

Chapter 1 Legislative Recommendations

1981

The Federal Election Campaign Act requires the Commission to include in its annual report "...recommendations for any legislative or other action the Commission considers appropriate...." Section 438(a)(9). The following recommendations reflect the Commission's experience in administering the 1979 Amendments to the election law and in administering the public financing program in two Presidential elections. The Commission believes these suggestions will make the election law more workable and more acceptable by political committees and the public. Continuing to evaluate its administration of the election law, the Commission may offer additional recommendations later this year.

Reporting

General Waiver Authority (2 U.S.C. §436)

In the past, there have been instances when the Commission may have wished to suspend the reporting requirements of the law in cases where reports or requirements were excessive or unnecessary. In the 1979 Amendments to the Act, Congress repealed 2 U.S.C. §436 which provided the Commission with a limited waiver authority. That provision was unclear and of limited use; nonetheless, to reduce needlessly burdensome disclosure requirements, the Commission should have authority to grant general waivers or exemptions from the extensive reporting, recordkeeping and organizational requirements of the Act. Each proposal for a general waiver would, of course, be submitted to Congress in the form of a regulation subject to legislative review. If Congress does not grant the Commission general waiver authority over the reporting requirements of the law, it should consider changing specific provisions that have proven burdensome. The Commission suggests the following changes: (1) a candidate's principal campaign committee existing solely to extinguish debts from a previous campaign should be permitted to file semiannual reports even in an election year, provided that, if the candidate is currently seeking election, he or she has authorized a new principal campaign com-

mittee, which is reporting for that election and (2) the principal campaign committee of a candidate for the office of President should not be required to file pre- and post-general election reports if the candidate is no longer seeking election.

Point of Entry (2 U.S.C. §432(g))

The Commission recommends that it be the sole point of entry for all disclosure documents filed by Federal committees. A single point of entry would eliminate any confusion about where candidates and committees are to file their reports. It would assist committee treasurers by having one office with which to file, correspond and ask questions. At present, conflicts may arise when more than one office sends out materials, makes requests for additional information and answers questions relating to the interpretation of the law. A single point of entry should also reduce the cost to the Federal government of maintaining three different offices, especially in the area of personnel, equipment and data processing.

The Commission has authority to prepare and publish lists of nonfilers. It is extremely difficult to ascertain who has and who has not filed when reports may have been filed at or are in transit between two different offices. Separate points of entry also make it difficult for the Commission to track responses to compliance notices. Many responses and/or amendments may not be received by the Commission in a timely manner, even though they were sent on time by the candidate or committee. The delay in transmittal between two offices sometimes leads the Commission to believe that candidates and committees are not in compliance. A single point of entry would eliminate this confusion. If the Commission received all documents, it would transmit on a daily basis file copies to the Secretary of the Senate and the Clerk of the House, as appropriate. The Commission notes that the report of the Institute of Politics of the John F. Kennedy School of Government at Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act, 1972-78*,

prepared for the House Administration Committee, recommends that all reports be filed directly with the Commission (Committee Print, 96th Cong., 1st Sess., at 122 (1979)).

Authorized Presidential Committees (2 U.S.C. §434(a)(3))

To minimize reporting burdens, Congress may wish to permit authorized Presidential committees filing reports on a monthly basis to revert to quarterly filing, where the candidate is no longer seeking nomination or election to the office of President and has so notified the Commission in writing. In addition, Congress may wish to allow such committees to file semiannual reports in a nonelection year.

48-Hour Reports (2 U.S.C. §434(a)(6))

Require recipient committee to report in one notification contributions of \$1,000 or more received after the close of books on the 20th day before the election through the 10th day before the election. Contributions of \$1,000 or more received after the 10th day would be reported within 48 hours.

Contribution and Expenditure Limitations

Election Period Limitations (2 U.S.C. §441a)

The contribution limitations are structured on a "per-election" basis, thus necessitating dual bookkeeping or the adoption of some other method to distinguish between primary and general election contributions. The Act could be simplified by changing the contribution limitations from a "per-election" basis to an "annual" or "election-cycle" basis. If an annual limitation is chosen, contributions made to a candidate in a year other than the calendar year in which the election is held should be considered to have been made during the election year. Thus, multicandidate committees could give up to \$10,000 and all other persons could give up to \$2,000 to an authorized committee at any point during the election cycle.

Contributions by Minors (2 U.S.C. §441a)

The Act does not stipulate at what age a minor child may make contributions. Presently, the Commission is forced to rely on subjective criteria such as whether "the decision to contribute is made knowingly or voluntarily by the minor child." Congress should establish an age below which contributions by children would be considered to have been made by the parent and subject to the parent's \$1,000 contribution limitation.

