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THE WHITE HOUSE
WASHINGTON

February 13, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN
FROM: JAMES E. CONNOR *JEC*
SUBJECT: Amendments to the Federal
Election Act

The President reviewed your memorandum of February 12 and approved the following decisions:

- Option A - Maintain the Commission indefinitely but limit the applicability of the laws pertaining to the Commission and public financing to the 1976 elections.
- Option D - Do nothing to repeal the one-house veto provision but state your objection in your message to the Congress.

Please follow-up with appropriate action.

cc: Dick Cheney

THE WHITE HOUSE
WASHINGTON

February 12, 1976

MR PRESIDENT:

Philip Buchen's memorandum 2/12/76
Amendments to the Federal Election Act

Staffing of the attached memorandum resulted in the following:

Max Friedersdorf, Rogers Morton, Bo Callaway,
and Jim Lynn --- Recommend Options A and D.
Jack Marsh --- Recommends Option B.

Jim Connor


~~THE PRESIDENT HAS SEEN~~

THE WHITE HOUSE

WASHINGTON

February 12, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP BUCHEN 

SUBJECT: Amendments to the Federal Election Act

Attached at Tab A for your consideration is a draft bill prepared by the Department of Justice to amend the Federal election laws as a result of the Supreme Court's opinion in Buckley v. Valeo. An explanation by Justice of its provisions is attached at Tab B. As drafted, the bill would basically accomplish the following:

1. Reconstitute the Federal Election Commission by providing for six Presidential appointees to be confirmed by the Senate;
2. Eliminate the one-house veto provisions of the law that permits either house of Congress to disapprove regulations by the Commission within 30 legislative days of submission by the FEC to Congress; and
3. Make the provisions pertaining to most of the laws with which the Commission is concerned, including campaign financing, inapplicable to elections after 1976, while still retaining the key prohibitions of the present law, including those limiting contributions by corporations, labor unions, government contractors, foreign nationals, and cash contributions.

In order to finalize the bill to be submitted to Congress, your decision is required on the following options:

OPTION A: Limit the applicability of certain provisions of the present law to elections occurring before January 1, 1977, and related runoff elections, without abolishing the Commission on a date certain so that it may continue its investigations and civil enforcement proceedings for so long as it takes to resolve them, just as the present draft bill provides in Section 6.

PRO

- °Provides an independent enforcement mechanism for the 1976 elections that will last as long as it takes to complete all investigations and civil enforcement proceedings.
- °Limits to the 1976 elections the applicability of provisions of the law dealing with the Commission, the present public financing scheme, and limitations on contributions and, therefore, clears the way for completely new legislation in 1977. Leaves an experienced Commission intact which could continue as the body charged with administering such revised election law as may be passed in 1977.

CON

- °Would continue a Commission in existence with progressively fewer responsibilities for so long as it may take to complete all of its investigations and civil enforcement proceedings, which could take as long as three years or more if the Commission is not sooner terminated or replaced by a new statute.
- °Creation of a new Commission by future legislation with different members may

seem inappropriate if the present Commission remains in office.

- °Permits Congress to do nothing and escape the consequences of election reforms that are embodied in the present law, and so may be perceived by supporters of the law as a defeat for all their reform efforts.

OPTION B: Abolish the Commission on a date certain in 1977, and transfer to the Department of Justice its records and the authority to continue investigations and civil enforcement proceedings begun by the Commission prior to its termination and to conduct additional investigations and bring additional enforcement actions, but provide that the parts of the present law as specified in Section 6 of the draft bill shall not apply to any election that occurs after December 31, 1976, except related runoff elections.

PRO

- °Avoids maintaining the Commission and staff in place after their principal responsibilities are over and much of their work has been completed.

CON

- °Permits Congress to do nothing and escape election returns that are embodied in the present law, and so may be perceived by supporters of the law as a defeat for all their reform efforts.

OPTION C: Abolish the Commission on a date certain in 1977, and transfer to the Department of Justice its records and the authority to continue investigations and civil enforcement proceedings begun by the Commission prior to its termination and to conduct additional investigations and bring additional enforcement

actions, but saying nothing about making any provisions of the current law apply only to elections that occur after December 31, 1976, except related runoff elections.

PRO

- °Provides an enforcement mechanism for future elections as well as for those in 1976 even if the law is not changed.
- °If the present provisions of the law would continue into future elections under enforcement by the Department of Justice, while the Presidency is still held by a Republican, the Congress may be more inclined to move quickly in reforming the law and creating a new independent enforcement mechanism than if the present law automatically expires and could not apply to future elections.

CON

- °Could be perceived as indicating your opposition to an independent enforcement mechanism against a background of failure of Justice to enforce previous election laws vigorously.
- °Could result in leaving undesirable provisions of present laws in force under an enforcement mechanism controlled by one political party to the disadvantage of the other.

OPTION D: Strike Section 4 of the draft bill which eliminates the one-house veto provision of the present law.

PRO

- °Simplifies your initiative and avoids a provision which will be vigorously opposed in the Congress and has no chance of passage.

