

Chapter 4

Legislative Recommendations

1980

The Commission is required to include in its annual report "any legislative or other actions the Commission considers appropriate." (2 U.S.C. § 438(a)(9), formerly 2 U.S.C. § 437e.) On January 8, 1980, the Federal Election Campaign Act Amendments of 1979 were enacted (Public Law 96-187). The 1979 Amendments incorporate many of the improvements in the Act the Commission has recommended over the past three years. The Commission applauds the Congress' efforts in election campaign law reform and is confident that the 1979 Amendments will result in a significant decrease in reporting burdens on candidates and committees. We hope the Amendments will also encourage more vigorous volunteer activity at the grass roots level.

It is too early to determine whether improvements will be needed to the changes made in the 1979 Amendments. There are, however, several areas not addressed by the 1979 Amendments in which the Commission made recommendations in the past. The Commission reiterates its support for these changes and includes them in the following list of legislative recommendations.

Reporting

General Waiver Authority

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. To further 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.

Point of Entry

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 can-

didates 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. 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)).

State Filing Officers

The 1979 Amendments significantly ease the burden on Secretaries of State and equivalent State filing officers by reducing retention requirements. Another concern expressed by State officers not addressed in the 1979 Amendments is the absence of reimbursement by the Federal government for costs incurred in receiving, indexing and maintaining Federal disclosure reports. Such Federal payments could be made on

an electoral vote basis, or some other equitable formula, that would require minimal administrative overhead.

Contribution and Expenditure Limitations

Election Period Limitations

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 to National Party Committees

An individual may give \$20,000 to the committees established and maintained by a national political party, but a multicandidate committee may give only \$15,000. This appears to be different from the treatment accorded contributions to a candidate's authorized committees by which an individual may contribute only \$1,000 per election while a multicandidate committee may give \$5,000 per election.

Contributions by Minors

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.

Multicandidate Committee Qualification Requirements

In order to attain qualified multicandidate committee status to be eligible to give \$5,000 per election to Federal candidates, political committees could be required to make contributions of \$100 or some other specified sum to five Federal candidates. Under the present Act, a political committee need give as little as \$1 to four candidates in order to be eligible to give \$5,000 to the fifth candidate, provided all other criteria are met.

Contributions to Draft Committees

Consideration should be given to the application of contribution limitations to draft movements. 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 or individuals 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 com-

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

Voluntary Services

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.

Corporate and Labor Organization Political Activity

Registration and Get-Out-The-Vote

Congress may wish to delineate by statute the extent to which the Act allows corporations and labor organizations to conduct nonpartisan registration and get-out-the-vote campaigns to assist the general public without the sponsorship of a nonpartisan organization, so long as they merely urge people to register and to vote. The current language of 2 U.S.C. §441b(b)(2)(C) has been construed as permitting corporations and labor organizations to participate in such activities only if they are cosponsored with and conducted by an organization which does not support or endorse candidates or political parties. The present restrictive statutory language therefore deters corporations and labor organizations from unilaterally engaging in nonpartisan public service activity relating to citizen participation in the election process.

Trade Association

Solicitation Approval

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

Delegate Selection

Amendments are needed to delineate the status of delegates and delegate-candidates to Presidential nominating conventions and the applicability of the disclosure provisions and contribution and expenditure limitations to their activities. The Commission is attempting to deal with the application of the contribution and expenditure limits and reporting requirements of the Act to delegate selection through regulations. This task is complicated, however, because the statute gives no explicit guidance as to the status of delegates. Congress should define the extent to which financial activity in connection with delegate selection is subject to the Act.