Contributions to Draft Committees (2 U.S.C. §441a)

Consideration should be given to the contribution limitations that apply to draft committees. Since the \$1,000 limitation on contributions by persons other than multicandidate committees applies only to candidates, a person may give up to \$5,000 per year — the limit applicable to "other political committees" — to a draft committee. Precisely this situation was presented in Advisory Opinion 1979-40. Congress may wish to amend the statute to make the \$1,000 limitation, rather than the \$5,000 limitation, applicable to contributions to political committees whose purpose is to influence a clearly identified individual to become a candidate.

Although the limitation on contributions by multicandidate committees to candidates or to draft committees is \$5,000, multicandidate committees, as well as other persons, may make two contributions toward the nomination of an individual — one contribution to a draft movement and, if the individual later becomes a candidate, another contribution to the candidate's authorized committee. Accordingly, Congress may wish to consider amending the Act to provide that a person who has contributed to a draft committee with the knowledge that his or her contribution will be expended to draft a clearly identified individual will, for the purposes of the contribution limitations, be considered to have made a contribution to a "candidate." If that individual should become a candidate, the contributors to the draft movement would be eligible to give to the candidate's

authorized committees only to the extent their earlier aggregate contributions did not exceed the "candidate" limits.

Earmarked Contributions (2 U.S.C. §441a(a)(8))

Section 441a(a)(8) states that contributions made on behalf of a candidate through an intermediary or conduit shall be considered contributions to the candidate by the original donor. The statute should be amended to make this provision applicable to contributions earmarked to political committees.

Foreign Nationals (2 U.S.C. §441e)

Section 441e should be revised to state whether this section reaches U. S. corporations owned by foreign nationals, subsidiaries of foreign corporations and trade associations with members who are foreign nationals or foreign corporations.

Voluntary Services (2 U.S.C. §431(8)(B))

The Act places no limit on the services that a professional may donate to a candidate. For example, a professional entertainer may participate in a concert for the benefit of a candidate without the proceeds of that concert counting toward the entertainer's contribution limitations. Congress may wish to circumscribe the use of volunteer professional services when they are donated solely for fundraising rather than for actual campaigning. A similar question is raised when an artist donates artwork to a campaign to be used for fundraising or to be disposed of as an asset of the campaign.

Trade Association Solicitation Approval (2 U.S.C. §441b(b)(4)(D))

Trade association political action committees must obtain the separate and specific approval of each member corporation to solicit their executive and administrative personnel. Some trade associations have thousands of members, and it is a considerable administrative burden to obtain approval to solicit every year. The one-year limitation should be removed, and the trade association should be allowed to solicit until the corporation revokes its approval.

Presidential Elections

Repayments to the Fund (26 U.S.C. §9007(b))

Repayments under the Presidential Primary Matching Payment Account Act (Chapter 96, 26 U.S.C.) are credited to the Presidential Election Campaign Fund, while repayments under the Presidential Election Campaign Fund Act (Chapter 95, 26 U.S.C.) are credited to the general fund of the Treasury. All repayments should be credited to the Presidential Election Campaign Fund so that dollars checked off by taxpayers for the Fund do not indirectly end up in the general fund.

Use of Contributions Matched by Federal Funds (26 U.S.C. §9038(b)(2)(B))

Section 9038(b)(2)(B) requires the repayment of any matching funds used for any purpose other than "...to restore funds...which were used, to defray qualified campaign expenses." This provision requires the repayment of an amount equal to any expenditure from matching funds or private contributions made for nonqualified campaign expenses. (See 11 CFR 9038.2(a)(2).) The Congress may wish to more clearly state in §9038(b)(2)(B) that a candidate who accepts public funding may not make expenditures from public funds or private contributions for other than qualified campaign expenses.

Qualified Campaign Expenses (26 U.S.C. §9002(11) and 9032(9))

Chapters 95 and 96 of Title 26 of the Internal Revenue Code contain different definitions of "qualified campaign expense." Chapter 95 defines a "qualified campaign expense" to mean an expense incurred to further the election of a Presidential candidate. Chapter 96 defines "qualified campaign expense" to mean an expense incurred in connection with a campaign for nomination to the office of President. The Commission recommends that the definition contained in Chapter 96 be incorporated into Chapter 95.

Also, the second sentence of the paragraph following 26 U.S.C. §9002(11)(c) should be

clarified to indicate whether it incorporates the "coattails provision" (2 U.S.C. §431(8)(B)(xi)) or the limitations on "support" of other candidates by a principal campaign committee (2 U.S.C. §432(e)(3)(B)).