CON

°Failure to advocate elimination of the one-house veto provision may imply your acceptance of this unconstitutional provision in the present law, although this effect may be overcome if in submitting the bill with this section omitted, you do register your opposition to the one-house veto provision and indicate that in future reform legislation to be proposed by you it will be eliminated.

RECOMMENDATIONS

I recommend that you approve OPTION A because it continues independent enforcement of the election laws, and coupled with public support for continuing election reform, it effectively insures consideration by Congress next year of reform proposals, including your own.

I also recommend OPTION D, noting the one-house veto problem in your message, rather than in the bill, because the issue is not understood by the public, it has no chance of success on the Hill, and to raise it in the bill is inconsistent with your request that Congress limit itself to the more urgent question of reconstituting the Commission.

DECISIONS

OPTION A

Maintain the Commission indefinitely but limit the applicability of the laws pertaining to the Commission and public financing to the 1976 elections.

APPROVE

SP 7

DISAPPROVE _____

OPTION B

Abolish the Commission in 1977 and transfer to Justice the Commission's authority to enforce the election laws, limited to the 1976 election.

APPROVE _____ DISAPPROVE _____

OPTION C

Abolish the Commission in 1977 and transfer its enforcement authority to Justice without limiting the applicability of the current election laws.

APPROVE _____ DISAPPROVE _____

OPTION D

Do nothing to repeal the one-house veto provision but state your objection in your message to the Congress.

APPROVE NR4 DISAPPROVE _____

A BILL

To establish the offices of members of the Federal Election Commission as officers appointed by the President, by and with the advice and consent of the Senate, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Federal Election Campaign Act Amendments of 1976.

SEC. 2(a). The text of paragraph 1 of section 310(a) of the Federal Election Campaign Act of 1971 (hereinafter "the Act") (2 U.S.C. 437c(a)) is amended to read as follows:

"There is established a Commission to be known as the Federal Election Commission. The Commission is composed of 6 members, appointed by the President, by and with the advice and consent of the Senate. No more than three of the members shall be affiliated with the same political party."

(b) (1) Subparagraph (A) and subparagraph (D) of section 310(a) (2) of the Act (2 U.S.C. 437c(a) (2) (A), 437c(a) (2) (D)) each are amended by striking out "of the members appointed under paragraph (1) (A)".

(2) Subparagraph (B) and subparagraph (E) of section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)(B), 437c(a)(2)(E)) each are amended by striking out "of the members appointed under paragraph (1)(B)".

(3) Subparagraph (C) and subparagraph (F) of section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)(C), 437(a)(2)(F)) each are amended by striking out "of the members appointed under paragraph (1)(C)".

SEC. 3(a). The terms of the persons serving as members of the Federal Election Commission upon the enactment of this Act shall terminate upon the appointment and confirmation of members of the Commission pursuant to this Act.

(b) The persons first appointed under the amendments made by the first section of this Act shall be considered to be the first appointed under section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)), as amended herein, for purposes of determining the length of terms of those persons and their successors.

(c) The provision of section 310(a)(3) of the Act (2 U.S.C. 437c(a)(3)), forbidding appointment to the Federal Election Commission of any person currently elected or appointed as an officer or employee in the executive, legislative, or judicial branch of the Government of the United States, shall not

apply to any person appointed under the amendments made by the first section of this Act solely because such person is a member of the Commission on the date of enactment of this Act.

(d) Section 310(a)(4) of the Act (2 U.S.C. 437c(a)(4)) is amended by striking out "(other than the Secretary of the Senate and the Clerk of the House of Representatives)".

(e) Section 310(a)(5) of the Act (2 U.S.C. 437c(a)(5)) is amended by striking out "(other than the Secretary of the Senate and the Clerk of the House of Representatives)".

SEC. 4. Section 316 of the Act (2 U.S.C. 438) is amended by striking out subsection (c), 2 U.S.C. 438(c), and redesignating subsection (d), as subsection (c).

SEC. 5. All actions heretofore taken by the Commission shall remain in effect until modified, superseded or repealed according to law.

SEC. 6. The provisions of ^{Chapter 14 of Title 2, the United} /States /of section 608 of ^{Code} Title 18, and of Chapters 95 and 96 of Title 26 shall not apply to any election, as defined in Section 301 of the Act (2 U.S.C. 431(a)), that occurs after December 31, 1976, except run-offs relating to elections occurring before such date.

Department of Justice
Washington, D.C. 20530

MEMORANDUM FOR THE HONORABLE BARRY N. ROTH
Assistant Counsel to the President

Re: Federal Election Legislation

Attached is a draft bill to deal with the problems raised by Buckley v. Valeo. Three points bear notice:

1. Section 2, in addition to making all Commission members Presidential appointees, eliminates the Secretary of the Senate and the Clerk of the House as non-voting ex officio members. The Supreme Court's opinion does not deal directly with the problem of these non-voting members. We believe, however, that the spirit of the opinion, and perhaps even the letter of the Constitution, requires this elimination. Their subjection to the legislative branch is even greater than that of the present voting Commission members, since they are not only appointed by Congress but paid by it. Of course, the absence of voting power is significant, but perhaps not determinative for constitutional purposes. The power to be present and participate in discussions is the power to influence. Normally, a judge, Commissioner, juror or director, who is disqualified for conflict of interest, is expected to recuse himself not merely from voting but from deliberations as well.