Compliance Funds

The Act specifically excludes from the definition of "contribution" the payment of legal and accounting services by a regular employer to insure compliance with the Federal Election Campaign Act and Chapters 95 and 96 of the Internal Revenue Code. The Commission's regulations specifically permit a Presidential campaign to set up a separate account containing private monies to be used for compliance purposes. A major party Presidential candidate may not otherwise receive private contributions. In order to insure the integrity of the Presidential general election public financing provisions and to eliminate the need for any private contributions in the general election, the Presidential Election Campaign Fund Act should be amended to provide a block grant of a specified amount for legal and accounting services for each candidate and committee receiving public funds. Similar grants, perhaps on a pro rata basis, should be considered for candidates who receive matching funds in the primary election.

Presidential Election Campaign Fund

Under current provisions, the Secretary of the Treasury is required to place first priority on funds for convention financing; second priority on funds for general election financing; and third priority on the matching payment account fund. Since the primaries occur before the general election, the Secretary may not have a clear idea of the amount to reserve for the general election. The Secretary may determine that a substantial portion of the entire fund needs to be reserved for a number of possible qualified nominees in the general election, thus denying Presidential primary candidates their full entitlements. On the other hand, the Secretary may make a determination which would not reserve sufficient monies for the general election fund to pay new party candidates who qualify in the general election. Since the amount in the fund is a fixed amount in that it is limited by the number of dollars received as a result of the tax checkoff provision, the Secretary may be faced with a situation where he or she must risk depleting the general election fund to assure full entitlement for Presidential primary candidates. Under some circumstances, the present system could be unworkable. It should therefore be modified either to guarantee full entitlement to all qualified candidates or to eliminate discretion by the Secretary and the Commission in determining how to distribute partial entitlements.

Repayments to the Fund

Repayments under the Presidential Primary Matching Payment Account Act (Chapter 96, 26 U.S.C.) are made to the Presidential Election Campaign Fund, while repayments under the Presidential Election Campaign Fund Act (Chapter 95, 26 U.S.C.) are made to the general fund of the Treasury. All repayments should be made 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) 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 section 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 Expense

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 broader definition contained in Chapter 96 be incorporated into Chapter 95.

Fundraising Exemption

Congress may wish to consider the results of the application of the 20 percent fundraising exemption as it is presently drafted. The Act clearly makes the 20 percent fundraising exemption applicable to the entire \$10 million limit for Presidential primary candidates, although the legislative history indicates a Congressional intent to apply the exemption only to the \$5 million privately raised. Further, the 20 percent fundraising exemption applies to Presidential nominees who accept partial public funding for the general election. The application of the fundraising exemption in this situation has the effect of increasing the nominee's spending ceiling and placing nominees who have elected to accept full funding at a lower spending limit.

The 20 percent fundraising exemption should be eliminated and the expenditure limitation raised accordingly.

Commission Duties, Powers and Authority

Number of Legislative Days for Regulation Review

Congress should reduce the current 30 legislative days for the review of regulations to 15 legislative days.

Judicial Review

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, no apparent reason exists for the different review provisions in Chapters 95 and 96 of Title 26. This anomaly creates difficulties for the courts because cases brought under one chapter often also involve questions relating to the other chapter. Congress should consider making the provisions of 26 U.S.C. §9011, including the provisions for expedited review of §9011(b), apply to Chapter 96. This could be done by changing §§9040 and 9041 so they become identical to §§9010 and 9011.

Additionally, the Congress should address what the Supreme Court called "the jurisdictional ambiguities" resulting from Title 2 having a totally different expedited review provision (2 U.S.C. §437h) for questions of constitutionality than for questions of statutory construction. The legislative history of §437h indicates it was intended to provide a vehicle for the challenge to the 1974 Amendments heard by the Court in *Buckley v. Valeo*. It has since outlived its purpose and should be repealed. By giving precedence to constitutional questions it is inconsistent with the traditional practice of the courts in not addressing constitutional questions when a case may be resolved on statutory grounds. Legal challenges to the Act, whether constitutional or statutory, could still be considered by

the courts without §437h through the ordinary provisions for judicial review in Title 28, United States Code.

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."

26 U.S.C. §9011(b)(1)

The term "contrue" in 26 U.S.C. §9011(b)(1) should be "construe."