

Legislative Recommendations 1976

Introduction

In any area as novel and complex as election law, comprehensive legislation will invariably contain flaws and omissions. Congress enacted, in only three years, three major, landmark pieces of legislation – the Presidential Election Campaign Fund Act, the Federal Election Campaign Act of 1971, and the Federal Election Campaign Act Amendments of 1974. Other, somewhat less comprehensive legislation was also passed, including a bill which substantially overhauled many of the provisions of the tax code relating to elections.

Congress has anticipated the need to continually modify, renew and update election legislation. The 1974 Amendments contained provisions requiring or instructing the Commission to submit legislative recommendations to the Congress and the President.¹ Since its inception, the Commission has kept an inventory of possible amendments to the law. The list which follows is a condensation of the Commission's inventory representing those areas where possible legislative remedies are needed to assure the smooth functioning of the law. The Commission has not attempted to arrive at a consensus as to which provisions of the law should be amended, but rather submits the following list of possible areas which the Congress may wish to consider for amendment. Individual Commissioners may disagree as to the advisability and necessity of some of the amendments on the list.

At the time of submission of these legislative recommendations, Congress is working on the Federal Election Campaign Act Amendments of 1976. Some of the Commission's proposed legislative changes are included in the bills

¹ 2 USC 437d(d) and 2 USC 437e.

being marked up by the Congressional committees responsible for election legislation. Due to the uncertain status of these bills, the Commission has decided to submit its recommendations in their original form.

The Commission has divided these recommendations into eight categories: 1. Simplification, 2. Clarification, 3. Judicial Determinations, 4. Consolidation, 5. Compliance and Enforcement, 6. Presidential Elections, 7. Miscellaneous, 8. Technical and Conforming.

Simplification

One of the major concerns of the Commission is simplifying the law and reducing the burdens on candidates and committees. As presently written, the law frequently applies indiscriminantly to large Presidential committees, multicandidate committees, medium-size Senate committees and small House and political party committees. Both the Commission and the Congress must continually seek ways to simplify the law in order to reduce the burden on candidates and committees and to make procedures less cumbersome. Specifically:

Threshold for Record- keeping

The threshold for keeping records of the identification of contributors could be raised from \$10 to \$25 or \$50.² While almost all candidates and committees keep these records for fundraising purposes, the present threshold can be raised to reduce the legal burdens on candidates and committees without thwarting the purposes of the Act. The Supreme Court found in *Buckley v. Valeo* that:

[t]he \$10 and \$100 thresholds are indeed low. Contributors of relatively small amounts are likely to be especially sensitive to recording or disclosure of their political preferences. These strict requirements may well discourage participation by some citizens in the political process, a result that Congress hardly could have intended. Indeed, there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure. Rather, it seems merely to have adopted the thresholds existing in similar disclosure laws since 1910. [Footnote omitted.] But we cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion. We cannot say, on this bare record that the limits designed are wholly without rationality.

Thus, while it is not immediately necessary for Congress to revise its minimum recordkeeping requirements, it may wish to do so, in view of the Supreme Court's belief that the recordkeeping thresholds are low.³

²See 2 USC 432 (c)(2).

³*Buckley v. Valeo*, 44 USLW 4127, 4151, 4152 (U.S., January 30, 1976).

Oral Contracts There is considerable merit to amending the law to provide that a contract, promise, or agreement must be written in order to constitute a contribution or an expenditure.⁴ Thus, oral contracts and promises would no longer be covered by the Act's definition of contribution and expenditure. The existing language presents severe enforcement problems for the Commission and causes needless confusion on the part of candidates and political committees.

Amended Registration The requirement that multicandidate committees file an amended registration statement each time they contribute to (i.e., "support") a Federal, state, or local candidate could be repealed or amended to require only the reporting of various categories of Federal candidates supported. This registration requirement can be both cumbersome and duplicative. The periodic reports by multicandidate committees also contain a listing of candidates and committees supported. The additional registration requirement is particularly burdensome for multicandidate committees who must file dozens, even hundreds of amended registration statements during each election year.⁵

Local Filing The requirement that each committee include in its registration statement a listing of all reports required to be filed by the committee with state or local officers should be repealed. This requirement is no longer necessary, because of the provision in the 1974 Act Amendments which pre-empts state reporting requirements.⁶

Point of Registration An amendment could be made to clarify that multicandidate and party committees register and report to the Commission and not to the candidates they support.⁷

Quarterly Reporting The threshold for the waiving of candidate or committee quarterly reports could be increased. The law now exempts from the quarterly reporting requirements any committee which receives contributions of \$1,000 or less and makes expenditures of \$1,000 or less. The \$1,000 figure could be increased to \$2,500 or \$5,000 in non-election years.⁸

The waiver of quarterly reporting requirement period could be extended to include the period from 20 days before the election to 40 days after the election. Under the present law, when the last day for filing a quarterly report occurs within 10 days of an election, the filing of the quarterly report is waived and superceded by the pre-election report. Extending this waiver to

⁴ See 2 USC 431(e)(2) and (f)(2); 18 USC 591(e)(2) and (f)(2).

⁵ See 2 USC 433(b)(6)

⁶ See 2 USC 433(b)(10)

⁷ See 2 USC 432(f)(2), USC 433 (e), 2 USC 434(a)(1), (2), but contra 2 USC 433(a), 2 USC 435(b), 2 USC 434(e).

⁸ See 2 USC 434(a)(1)(C).

quarterly reports required to be filed immediately after the election would reduce the number of reports without thwarting the purposes of the Act.⁹

**Itemized
Transfers**

Transfers aggregating less than \$100 per calendar year could be exempted from the requirement that they be itemized on candidate and committee reports. Presently, all transfers by candidates and political committees must be itemized and reported.¹⁰

**Consolidated
Reports**

Additional time should be provided for the consolidation and filing of pre-election reports. Authorized committees of a candidate now file their reports with the principal campaign committee on the same day which the principal campaign committee must consolidate and file those reports with the Commission. Alternatively, a different mechanism could be developed for the filing of reports. For example, the principal campaign committee could be required to file only a summary sheet on the 10th day, and a complete consolidated report several days thereafter.¹¹

Clarification

The Presidential Election Campaign Fund Act, the Federal Election Campaign Act of 1971 and the 1974 Amendments represent a comprehensive effort by Congress to regulate campaign financing. Any initial, wide ranging effort to regulate a political system as complex and diverse as ours will inevitably have some arbitrary distinctions and tend to treat factors and matters which are different as being alike. Some of these disparities are inherent in any system of regulating elections, but others can be remedied by legislation. There are several changes needed in the present statutory scheme in order to take into account the diverse elements of the political system.

Proliferation

The law could be amended to stipulate that political committees under the direction or control of another person, including any parent, subsidiary, branch, division, department, local or affiliate unit of that person would be considered as a single political committee for purposes of the contribution limitations. Political parties should be exempt from this restriction, although they would still be subject to the test which prohibits political committees under the direction or control of another person from having a separate contribution limitation.

**Multicandidate
Committee**

In order to attain qualified multicandidate committee status (i.e., to be eligible to give \$5,000 per election to Federal candidates), political

⁹ See 2 USC 434(a)(1)(b).

¹⁰ See 2 USC 434(b)(4).

¹¹ See 2 USC 434(a)(1)(A)(i).

committees could be required to make contributions of \$100 or some other specified sum to five Federal candidates. Under the 1974 Act Amendments, a political committee need only give \$1 to five candidates to be eligible to give \$5,000 to the sixth candidate.

In addition, political committees could be required to make contributions to five or more Federal candidates every two or four years in order to retain their eligibility to give \$5,000 per election per candidate. Currently, once a political committee meets the \$5,000 test, it can give \$5,000 to only one or two candidates each election.

**Draft
Movements**

Thought should be given to amending the law to make the contribution limitations applicable to draft movements. Under the present law, an individual is not a candidate unless he takes the action necessary to get on the ballot, makes or raises or authorizes a person to make or raise contributions or expenditures on his behalf or takes other affirmative action to become elected to Federal office. Thus, draft movements on behalf of individuals (who are not candidates under the definition contained in the Act) may accept contributions up to \$25,000 from individuals and of unlimited amounts from political committees. The existing disclosure requirements for draft movements should be retained.

**Dual
Candidacies**

Amendments to the law are needed to delineate the status of dual candidacies, and in particular, the applicability of the disclosure provisions and contribution and expenditure limitations to dual candidacies for:

- (a) President and Senate,
- (b) President and House of Representatives,
- (c) House and Senate,
- (d) Delegate and Congress,
- (e) Federal and state or local office.

For example, if an individual is simultaneously a candidate for the Senate (where there is no expenditure limitation) and for the Presidency (where there is an expenditure limitation for those candidates accepting public funds) in the same state, are both of his or her campaigns subject to the Presidential spending ceiling for that state or may his or her senatorial campaign spend unlimited amounts of money? Also, if a candidate for Congress (who may not accept contributions in excess of \$1,000 per election — \$5,000 for a multicandidate committee) is simultaneously an unauthorized delegate-candidate (who has no contribution limitations), may he or she accept contributions of \$25,000 from individuals or of unlimited amounts from other persons for the delegate-candidacy or are both campaigns subject to the Congressional ceilings?

Minor and Independent Parties

The Congress may wish to consider granting the Commission specific statutory authority to waive candidate and committee disclosure requirements particularly with regard to minor and independent parties. A recent court decision construed the District of Columbia campaign finance law (which closely parallels the Federal law) as necessarily embracing such waiver authority. *Doe v. Martin*, 404 F Supp. 753, 757 (D.C., 1975).

Judicial Determinations

Although the Federal Election Campaign Act of 1971, as amended (hereinafter "the Act") only became generally effective on January 1, 1975, already there has been significant judicial reaction to this and similar statutes. The courts have upheld most of the key provisions of the Act, but have found certain statutory provisions to be unconstitutional and in other instances have narrowly construed certain provisions in order to avoid a finding of unconstitutionality. While the judiciary's holding on the constitutionality of the Act is the law of the land, it remains solely the province of Congress to further facilitate the use of the Act by making conforming revisions so that the law on its face reflects the Courts' holdings. In order to aid Congress in implementing the judiciary's rulings, the Commission makes the following recommendations and observations concerning possible legislative changes.

Definition of "Contribution"

It is recommended that the definition of contribution be amended to specifically

include, not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate. The definition of 'contribution' *** for disclosure purposes parallels the definition in Title 18 almost word for word, and we construe the former provision as we have the latter. So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.^{1 2}

Unauthorized Activities Notice

The Supreme Court held in *Buckley v. Valeo* that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify a ceiling on independent expenditures,^{1 3} but also held that the disclosure of persons making independent expenditures for the purpose of expressly advocating an election result is permissible.^{1 4}

^{1 2}44 USLW, at 4150.

^{1 3}44 USLW, at 4140.

^{1 4}44 USLW, at 4149-4151.

The Congress may wish to extend the requirement that unauthorized or independent activities by political committees include a notice that such activities are not authorized by the candidate to include all persons making unauthorized expenditures.

**Reporting
Independent
Expenditures**

It is recommended that the provision requiring the reporting of independent expenditures [2 U.S.C. § 434(e)] be amended to clearly conform with the Supreme Court's opinion.

In summary § 434(e) as construed imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate.^{1 5}

Consolidation

Congress may wish to consider consolidating the various titles presently under the jurisdiction of the Commission in order to avoid the inherent overlapping, duplication and conflicts which now exist. Consolidation could afford a means of diminishing the confusion and misunderstanding that now may result in a person being inadvertently in non-compliance with the Act.

Definitions

Instead of four separate sets of definitions, there should be one single set with the same term having the same meaning for all provisions. A term which is used to require disclosure generally is also used to limit contributions and expenditures and to provide public funds and thus, as a rule, these terms should be defined in a stylistically and substantively identical fashion. Where a difference in definition is required in order to implement a policy distinction, such a distinction should be explicitly noted.^{1 6}

^{1 5} 44 USLW, at 4151.

^{1 6} Examples of the confusion which can result from a lack of parallelism in the Act are:

(a) The \$500 limit to the exceptions to the definitions of "contribution" and "expenditure" appears at the end of the paragraph in 2 U.S.C. § 431(e)(5), 18 U.S.C. § 591(e)(5), and 18 U.S.C. § 591(f)(4), but appears at the end of each subparagraph in 2 U.S.C. § 431(f)(4).

(b) The phrase "to the extent that the cumulative value" appears in 2 U.S.C. § 431(e)(5), 18 U.S.C. § 591(e)(5), and 18 U.S.C. § 591(f)(4), but the phrase "if the cumulative value" appears in 2 U.S.C. § 431(f)(4).

(c) An exception is provided to the definitions of "contribution" and "expenditure" in 2 U.S.C. § 431(e)(5)(F) and (f)(4)(H), but this exception does not appear in 18 U.S.C. § 591(e)(5) and (f)(4).

(d) The word "individual" is used in the \$500 limit to the exceptions to the definitions of "contribution" and "expenditure" in 2 U.S.C. § 431(e)(5), 2 U.S.C. § 431(f)(4), and 18 U.S.C. § 591(e)(5), but the word "person" is used in 18 U.S.C. § 591(e)(5).

**FEC
Authority
and
Powers**

The Commission's authority and powers should be the same with respect to each provision under its jurisdiction. The Commission should be specifically granted the power to write regulations for Title 18. The Commission is presently confronted with a paradox whereby it is required to answer any and all requests for Advisory Opinions relating to Title 18, often involving major policy decisions of general applicability, but is not granted the authority to reduce these important policy decisions to regulations.

Each Commission power, duty, responsibility and obligation should be cited uniformly in only one place in the Code.

**Other
Election
Provisions**

The Congress should conduct a thorough review of all election-related provisions not under the Commission's jurisdiction. Some of these provisions are outmoded, vague, or overly broad and could be amended or repealed. Others could be placed under the Commission's jurisdiction, in particular, 18 U.S.C. 612.

Compliance

Compliance with the law is the Commission's most important goal and responsibility. There are several amendments which could be made to streamline and facilitate compliance with the law.

Penalties

The penalty provisions could be more consistent so that the severity of the penalty is commensurate with the seriousness of the violation.

The penalty provisions could be amended to specifically make it an offense to knowingly submit false, erroneous or incomplete information to the Commission.

**Legal
Responsibility**

The statute places sole responsibility for filing reports of campaign receipts and expenditures on the treasurer of a political committee. This approach tends to focus the law's requirement on a campaign official who may not be an important figure in the committee hierarchy. Under the current law, a committee chairman might attempt to avoid responsibility for his committee's reporting violations by claiming that the statute imposes no reporting duty on him. While the "aiding and abetting" provisions of the Federal criminal law can be used under many circumstances, the raising of this false issue can mislead a court or jury. The statute could be amended to place equal reporting responsibility on the chairman and the treasurer of a political committee.

Presidential Elections

- Delegate Candidate** The law should clarify the status of delegate candidates and the applicability of the disclosure provisions and contribution and expenditure limitations to their activities.¹⁷
- State Filing** Read literally, the law would require Presidential candidates to file a copy of each statement filed with the Commission with the Secretary of State in each state where the candidate makes an expenditure, regardless of whether that expenditure is made during the reporting period. The Act should be amended to require reports for Presidential candidates to be filed with the Secretary of State only during those periods when an expenditure is made in the state.¹⁸
- Written Instruments** All written instruments representing contributions submitted to the Commission for matching purposes should be required to specifically designate the individual whose candidacy they are intended to support.

Miscellaneous Amendments

- Political Parties** The law should make greater recognition of the role of the political parties in the political process. While the Act does make some distinctions between party and special interest activities, those distinctions do not fully reflect the political parties' different function and purpose. Broad based permanent, on-going political party activities are healthy for the political system and should be exempt from many of the restrictions imposed on other multicandidate committee activities. For example, when read literally, the Act might count as an expenditure or contribution in-kind the mere mention of a candidate in a party newsletter, even though this is a traditional function of the political party and does not generally represent any real evil.
- Private Benefit** Campaign Activities for Private Benefit/Conversion of Campaign Funds. Prior to 1972 the law prohibited the purchase of goods or articles the proceeds of which inured to the benefit of a Federal candidate or political committee. (18 USC § 608(b), repealed by the 1971 FECA.) Congress may wish to consider reinstating some controls on campaign activities conducted for the private profit of the candidate or committee and/or the conversion of political funds to personal use.
- State Filing** Although the state election commissions are frequently the most logical place to have Federal reports filed, all such reports must currently be filed

¹⁷ The Commission has already submitted recommendations to the Congress for a statutory scheme to regulate this process.

¹⁸ See 2 USC 439.

with the Secretary of State. An amendment could be offered to give discretion to the states to decide where reports should be filed.¹⁹

All reports and statements required to be filed with both the Commission and the Secretary of State or other appropriate state agency should be filed simultaneously. Presently, there is no date or deadline for the filing of reports and statements required to be filed with the Secretary of State or other appropriate state agency.

Each multicandidate committee should file only with the Secretary of State or other appropriate state agency in the state in which it is headquartered. Committees which make one contribution to a Presidential candidate or contributions to several congressional candidates should not have to file in every state in which the Presidential candidate files or in every state in which the congressional candidates file.

**Review
of
Regulations**

The definition of "legislative days" for the review of regulation provision should be clarified as to whether it includes only days on which both Houses are in session or days on which either House is in session.

Technical and Conforming Amendments

- The limitations on expenditures relative to a clearly identified candidate (18 U.S.C. 608(e)) should be repealed. The Supreme Court has held this provision to be unconstitutional.
- The provisions requiring reports by certain persons (2 U.S.C. 437a) should be repealed. The Court of Appeals held this section to be unconstitutionally vague and overbroad.²⁰ The Court of Appeals' ruling was not appealed.²¹
- The provision relating to judicial review (2 U.S.C. 437h) should be amended to include the definitional section (18 U.S.C. 591). As stated by the Court of Appeals:

Poor draftsmanship does, in fact, exist. For example, 2 U.S.C. § 437h, the provision establishing review on constitutionality by certification to this court and appeal to the Supreme Court does not include among its list of reviewable criminal sections, 18 U.S.C. § 591, the section which sets forth the definitions underlying those sections which are deemed reviewable.²²

¹⁹ See 2 USC 439.

²⁰ *Buckley v. Valeo*, __U.S. App. D.C. __, 519 F 2d 821, 869-878(1975).

²¹ 44 USLW at 4145 n 70.

²² 519 F 2d, at 907, n. 2.

- In 2 U.S.C. 437b(a)(1) "Chapter 97" should read "Chapter 96".
- 2 U.S.C. 437d(a)(10) should be amended by striking "subsection (a)(1) of this section" and inserting in lieu thereof "section 438(a)(1) of this chapter." This cross reference is incorrect.
- 2 U.S.C. 455 and 2 U.S.C. 456 have been improperly codified and should be amended by striking out "title III of this Act" each place it occurs and inserting "this chapter."