There may well be matters affecting Commission policy where it would not be appropriate to have a direct representative of the House or Senate present. In Weiner v. United States, 357 U.S. 349, 355-56 (1958), the Supreme Court stressed that an independent agency should decide matters on the merits "entirely free from the control or coercive influence, direct or indirect * * * of either the Executive or the Congress." In Buckley the Court used similar words in describing the Commission's functions as "exercised free from day-to-day supervision of either Congress or the Executive Branch." (p. 134). As long as two officers of the legislative branch sit on the Commission there is thus a danger that the constitutional requirements will not be met.



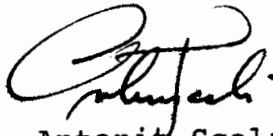
2. Section 4 eliminates the one-House veto of Commission regulations. Thus far all regulations which the Commission has attempted to issue have been disapproved. This is strong evidence of how the device can and will be used to give the Congress control over those very functions which the Court found to be executive in nature. It is thus contrary to the spirit of the Supreme Court ruling on separation of powers, although the Court expressly declined to rule on this point (p. 134, note 176).

We realize that both of these first two points erode to some extent the principle of noncontroversiality which is one of the objectives of the Administration's approach to this matter. However, an equally important objective is the assuring of a campaign law which will be invulnerable to further constitutional attack. Both the nonvoting member and the one-House veto features -- particularly the latter, since it was specifically addressed in the Court's opinion -- provide a clear basis for renewed litigation by the groups which brought the initial suit, with the attendant uncertainty that such litigation would produce.

3. Section 6 would make most of the laws with which the Commission is concerned inapplicable to elections after 1976. The cut-off does not, however, apply to all the provisions over which the Commission has jurisdiction and which were added or amended by the 1974 law. Sections 610, 611, 613, 614, 615, 616 and 617, which deal with contributions by banks, corporations, labor unions, government contractors and foreign nationals, anonymous contributions, cash contributions and similar matters are left unaffected. Attempts to cut back on these anticorruption provisions might be viewed as regressive. With the possible exception of Section 610 (which you should consider), they are generally unexceptionable restrictions and would not properly be considered part of the same "package" as that which produced the FEC provisions.

Chapter 95 of Title 26, the Presidential Election Campaign Fund Act, and Chapter 96 of Title 26, the Presidential Primary Matching Payment Account Act are covered by Section 6. However, 26 U.S.C. 6096

which provides for the \$1 tax check-off is not affected, so that a potential source of funds would be available if Congress wishes to reinstitute campaign financing.

A handwritten signature in black ink, appearing to read "Antonin Scalia". The signature is fluid and cursive, with a large initial "A" and "S".

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

STAFFING

February 12, 1976

MR PRESIDENT:

Philip Buchen's memorandum 2/12/76
Amendments to the Federal Election Act

Staffing of the attached memorandum resulted in the following:

Max Friedersdorf, Rogers Morton, Bo Callaway,
and Jim Lynn --- Recommend Options A and D.

Jack Marsh --- Recommends Option B.


Jim Connor

THE WHITE HOUSE

WASHINGTON

February 12, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP BUCHEN 

SUBJECT: Amendments to the Federal Election Act

Attached at Tab A for your consideration is a draft bill prepared by the Department of Justice to amend the Federal election laws as a result of the Supreme Court's opinion in Buckley v. Valeo. An explanation by Justice of its provisions is attached at Tab B. As drafted, the bill would basically accomplish the following:

1. Reconstitute the Federal Election Commission by providing for six Presidential appointees to be confirmed by the Senate;
2. Eliminate the one-house veto provisions of the law that permits either house of Congress to disapprove regulations by the Commission within 30 legislative days of submission by the FEC to Congress; and
3. Make the provisions pertaining to most of the laws with which the Commission is concerned, including campaign financing, inapplicable to elections after 1976, while still retaining the key prohibitions of the present law, including those limiting contributions by corporations, labor unions, government contractors, foreign nationals, and cash contributions.

In order to finalize the bill to be submitted to Congress, your decision is required on the following options:

OPTION A: Limit the applicability of certain provisions of the present law to elections occurring before January 1, 1977, and related runoff elections, without abolishing the Commission on a date certain so that it may continue its investigations and civil enforcement proceedings for so long as it takes to resolve them, just as the present draft bill provides in Section 6.

PRO

- °Provides an independent enforcement mechanism for the 1976 elections that will last as long as it takes to complete all investigations and civil enforcement proceedings.
- °Limits to the 1976 elections the applicability of provisions of the law dealing with the Commission, the present public financing scheme, and limitations on contributions and, therefore, clears the way for completely new legislation in 1977. Leaves an experienced Commission intact which could continue as the body charged with administering such revised election law as may be passed in 1977.

CON

- °Would continue a Commission in existence with progressively fewer responsibilities for so long as it may take to complete all of its investigations and civil enforcement proceedings, which could take as long as three years or more if the Commission is not sooner terminated or replaced by a new statute.
- °Creation of a new Commission by future legislation with different members may

seem inappropriate if the present Commission remains in office.

