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THE WHITE HOUSE
WASHINGTON

Jim -

Kathie Berger returned this
on Saturday - said Dick discussed
with the President.

What action now?

Trudy



*no further action
just file as outbox
PT JEG
NB 2/9/76*

THE PRESIDENT HAS SEEN

THE WHITE HOUSE

WASHINGTON

February 4, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN
ROGERS C. B. MORTON
JAMES E. CONNOR

SUBJECT: Federal Election Laws

On Friday, January 30, the Supreme Court issued its opinion on the constitutionality of the Federal Election Campaign Act. The purpose of this memorandum is to obtain your decision on how to respond to issues resulting from this decision.

BACKGROUND

The 1974 Campaign Act Amendments resulted from wide-spread public concern that large contributions were the reason for many of the abuses disclosed following the 1972 elections. Even so, the Amendments have frequently been criticized as excessively complex and designed primarily to insure that incumbents stay in office. The overall logic of the Act, however, has been substantially disrupted by the Court's decision upholding the limits on individual contributions, while invalidating ceilings on expenditures by candidates not receiving Federal funds or by groups or individuals who have no "prearrangement and coordination...with the candidate or his agent." Chief Justice Burger in a separate opinion has questioned whether the residue left by the Court leaves a workable program to be administered.

Although the Court also held that the appointment of a majority of the Commission's members by the Congress was unconstitutional, the FEC, as presently constituted, will continue to exist without additional legislation. However, its powers will be circumscribed to those which "are essentially of an investigative and informative nature,"



following the expiration on February 29 of the 30-day stay granted by the Court. The Court has left it to the Executive and the Congress to determine whether "to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains."

If no legislative action is taken, many aspects of the regulatory scheme will lapse. This would almost certainly prevent or delay the payment of the Federal funds that are now essential for Presidential candidates, and would make it impossible to render advisory opinions or issue regulations. Although the new law, even as amended by the Supreme Court, is a substantial change from past practice, your advisers believe it is essential that you be in a position of support for the principle of electoral reform. Of most immediate concern to your advisers is that you be in a position of support for a mechanism that will be able to effectively enforce the Federal election laws and maintain public confidence.

There are two basic goals:

- 1) Provide Presidential leadership for continued electoral reform;
- 2) Develop a sound system of electoral regulation which will ensure a viable two party system for the future.

ISSUES

There are two basic issues for your decision. The first is the immediate question presented by the Court of whether to reconstitute the FEC or to reassign the functions. The second addresses the broader policy question of whether and when to propose legislation dealing with the voids and defects in the Act governing the entire Federal electoral process.

The issue of reconstitution of the Commission is of primary concern on the Hill and has resulted in considerable controversy:

- 1) Wayne Hays, with some support from Speaker Albert and Tip O'Neill, has already indicated that he is opposed to any continuation of the Commission and that he desires to place the



disclosure, certification and perhaps even enforcement functions with GAO. Hays' strategy is to delay any House action for 30 days, and thus to force support for his position.

2) Bill Frenzel in the House and Schweiker, Cranston, Beall, Mondale, Mathias, Haskell and Stafford in the Senate, have introduced bills to reconstitute the FEC with members appointed by the President and confirmed by the Senate.

3) Senators Kennedy and Hugh Scott have introduced a bill that would additionally provide for public financing of Senate races. A similar provision for House races can be expected.

While the Senate can be expected, with Presidential support, to act within 30 days in favor of reconstituting the Commission, it is doubtful that the House will act in a similar manner, if at all.

I. Organization

Congressional reaction to the FEC has been negative for several reasons:

- Congressional recognition of the complexity of regulations proposed by the Commission,
- attempts by the Commission to minimize the advantages the Act gives to incumbents,
- personality clashes primarily between Wayne Hays and Chairman Curtis.

From the standpoint of public confidence, and to avoid interruption in the process, reconstitution of the Commission would likely require reappointment of the six present members. Privately, some members of Congress oppose reconstitution because they object to the reappointment of the present members. Publicly, Congress is likely to argue (as did Burger) that the Act is now so truncated that the remaining provisions do not require a commission for their implementation.



Even though the Congress may not pass legislation to reconstitute the Commission within 30 days, it may be important for the Administration publicly to favor reconstitution because the existence of an independent Commission is perceived by the public as a check on electoral excess. Your support of reconstitution would result in the Administration and most Congressional Republicans being joined by reform groups in opposing the Democratic leadership in the House.

Option 1. Permanently reconstitute the present Commission by providing for six Presidential appointees, confirmed by the Senate.

Pros:

- .. Eliminates uncertainty about 1976 election.
- .. Favorable public perception.
- .. Strong support in the Senate.
- .. Simple reconstitution easiest course to explain and defend.

Cons:

- .. Leaves the law in its present unsatisfactory state.
- .. Likely defeat in the House.

Option 2. Reconstitute the Commission, but restrict the duration of the entire Act to the 1976 elections.

Pros:

- .. Keeps you in leadership position on election reform issue.
- .. Eliminates uncertainty about the 1976 election.
- .. Ensures Congressional consideration of the entire election law when the issues can be addressed which are now politically difficult, e.g., contribution limitations, one-house veto provisions, enforcement responsibility of Justice, etc.
- .. Ensures that at a minimum if no action is later taken, a law which has never been approved by any Congress or President will go out of existence.