Public Funding for Independent Candidates

(26 U.S.C. §§9002(2), 9003 and 9008)

Congress should consider clarifying whether or not an independent candidate, who is not a new party candidate, is eligible for post-election public funding in the general election.

State Spending Limits

(2 U.S.C. §441a(b)(1)(A))

The Commission has observed during the 1976 and 1980 primary election cycles that candidates and their respective principal campaign committees have expended heavy resources in an attempt to observe the State-by-State spending limitations contained in 2 U.S.C. §441a(b)(1)(A). The Commission has also spent a considerable amount of its audit resources in verifying compliance with these State limitations. In the process, it has uncovered a number of difficulties. First, it has been difficult to differentiate between expenses that were "national" in impact and expenses that were targeted to a specific State(s). For example, how does one categorize nationwide media broadcasts, nationwide mailings and the distribution of campaign literature which addresses issues of national interest rather than issues pertaining to a specific State(s).

Additionally, it has been difficult to determine how to reasonably attribute travel costs to a specific State(s) when a candidate and support staff travel throughout the United States. Finally, it has been difficult to determine how to reasonably attribute to a specific State(s) the costs of producing and airing television spots, especially in light of cable television and its penetration into multistate markets.

The areas mentioned above are but a few of the practical difficulties encountered when one attempts to attribute the costs associated

with a nationwide Presidential campaign to specific States. The Commission has also found that, with a few exceptions (Iowa, New Hampshire and Maine), candidate expenditures have not approached the State limits. The Congress may, therefore, wish to remove the State-by-State limitations and retain the overall expenditure limitation, with an amendment to incorporate the present 20 percent fundraising exemption into the overall limit. (See the 1979 *Annual Report*, page 40, for a detailed discussion of a fundraising exemption recommendation.)

Public Funding of Federal Candidates by States

(2 U.S.C. §431(8) and (9))

At least one State has established a public funding scheme in which State tax money is distributed to State party committees, which in turn have discretion over the amount each candidate for office in that party should receive. Congress may wish to consider excepting these payments from the definitions of "contribution" and "expenditure" so that the party is not a contributor and so that these amounts do not apply to §441a(d) limits.

Entitlement of Eligible Candidates to Payments

(26 U.S.C. §9004(a)(2))

Under §9004(a)(2), a minor or new party Presidential candidate who received more than 5 percent of the popular vote would be eligible for pre-election funding in the next Presidential general election. If the candidate did not run again, the party's new nominee would be eligible for such funding. If the candidate ran in the next election as an independent or the candidate of yet another new party, both the candidate and his or her old party would be eligible for pre-election funding in the next election. Congress may want to eliminate the opportunity for such double funding.

Recovery of Public Funds (26 U.S.C.

§§9010(b) and 9040(b))

Sections 9010(b) and 9040(b) should be amended to clarify that the Commission may seek repayments of amounts determined to be

repayable in the context of enforcement proceedings and audits under sections other than 9038. As currently drafted, those sections are confusing since they do not reference the Title 2 enforcement procedures, which may uncover payments improperly made, or the other provisions permitting Commission audits.

Deadline for Consideration of Initial Matching Fund Certification (26 U.S.C. §9036)

In order to allow the Commission sufficient time to adequately verify the initial threshold submission to establish eligibility for matching funds, the 10-day period for processing should be increased to 20 days.

Commission Duties, Powers and Authorities

Number of Legislative Days for Regulation Review (2 U.S.C. §438(d))

The 1979 Amendments contained a provision reducing the number of legislative days for Congressional review of Commission regulations from 30 days to 15. This reduction was only applicable, however, to the regulations written to implement the 1979 Amendments. Congress should shorten the period for review of all Commission regulations to 15 legislative days.

In addition, two different standards currently apply to Congressional review of Commission regulations because two different definitions of "legislative day" are provided under Title 2 and Title 26. In Title 2, legislative days are counted separately in each House of Congress. In Title 26, legislative days are only counted when both Houses are in session. The Title 26 provision should be revised to match the Title 2 provision, thus avoiding unnecessary delay in regulation review.

Judicial Review (2 U.S.C. §437h; 26 U.S.C. §§9010, 9011, 9040 and 9041)

The Act contains different judicial review provisions which Congress should consider conforming to each other. As noted by the Court of Appeals for the District of Columbia Circuit, no

apparent reason exists for the different review provisions in Title 2 and in Chapters 95 and 96 of Title 26. This anomaly creates difficulties for the courts because cases brought under one Act often also involve questions relating to the other Acts. See *Republican National Committee v. Federal Election Commission* (case brought under both 2 U.S.C. §437h and 26 U.S.C. §9011(b)). The requirement of §437h that cases be heard by the courts of appeals sitting *en banc* has been noted by the Courts of Appeals for the District of Columbia Circuit, the Fifth Circuit and the Ninth Circuit as presenting great difficulties. The *en banc* requirement should be repealed and Congress should establish a single judicial review provision applicable to all three Acts.

Revolving Fund (2 U.S.C. §438)

Although the FEC charges fees for publications and photocopies of documents provided to the public upon request and pursuant to the Freedom of Information Act, none of the monies collected reimburse the FEC for resources used. Instead, the money is transferred to the U. S. Treasury. For the fiscal year ended September 30, 1980, the FEC collected and transferred \$37,342.73 to the Treasury (the miscellaneous receipts account). This amount represented fees derived from selling Commission publications and photocopies of documents to the public. In order for the FEC to receive reimbursements for the documents it provides, a "revolving fund account" must be authorized by law. According to the *Treasury Fiscal Requirements Manual*, Congress would have to authorize a revolving fund account to finance a continuing cycle of operations in which expenditures would generate receipts and the receipts would be available for new expenditures. In addition, costs awarded to the Commission in litigation (e.g., printing, but not civil penalties), should be payable to the revolving fund.

Comment Period for Advisory Opinions (2 U.S.C. §437f(d))

The 1979 Amendments provide that advisory

opinion requests submitted by candidates or their committees within 60 days of an election must be answered within 20 days. However, the Act sets a 10-day public comment period for all requests. This comment period should be shortened to five days for requests under the 20-day requirement to give the Commission sufficient time to fully consider and incorporate comments received.

Registration

Names of Committees (2 U.S.C. §432(e))

Under Section 432(e)(4), authorized committees must include the candidate's name in the name of the committee. Separate segregated funds must include the name of their connected organization in their name under Section 432(e)(5). The concept behind these requirements is to enable the public to know whom these committees represent. However, many political committees connected with the organization are not covered by these provisions, even though the public has the same need to know.

"Draft" committees, so called "dump" committees and "delegate" committees should also be required to include the name of the person or candidate they support or oppose in their name, with an appropriate reference to the nature of the committee, e.g., "draft," "delegate" or "dump." In addition, other political committees which have connected organizations or sponsors but which are not segregated funds should be required to include the name of their parent organization in the committee's name.

No committee should be able to use the name of a political party in its name unless it is an official party committee. Similarly, no committee should be able to include the name of a Federal office in its name unless it is an authorized committee.

Other Statutes

Regulatory Flexibility Act (Pub. L. 96-354)

Congress should exempt the Federal Election Commission from the requirements of the Regulatory Flexibility Act. None of the Commission's regulations could have a significant impact on a substantial number of small businesses due to the nature of the Commission's jurisdiction, which mainly extends to political committees. The Commission is therefore required to comply with the Regulatory Flexibility Act in a negative fashion, spending time and resources repeatedly asserting that no effect on small businesses will result from Commission rulemaking. A far simpler solution would be to exempt the Commission from these requirements.

Privacy Act of 1974 (Pub. L. 93-579)

The Commission should be exempted from its duty to comply with the accounting requirements of 5 U.S.C. §552a(c) to the extent that the section requires an accounting of all disclosures maintained on the public record. The Commission has a reading room to which members of the general public may come and inspect microfilm copies of public reports. Placing such documents on the public record is a routine use of such materials. An exemption from the accounting requirements would not contravene the principles of the Privacy Act since the individuals involved are those running for office or contributing to candidates for Federal office. Congress has determined that in this situation the public's need to know the financial activities of political committees outweighs any privacy interest such individuals may have in this area.

Technical Amendments

26 U.S.C. §527(f)(3)

The cross-reference in 26 U.S.C. §527(f)(3) should be changed from "section 610 of Title 18" to "section 441b of Title 2."

Gender Specific Language

Gender specific language should be eliminated from the statute wherever it appears. Examples include §§439a, 441a(a)(7), 441b(b)(3)(C), 441f, 441h, 442, 9002(11)(a), 9012(b)(2), 9035, etc.

Definitions (2 U.S.C. §431)

The 1979 Amendments changed the numeration of the definition subsections in 2 U.S.C. §431 from letters to numbers. As a result of this change, citations to this section have numbers following numbers, e.g., 2 U.S.C. §431(8). Such citations differ from traditional citation form and therefore appear incorrect and can be awkward to cite orally. The numeration should be changed to lower case letters.