- °Permits Congress to do nothing and escape the consequences of election reforms that are embodied in the present law, and so may be perceived by supporters of the law as a defeat for all their reform efforts.

OPTION B: Abolish the Commission on a date certain in 1977, and transfer to the Department of Justice its records and the authority to continue investigations and civil enforcement proceedings begun by the Commission prior to its termination and to conduct additional investigations and bring additional enforcement actions, but provide that the parts of the present law as specified in Section 6 of the draft bill shall not apply to any election that occurs after December 31, 1976, except related runoff elections.

PRO

- °Avoids maintaining the Commission and staff in place after their principal responsibilities are over and much of their work has been completed.

CON

- °Permits Congress to do nothing and escape election returns that are embodied in the present law, and so may be perceived by supporters of the law as a defeat for all their reform efforts.

OPTION C: Abolish the Commission on a date certain in 1977, and transfer to the Department of Justice its records and the authority to continue investigations and civil enforcement proceedings begun by the Commission prior to its termination and to conduct additional investigations and bring additional enforcement

actions, but saying nothing about making any provisions of the current law apply only to elections that occur after December 31, 1976, except related runoff elections.

PRO

- °Provides an enforcement mechanism for future elections as well as for those in 1976 even if the law is not changed.
- °If the present provisions of the law would continue into future elections under enforcement by the Department of Justice, while the Presidency is still held by a Republican, the Congress may be more inclined to move quickly in reforming the law and creating a new independent enforcement mechanism than if the present law automatically expires and could not apply to future elections.

CON

- °Could be perceived as indicating your opposition to an independent enforcement mechanism against a background of failure of Justice to enforce previous election laws vigorously.
- °Could result in leaving undesirable provisions of present laws in force under an enforcement mechanism controlled by one political party to the disadvantage of the other.

OPTION D: Strike Section 4 of the draft bill which eliminates the one-house veto provision of the present law.

PRO

- °Simplifies your initiative and avoids a provision which will be vigorously opposed in the Congress and has no chance of passage.

CON

°Failure to advocate elimination of the one-house veto provision may imply your acceptance of this unconstitutional provision in the present law, although this effect may be overcome if in submitting the bill with this section omitted, you do register your opposition to the one-house veto provision and indicate that in future reform legislation to be proposed by you it will be eliminated.

RECOMMENDATIONS

I recommend that you approve OPTION A because it continues independent enforcement of the election laws, and coupled with public support for continuing election reform, it effectively insures consideration by Congress next year of reform proposals, including your own.

I also recommend OPTION D, noting the one-house veto problem in your message, rather than in the bill, because the issue is not understood by the public, it has no chance of success on the Hill, and to raise it in the bill is inconsistent with your request that Congress limit itself to the more urgent question of reconstituting the Commission.

DECISIONS

OPTION A

Maintain the Commission indefinitely but limit the applicability of the laws pertaining to the Commission and public financing to the 1976 elections.

APPROVE _____ DISAPPROVE _____

OPTION B

Abolish the Commission in 1977 and transfer to Justice the Commission's authority to enforce the election laws, limited to the 1976 election.

APPROVE _____ DISAPPROVE _____

OPTION C

Abolish the Commission in 1977 and transfer its enforcement authority to Justice without limiting the applicability of the current election laws.

APPROVE _____ DISAPPROVE _____

OPTION D

Do nothing to repeal the one-house veto provision but state your objection in your message to the Congress.

APPROVE _____ DISAPPROVE _____

A BILL

To establish the offices of members of the Federal Election Commission as officers appointed by the President, by and with the advice and consent of the Senate, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Federal Election Campaign Act Amendments of 1976.

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"There is established a Commission to be known as the Federal Election Commission. The Commission is composed of 6 members, appointed by the President, by and with the advice and consent of the Senate. No more than three of the members shall be affiliated with the same political party."

(b) (1) Subparagraph (A) and subparagraph (D) of section 310(a) (2) of the Act (2 U.S.C. 437c(a) (2) (A), 437c(a) (2) (D)) each are amended by striking out "of the members appointed under paragraph (1) (A)".

(2) Subparagraph (B) and subparagraph (E) of section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)(B), 437c(a)(2)(E)) each are amended by striking out "of the members appointed under paragraph (1)(B)".

(3) Subparagraph (C) and subparagraph (F) of section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)(C), 437(a)(2)(F)) each are amended by striking out "of the members appointed under paragraph (1)(C)".

SEC. 3(a). The terms of the persons serving as members of the Federal Election Commission upon the enactment of this Act shall terminate upon the appointment and confirmation of members of the Commission pursuant to this Act.

(b) The persons first appointed under the amendments made by the first section of this Act shall be considered to be the first appointed under section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)), as amended herein, for purposes of determining the length of terms of those persons and their successors.

(c) The provision of section 310(a)(3) of the Act (2 U.S.C. 437c(a)(3)), forbidding appointment to the Federal Election Commission of any person currently elected or appointed as an officer or employee in the executive, legislative, or judicial branch of the Government of the United States, shall not

apply to any person appointed under the amendments made by the first section of this Act solely because such person is a member of the Commission on the date of enactment of this Act.