Con:

- .. If proposed initially, will subject the Administration to reform group criticism for half-hearted support of electoral reform.

Note: This is a good fall-back position for dealing with the Congress. They may be willing to compromise at this position.

Option 3. Abolish the Commission and assign to GAO its functions relating to disclosure and certification of Presidential candidates for Federal funds. Assign to the Department of Justice the FEC's enforcement, rulemaking and advisory functions by giving Justice specific authority to bring civil suits and to issue advisory opinions.

Pros:

- .. May be the only legislation the House will pass.
- .. Provides some certainty for upcoming election.

Cons:

- .. Loss of independent agency to enforce law.
- .. Presents appearance problem if Justice is to investigate all matters presently investigated by the Commission.
- .. Public may perceive you as weakening on election reform and the enforcement process.
- .. Any attempts to give enforcement powers to GAO raise anew similar constitutional questions concerning separation of powers and would have to be vigorously opposed.

Note: Administration may eventually have to accede in order to provide some certainty for the forthcoming election and should not be eliminated from later consideration.



II. Policy Changes in the Federal Election Law

The Supreme Court decision leaves us with a set of election laws that are undesirable. There are no limits on spending by individuals or groups who are independent of a candidate. The limits on individual contributions to a candidate stimulate the formation of independent groups by special interests, wealthy individuals, big business and big labor. Furthermore, it encourages candidates to abjure responsibility and control for what is said and done on their behalf by independent groups. A Pandora's box of mischief is opened. The fundamentals of our electoral process have been altered unintentionally and without consideration of the overall effects. These problems can only be dealt with through major changes in the Federal Election Laws.

Option 1. Keep indefinitely the provisions of the law as they presently exist.

The law, although fatally flawed, has established the groundrules by which Presidential candidates have been conducting their campaigns because all Presidential candidates have accepted and are likely to continue to accept matching funds. The continuation of what is now in place is the most practical response to the call for continued regulation of electoral excesses and to the need for providing certainty in the 1976 election. You would not propose change under this option, although further legislation certainly should be proposed later.

Pros:

- .. Statutes already in existence and functioning.
- .. They are perceived as a "good" by the public.
- .. They have been found constitutional by the Supreme Court.
- .. Simplest possible proposal.

Cons:

- .. Does not provide relief from possible excesses now permitted in individual expenditures.
- .. Allows an incomplete regulatory scheme to control the current elections.
- .. Does not provide for an automatic review of a flawed law.



Option 2. Limit the duration of the present election laws to the 1976 campaigns.

This is the companion to Option 2, above, and would provide certainty for the 1976 election without perpetuating an incomplete regulatory scheme that has not been approved by either Congress or the Executive. This approach can either be pursued from the start if you choose Option 2, above, or can be held as the basis for a compromise position. The following are examples of issues that would be considered in connection with later reform legislation:

1. Raising the contribution limitation to lessen the attractions of independent expenditures;
2. Continuing public financing for Presidential campaigns;
3. Initiating public financing for Congressional and Senatorial campaigns;
4. Eliminating state expenditure ceilings, while maintaining the national ceiling on candidates receiving Federal funds.

Pros:

- ..Ensures consideration of the entire election law at a time when issues can be addressed without the emotionalism and political problems raised in the context of the current campaign. As a compromise to Congressional inaction, it could be coupled with a strong Presidential commitment to submit comprehensive reform legislation in 1977.
- ..Allows you later to take a second public position in support of reform if Congress fails to act.

Cons:

- ..If proposed initially by you, could subject the Administration to criticism for half-hearted support of election reform.



Option 3. Propose immediate changes in the election law prior to the election in 1976 which would remedy the most serious deficiencies which result from the Supreme Court decision.

Because it is recognized that the law is so seriously flawed as a result of the Court decision, you may wish to initiate work immediately on possible remedies to alter the law. This approach would focus on the issues raised in the previous options.

Pro:

- ..Recognize that the law as it now stands is unworkable and enables you to demonstrate leadership by proposing sensible modifications.

Cons:

- ..May be construed as weakening your commitment to real constraints on campaign expenditures and excesses.
- ..Will inject a further note of uncertainty in the election of 1976.
- ..Reform proposals would not likely pass and could appear self-serving.

RECOMMENDATION

All of your advisers agree that in substantive terms Option 2, i. e. setting a definite time limit on both the Commission and the law, is the most desirable outcome because it forces reconsideration of an unworkable law. They are, however, divided as to the most effective way of achieving that outcome.

One tactical approach is to set forth your position firmly in support of unlimited continuation of the Commission (and therefore the present law--Option 1). This approach, it is argued, would enable you to reap maximum public benefits from appearing to support election reform unreservedly. Moreover, it would clearly demarcate your position from those in Congress who oppose continuation of an



effective Commission. It also gives you a base from which to compromise with Congress in the direction of Option 2.

Recommended by: Buchen, Morton, Callaway, Friedersdorf

A second tactical approach is to announce immediately you are proposing reconstitution of the Commission, while at the same time recommending that the existing Act expire after the 1976 election, thus forcing the Executive and Congress to readdress the entire issue of election reform after the election-Option 2. Those who support this approach think that since this is our desired approach anyway, we should publicly announce it at the outset in order to indicate that we are fully aware of the fundamental problems in the law as it now exists. Moreover, such an approach avoids staking out a position which we do not realistically expect to attain.

Recommended by:

