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THE WHITE HOUSE
WASHINGTON

DATE: 6/16/94

TO: Michael Waldman

FROM: White House Counsel
Room 128, OEOB, x7900
Cliff Sloan

☑ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

Copy for M. Waldman

# American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
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Tom:

The attached memo is my effort to outline the constitutional issues I noted when we met earlier this week.

As we stated at the meeting, we will do out best to work with Perry and Bob Rozen on the Jeffords Amendment and bundling issues. With regard to the latter, our concerns are with (a) corporations and lobbyists arranging for company executives to make a series of $200 plus contributions to a particular candidate (b) treating lawfully bundled contributions as outside the overall PAC cap and (c) the matching of lawfully bundled contributions.

Attachment

**Memorandum On Constitutional Questions Raised By Title I Of The 1994 FECA Amendments Draft**

1. **The Case Law Background**. Buckley v. Valeo, 424 U.S. 1 (1976) invalidated the 1971 FECA's mandatory limit on candidate campaign expenditures. Id. at 54-58. In so doing, the Court rejected the claim that such governmental interests as "equalizing the financial resources of candidates" and "reducing the allegedly sky-rocketing costs of political campaigns" justify such a "direct and substantial restraint[] on the quantity of political speech." Id.

At the same time, the Court -- in sustaining the presidential public financing system -- stated that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. The Court discussed at length and rejected the argument that public financing discriminates against candidates who do not qualify (or by hypothesis do not choose to qualify). In so doing, the Court emphasized that while the privately financed candidate loses the public "enhancement of [his] opportunity to communicate with the electorate," the publicly financed candidate "suffer[s] a countervailing denial" -- "voluntary acceptance of an expenditure ceiling." Id. at 94-95. See also id. at 99 (justifying presidential public financing on the ground that since publicly financed candidates "voluntarily consent to a spending ceiling [privately financed] candidates will be able to spend more than the publicly financed candidate."

Putting these pieces together, the fair conclusion is that a statute that in practical terms requires all candidates to "agree to" expenditure ceilings would be ruled unconstitutional <u>and</u> that a statute that provides benefits to publicly financed candidates but no countervailing detriments where their opponent is privately financed would also be ruled unconstitutional. Indeed, a "public benefits - no detriments" statute could be seen as simply one means of forcing all candidates into the public financing system.

(a) **<u>The Lack of a Firm Expenditure Cap</u>**. Because it does not provide a firm cap on a publicly financed candidate's spending, Title I Subtitle B of the 1994 FECA Amendments draft is <u>extremely vulnerable</u> to judicial attack. Where a privately financed candidate raises substantial monies his/her publicly financed opponent is both entitled to substantial public benefits and is freed from all of the provisional limitations and detriments that are a precondition for being eligible for the public benefits in the first place. <u>Buckley</u> all but compels the conclusion that such a system will not pass constitutional muster. Put another way, <u>Buckley</u> requires that the current draft be amended so that there is an outside limit on what a publicly financed candidate can spend in a situation in which such a candidate faces a privately financed candidate.

(b) **<u>Triggering Off The Limits</u>**. Even if the foregoing reading of <u>Buckley</u> is overdrawn, it cannot be gainsaid that any combination of preconditions on receiving public financing and rules that "trigger off" these preconditions in order to enable the publicly financed candidate to match spending by, or on behalf of, a privately financed candidate raises a substantial constitutional question. Whatever the truth of the matter, such a system has the appearance of one designed to force all candidates -- or at least all rational candidates -- into accepting "voluntary" expenditure ceilings contrary to the Buckley ban on mandatory expenditure limitations. Prudence therefore counsels that the limitations on publicly financed candidates be triggered off only for the most compelling reasons. The current draft does not follow that counsel.

In essence, the judgment embodied in the draft is that the quid pro quo for public financing should be a lower permissible level of candidate expenditures than the current normal privately financed level of expenditures and a limit on the candidate's personal financing of his/her campaign.

There is, I believe, a compelling public interest in enabling rational candidates to opt into such an arrangement without running the risk that they will be submerged in a privately financed candidate's money tidal wave.

But that public interest is not nearly strong enough to trigger off the publicly financed candidate's basic expenditure limit at 50% of that limit or the personal financing limitation where the privately financed candidate has put substantial personal money into his race but is still below the overall expenditure limit. Both these triggering off provisions need to be rewritten.

(c) **The Independent Expenditure Match**. Providing publicly financed candidates a match for independent expenditures also raises a very difficult constitutional issue. Again, providing additional benefits to a publicly financed candidate where that candidate is not being outspent overall can fairly be taken to be an effort to force all candidates into the public financing system rather than an effort to safeguard a publicly financed candidate against unacceptable downside risks.

(d) **The "Closely Contested Primary"**. A qualitatively different problem is raised by the provision raising a publicly financed candidate's expenditure limit if the candidate has a closely contested primary. Here the challenge will be based on the theory that the result is to discriminate against one publicly financed candidate in favor of another; that challenge cannot be dismissed out of hand.

(e) The foregoing leads me to the conclusion that Title IB should:

- include a cap on the amount a publicly financed candidate can spend in situations in which his/her opponent is privately financed (a cap set at twice the basic expenditure limit should withstand judicial challenge);
- have at least a 75% trigger -- instead of 50% -- for increasing the basic expenditure limit, for permitting additional personal financing -- and, in all probability, for providing the independent expenditure match;
- add a proviso to the "closely contested primary" provision that no more than $600,000 can be spent in connection with the general election.

2. **<u>The Caps on PAC and Large Donor Contributions</u>**. The only governmental interest the Court has found sufficiently compelling to overcome the First Amendment interests involved in the election finance system is the interest in "limit[ing] the actuality and appearance of corruption." 424 U.S. at 26.

So as not to belabor a point made many times, while it is not certain, on balance it appears that the Court would hold that a PAC cap is justified by this interest.

In contrast, it is unlikely that the "anti corruption" interest will be found to justify the large donor cap. It is difficult to argue that two, fifty, or a hundred <u>lawful</u> $201 contributions by individuals who do not even know each other are more corrupting than one such contribution and an equal number of $100 contributions.

3. **<u>The Closely Contested Primary Increase In The PAC And Large Donor Caps</u>**. Raising the PAC and large donor caps for candidates with closely contested primaries raises serious discrimination questions and also calls the validity of the underlying caps into question. It seems plain from <u>Buckley</u> that the Court would strike down individual contribution limits that treat candidates differently -- <u>viz</u>. a $1000 limit for a candidate who does not have a closely contested primary and a $1500 limit for a candidate who does have such a primary. This line of distinction simply has nothing to do with preventing large contribution corruption. By the same reasoning, it would appear that the Court would strike down different PAC and large donor caps for candidates

who have had a closely contested primary and those who have not had such a primary.