049
William Clinton (D)	13,412,197.51	21.2	9,936,033
Robert Dole (R)	13,545,770.94	23.1	8,917,770
Phil Gramm (R)	7,356,221.26	12.6	75,831
John Hagelin (NLP)	504,830.79	.9	
Alan Keyes (R)	2,145,766.41	3.7	456,398
Lyndon LaRouche (D)	624,692.04	1.0	496,423
Richard G. Lugar (R)	2,657,244.26	4.5	129,543
Arlen Specter (R)	1,010,457.16	1.7	<i>negligible</i>
Pete Wilson (R)	1,724,257.09	2.9	<i>negligible</i>
Total Primary Funds	58,538,356.15		
Convention Committees			
Democratic Committee	12,364,000.00	50.0	
Republican Committee	12,364,000.00	50.0	
Total Convention Funds	24,728,000.00		
General			
William Clinton (D)	61,820,000.00	40.5	47,402,357
Robert Dole (R)	61,820,000.00	40.5	39,198,755
Ross Perot (Reform)	29,055,000.00	19.0	8,085,402
Total General Funds	152,695,000.00		

* *Vote totals not included for minor or third party candidates*

2000 Presidential Election

Candidate	Funds Received (\$)	Percentage of all funds	Votes received*
Primary			
Gary Bauer (R)	5,052,747.59	8.1	65,602
Bill Bradley (D)	12,462,047.69	20.0	3,027,426
Patrick Buchanan (Ref)	4,509,673.04	7.2	
Albert Gore (D)	15,456,083.75	24.8	11,081,247
John Hagelin (NLP)	700,286.06	1.1	
Alan Keyes (R)	5,043,341.03	8.1	97,771
Lyndon LaRouche (D)	1,448,388.83	2.3	327,928
John McCain (R)	14,777,748.06	23.7	7,057,172
Ralph Nader (G)	723,307.65	1.2	
Dan Quayle (R)	2,087,749.86	3.4	<i>negligible</i>
Total Primary Funds	62,261,373.56		
Convention Committees			
Democratic Committee	13,512,000.00	45.7	
Republican Committee	13,512,000.00	45.7	
Reform Party Committee	2,522,690.00	8.5	
Total Convention Funds	29,546,690.00		
General			
George Bush (R)	67,560,000.00	45.7	50,455,156
Albert Gore (D)	67,560,000.00	45.7	50,992,335
Patrick Buchanan (Reform)	12,613,452.00	8.5	448,892
Total General Funds	147,733,452.00		

* Vote totals not included for minor or third party candidates