(d) Section 310(a)(4) of the Act (2 U.S.C. 437c(a)(4)) is amended by striking out "(other than the Secretary of the Senate and the Clerk of the House of Representatives)".

(e) Section 310(a)(5) of the Act (2 U.S.C. 437c(a)(5)) is amended by striking out "(other than the Secretary of the Senate and the Clerk of the House of Representatives)".

SEC. 4. Section 316 of the Act (2 U.S.C. 438) is amended by striking out subsection (c), 2 U.S.C. 438(c), and redesignating subsection (d), as subsection (c).

SEC. 5. All actions heretofore taken by the Commission shall remain in effect until modified, superseded or repealed according to law.

Chapter 14 of Title 2, the United States Code

SEC. 6. The provisions of /States /of section 608 of Code Title 18, and of Chapters 95 and 96 of Title 26 shall not apply to any election, as defined in Section 301 of the Act (2 U.S.C. 431(a)), that occurs after December 31, 1976, except run-offs relating to elections occurring before such date.

B

Department of Justice
Washington, D.C. 20530

MEMORANDUM FOR THE HONORABLE BARRY N. ROTH
Assistant Counsel to the President

Re: Federal Election Legislation

Attached is a draft bill to deal with the problems raised by Buckley v. Valeo. Three points bear notice:

1. Section 2, in addition to making all Commission members Presidential appointees, eliminates the Secretary of the Senate and the Clerk of the House as non-voting ex officio members. The Supreme Court's opinion does not deal directly with the problem of these non-voting members. We believe, however, that the spirit of the opinion, and perhaps even the letter of the Constitution, requires this elimination. Their subjection to the legislative branch is even greater than that of the present voting Commission members, since they are not only appointed by Congress but paid by it. Of course, the absence of voting power is significant, but perhaps not determinative for constitutional purposes. The power to be present and participate in discussions is the power to influence. Normally, a judge, Commissioner, juror or director, who is disqualified for conflict of interest, is expected to recuse himself not merely from voting but from deliberations as well.

There may well be matters affecting Commission policy where it would not be appropriate to have a direct representative of the House or Senate present. In Weiner v. United States, 357 U.S. 349, 355-56 (1958), the Supreme Court stressed that an independent agency should decide matters on the merits "entirely free from the control or coercive influence, direct or indirect * * * of either the Executive or the Congress." In Buckley the Court used similar words in describing the Commission's functions as "exercised free from day-to-day supervision of either Congress or the Executive Branch." (p. 134). As long as two officers of the legislative branch sit on the Commission there is thus a danger that the constitutional requirements will not be met.



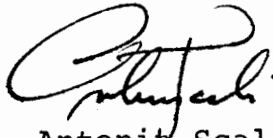
2. Section 4 eliminates the one-House veto of Commission regulations. Thus far all regulations which the Commission has attempted to issue have been disapproved. This is strong evidence of how the device can and will be used to give the Congress control over those very functions which the Court found to be executive in nature. It is thus contrary to the spirit of the Supreme Court ruling on separation of powers, although the Court expressly declined to rule on this point (p. 134, note 176).

We realize that both of these first two points erode to some extent the principle of noncontroversiality which is one of the objectives of the Administration's approach to this matter. However, an equally important objective is the assuring of a campaign law which will be invulnerable to further constitutional attack. Both the nonvoting member and the one-House veto features -- particularly the latter, since it was specifically addressed in the Court's opinion -- provide a clear basis for renewed litigation by the groups which brought the initial suit, with the attendant uncertainty that such litigation would produce.

3. Section 6 would make most of the laws with which the Commission is concerned inapplicable to elections after 1976. The cut-off does not, however, apply to all the provisions over which the Commission has jurisdiction and which were added or amended by the 1974 law. Sections 610, 611, 613, 614, 615, 616 and 617, which deal with contributions by banks, corporations, labor unions, government contractors and foreign nationals, anonymous contributions, cash contributions and similar matters are left unaffected. Attempts to cut back on these anticorruption provisions might be viewed as regressive. With the possible exception of Section 610 (which you should consider), they are generally unexceptionable restrictions and would not properly be considered part of the same "package" as that which produced the FEC provisions.

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which provides for the \$1 tax check-off is not affected, so that a potential source of funds would be available if Congress wishes to reinstitute campaign financing.

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Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: February 12, 1976

Time:

FOR ACTION:

- ✓ Jack Marsh
- ✓ Rogers Morton
- ✓ Max Friedersdorf

cc (for information):

✓ Jim Lynn

FROM THE STAFF SECRETARY

DUE: Date: IMMEDIATE TURN-AROUND Time:

SUBJECT:

Philip Buchen memorandum 2/12/76
re Amendments to the Federal Election
Act.

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

Marsh - option B
Friedersdorf - option A and D
Morton - } options A and D
Callaway - }
Lynn - options A + D
(Callahan)

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James E. Connor
For the President

THE WHITE HOUSE

WASHINGTON

February 12, 1976

MEMORANDUM FOR: JAMES E. CONNOR
FROM: MAX FRIEDERSDORF *mf*
SUBJECT: Philip Buchen memorandum 2/12/76
re Amendments to the Federal Election Act

The Office of Legislative Affairs concurs with Option A and D.

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: February 12, 1976

Time:

FOR ACTION:

Jack Marsh
* Rogers Morton
Max Friedersdorf

Jim Lynn

cc (for information):

Jerry Jones
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: IMMEDIATE TURN-AROUND Time:

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ACTION REQUESTED:

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X For Your Recommendations

_____ Prepare Agenda and Brief

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X For Your Comments

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REMARKS:

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James E. Connor
For the President

THE WHITE HOUSE

WASHINGTON

February 12, 1976

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FROM: PHILIP BUCHEN 

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1. Reconstitute the Federal Election Commission by providing for six Presidential appointees to be confirmed by the Senate;
2. Eliminate the one-house veto provisions of the law that permits either house of Congress to disapprove regulations by the Commission within 30 legislative days of submission by the FEC to Congress; and
3. Make the provisions pertaining to most of the laws with which the Commission is concerned, including campaign financing, inapplicable to elections after 1976, while still retaining the key prohibitions of the present law, including those limiting contributions by corporations, labor unions, government contractors, foreign nationals, and cash contributions.

In order to finalize the bill to be submitted to Congress, your decision is required on the following options:

OPTION A: Limit the applicability of certain provisions of the present law to elections occurring before January 1, 1977, and related runoff elections, without abolishing the Commission on a date certain so that it may continue its investigations and civil enforcement proceedings for so long as it takes to resolve them, just as the present draft bill provides in Section 6.

PRO

- °Provides an independent enforcement mechanism for the 1976 elections that will last as long as it takes to complete all investigations and civil enforcement proceedings.
- °Limits to the 1976 elections the applicability of provisions of the law dealing with the Commission, the present public financing scheme, and limitations on contributions and, therefore, clears the way for completely new legislation in 1977. Leaves an experienced Commission intact which could continue as the body charged with administering such revised election law as may be passed in 1977.

CON

- °Would continue a Commission in existence with progressively fewer responsibilities for so long as it may take to complete all of its investigations and civil enforcement proceedings, which could take as long as three years or more if the Commission is not sooner terminated or replaced by a new statute.
- °Creation of a new Commission by future legislation with different members may

seem inappropriate if the present Commission remains in office.

- °Permits Congress to do nothing and escape the consequences of election reforms that are embodied in the present law, and so may be perceived by supporters of the law as a defeat for all their reform efforts.

OPTION B: Abolish the Commission on a date certain in 1977, and transfer to the Department of Justice its records and the authority to continue investigations and civil enforcement proceedings begun by the Commission prior to its termination and to conduct additional investigations and bring additional enforcement actions, but provide that the parts of the present law as specified in Section 6 of the draft bill shall not apply to any election that occurs after December 31, 1976, except related runoff elections.

PRO

- °Avoids maintaining the Commission and staff in place after their principal responsibilities are over and much of their work has been completed.

CON

- °Permits Congress to do nothing and escape election returns that are embodied in the present law, and so may be perceived by supporters of the law as a defeat for all their reform efforts.

OPTION C: Abolish the Commission on a date certain in 1977, and transfer to the Department of Justice its records and the authority to continue investigations and civil enforcement proceedings begun by the Commission prior to its termination and to conduct additional investigations and bring additional enforcement

actions, but saying nothing about making any provisions of the current law apply only to elections that occur after December 31, 1976, except related runoff elections.

PRO

- °Provides an enforcement mechanism for future elections as well as for those in 1976 even if the law is not changed.
- °If the present provisions of the law would continue into future elections under enforcement by the Department of Justice, while the Presidency is still held by a Republican, the Congress may be more inclined to move quickly in reforming the law and creating a new independent enforcement mechanism than if the present law automatically expires and could not apply to future elections.

CON

- °Could be perceived as indicating your opposition to an independent enforcement mechanism against a background of failure of Justice to enforce previous election laws vigorously.
- °Could result in leaving undesirable provisions of present laws in force under an enforcement mechanism controlled by one political party to the disadvantage of the other.

OPTION D: Strike Section 4 of the draft bill which eliminates the one-house veto provision of the present law.

PRO

- °Simplifies your initiative and avoids a provision which will be vigorously opposed in the Congress and has no chance of passage.

CON

°Failure to advocate elimination of the one-house veto provision may imply your acceptance of this unconstitutional provision in the present law, although this effect may be overcome if in submitting the bill with this section omitted, you do register your opposition to the one-house veto provision and indicate that in future reform legislation to be proposed by you it will be eliminated.

RECOMMENDATIONS

I recommend that you approve OPTION A because it continues independent enforcement of the election laws, and coupled with public support for continuing election reform, it effectively insures consideration by Congress next year of reform proposals, including your own.

I also recommend OPTION D, noting the one-house veto problem in your message, rather than in the bill, because the issue is not understood by the public, it has no chance of success on the Hill, and to raise it in the bill is inconsistent with your request that Congress limit itself to the more urgent question of reconstituting the Commission.

DECISIONS

OPTION A

Maintain the Commission indefinitely but limit the applicability of the laws pertaining to the Commission and public financing to the 1976 elections.

APPROVE _____ DISAPPROVE _____

OPTION B

Abolish the Commission in 1977 and transfer to Justice the Commission's authority to enforce the election laws, limited to the 1976 election.

APPROVE M DISAPPROVE

OPTION C

Abolish the Commission in 1977 and transfer its enforcement authority to Justice without limiting the applicability of the current election laws.

APPROVE DISAPPROVE

OPTION D

Do nothing to repeal the one-house veto provision but state your objection in your message to the Congress.

APPROVE DISAPPROVE

A BILL

To establish the offices of members of the Federal Election Commission as officers appointed by the President, by and with the advice and consent of the Senate, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Federal Election Campaign Act Amendments of 1976.

SEC. 2(a). The text of paragraph 1 of section 310(a) of the Federal Election Campaign Act of 1971 (hereinafter "the Act") (2 U.S.C. 437c(a)) is amended to read as follows:

"There is established a Commission to be known as the Federal Election Commission. The Commission is composed of 6 members, appointed by the President, by and with the advice and consent of the Senate. No more than three of the members shall be affiliated with the same political party."

(b) (1) Subparagraph (A) and subparagraph (D) of section 310(a) (2) of the Act (2 U.S.C. 437c(a) (2) (A), 437c(a) (2) (D)) each are amended by striking out "of the members appointed under paragraph (1) (A)".

(2) Subparagraph (B) and subparagraph (E) of section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)(B), 437c(a)(2)(E)) each are amended by striking out "of the members appointed under paragraph (1)(B)".

(3) Subparagraph (C) and subparagraph (F) of section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)(C), 437(a)(2)(F)) each are amended by striking out "of the members appointed under paragraph (1)(C)".

SEC. 3(a). The terms of the persons serving as members of the Federal Election Commission upon the enactment of this Act shall terminate upon the appointment and confirmation of members of the Commission pursuant to this Act.

(b) The persons first appointed under the amendments made by the first section of this Act shall be considered to be the first appointed under section 310(a)(2) of the Act (2 U.S.C. 437c(a)(2)), as amended herein, for purposes of determining the length of terms of those persons and their successors.

(c) The provision of section 310(a)(3) of the Act (2 U.S.C. 437c(a)(3)), forbidding appointment to the Federal Election Commission of any person currently elected or appointed as an officer or employee in the executive, legislative, or judicial branch of the Government of the United States, shall not

apply to any person appointed under the amendments made by the first section of this Act solely because such person is a member of the Commission on the date of enactment of this Act.

(d) Section 310(a)(4) of the Act (2 U.S.C. 437c(a)(4)) is amended by striking out "(other than the Secretary of the Senate and the Clerk of the House of Representatives)".

(e) Section 310(a)(5) of the Act (2 U.S.C. 437c(a)(5)) is amended by striking out "(other than the Secretary of the Senate and the Clerk of the House of Representatives)".

SEC. 4. Section 316 of the Act (2 U.S.C. 438) is amended by striking out subsection (c), 2 U.S.C. 438(c), and redesignating subsection (d), as subsection (c).

SEC. 5. All actions heretofore taken by the Commission shall remain in effect until modified, superseded or repealed according to law.

SEC. 6. The provisions of ^{Chapter 14 of Title 2, the United} /States /of section 608 of _{Code} Title 18, and of Chapters 95 and 96 of Title 26 shall not apply to any election, as defined in Section 301 of the Act (2 U.S.C. 431(a)), that occurs after December 31, 1976, except run-offs relating to elections occurring before such date.

B

Department of Justice
Washington, D.C. 20530

MEMORANDUM FOR THE HONORABLE BARRY N. ROTH
Assistant Counsel to the President

Re: Federal Election Legislation

Attached is a draft bill to deal with the problems raised by Buckley v. Valeo. Three points bear notice:

1. Section 2, in addition to making all Commission members Presidential appointees, eliminates the Secretary of the Senate and the Clerk of the House as non-voting ex officio members. The Supreme Court's opinion does not deal directly with the problem of these non-voting members. We believe, however, that the spirit of the opinion, and perhaps even the letter of the Constitution, requires this elimination. Their subjection to the legislative branch is even greater than that of the present voting Commission members, since they are not only appointed by Congress but paid by it. Of course, the absence of voting power is significant, but perhaps not determinative for constitutional purposes. The power to be present and participate in discussions is the power to influence. Normally, a judge, Commissioner, juror or director, who is disqualified for conflict of interest, is expected to recuse himself not merely from voting but from deliberations as well.

There may well be matters affecting Commission policy where it would not be appropriate to have a direct representative of the House or Senate present. In Weiner v. United States, 357 U.S. 349, 355-56 (1958), the Supreme Court stressed that an independent agency should decide matters on the merits "entirely free from the control or coercive influence, direct or indirect * * * of either the Executive or the Congress." In Buckley the Court used similar words in describing the Commission's functions as "exercised free from day-to-day supervision of either Congress or the Executive Branch." (p. 134). As long as two officers of the legislative branch sit on the Commission there is thus a danger that the constitutional requirements will not be met.



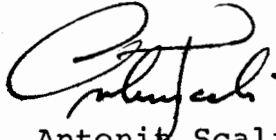
2. Section 4 eliminates the one-House veto of Commission regulations. Thus far all regulations which the Commission has attempted to issue have been disapproved. This is strong evidence of how the device can and will be used to give the Congress control over those very functions which the Court found to be executive in nature. It is thus contrary to the spirit of the Supreme Court ruling on separation of powers, although the Court expressly declined to rule on this point (p. 134, note 176).

We realize that both of these first two points erode to some extent the principle of noncontroversiality which is one of the objectives of the Administration's approach to this matter. However, an equally important objective is the assuring of a campaign law which will be invulnerable to further constitutional attack. Both the nonvoting member and the one-House veto features -- particularly the latter, since it was specifically addressed in the Court's opinion -- provide a clear basis for renewed litigation by the groups which brought the initial suit, with the attendant uncertainty that such litigation would produce.

3. Section 6 would make most of the laws with which the Commission is concerned inapplicable to elections after 1976. The cut-off does not, however, apply to all the provisions over which the Commission has jurisdiction and which were added or amended by the 1974 law. Sections 610, 611, 613, 614, 615, 616 and 617, which deal with contributions by banks, corporations, labor unions, government contractors and foreign nationals, anonymous contributions, cash contributions and similar matters are left unaffected. Attempts to cut back on these anticorruption provisions might be viewed as regressive. With the possible exception of Section 610 (which you should consider), they are generally unexceptionable restrictions and would not properly be considered part of the same "package" as that which produced the FEC provisions.

Chapter 95 of Title 26, the Presidential Election Campaign Fund Act, and Chapter 96 of Title 26, the Presidential Primary Matching Payment Account Act are covered by Section 6. However, 26 U.S.C. 6096

which provides for the \$1 tax check-off is not affected, so that a potential source of funds would be available if Congress wishes to reinstitute campaign financing.

A handwritten signature in black ink, appearing to read "Antonin Scalia". The signature is fluid and cursive, with a large initial "A" and a distinct "S" for "Scalia".

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

—
THE WHITE HOUSE
WASHINGTON

Jim Connor:

Jim - Bo
Calloway agrees with
Dag on option A & D
being the best w: FEC

Jim Austin

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: February 12, 1976

Time:

FOR ACTION:

cc (for information):

Jack Marsh

Jim Lynn

Jerry Jones

Dave Gergen

Rogers Morton

Max Friedersdorf

FROM THE STAFF SECRETARY

DUE: Date: IMMEDIATE TURN-AROUND Time:

SUBJECT:

Philip Buchen memorandum 2/12/76
re Amendments to the Federal Election
Act.

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments


Draft Remarks

REMARKS:

Option ASD
RCM

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.


James E. Connor
For the President

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: February 11, 1976

Time: 1:50 p.m.

FOR ACTION:

✓ Jack Marsh

✓ Rog Morton

✓ Phil Buchen

✓ Jim Cavanaugh

Ron Messer — FYI

Gergen
Gergen

cc (for information):

Roth
Callaway
Jones

FROM THE STAFF SECRETARY

to Bob Linder

DUE: Date:

TODAY

Time:

4:00 P.M.

SUBJECT:

Campaign Finance Message to the Congress
drafted by Gergen

ACTION REQUESTED:

___ For Necessary Action

X For Your Recommendations

___ Prepare Agenda and Brief

___ Draft Reply

X For Your Comments

___ Draft Remarks

REMARKS:

PLEASE NOTE DEADLINE --- DUE AT 4:00 TODAY

Marsh - one slight change
Morton - OK

Gergen is handling

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James E. Connor
For the President

(GERGEN)

February 11, 1976

CAMPAIGN FINANCE MESSAGE

To the Congress of the United States:

In less than three weeks time, unless there is affirmative action by the Congress, the Federal Election Commission will be stripped of most of its powers.

I do not believe that we can afford to let that happen. The American people can and should expect that our elections in this Bicentennial year will be free of abuse. And they know that the Federal Election Commission is the single most effective unit for meeting that challenge.

The Commission has become a symbol of our commitment to clean elections. If we gut it, we will erode public confidence and invite new chaos in our political process. If we maintain it, we can rebuild and restore the public faith that is essential for a democracy.

The fate of the commission has been called into question, of course, by the decision of the Supreme Court on January 30. The Court ruled that the Commission was inappropriately constituted because it was delegated executive powers but, in violation of the separation of powers doctrine, some of the members of the commission were appointed solely by the Congress. The Court said that this defect could be cured by having all members of the Commission nominated by the President upon the advice and consent of the Senate. Under the Court's ruling, the Commission was given a 30-day lease on life so that the defect might be corrected.

I fully recognize that other aspects of the Court's decision and that, indeed, the original law itself have created valid concerns among Members of Congress. I share many of those concerns, and I share in a desire to reform and improve upon the current law.

I am also of the firm opinion, however, that the 30-day period provided by the Court to reconstitute the Commission is not sufficient to undertake a comprehensive review and reform of the campaign laws. And most assuredly, this 30-day period must not become a convenient excuse to mutilate the campaign reforms that are already on the books. There is a growing danger that opponents of campaign reform will exploit this opportunity for their own ends. This cannot be tolerated; there must be no retreat from our commitment to clean elections.

Therefore, I am today submitting two legislative recommendations to the Congress for immediate action -- recommendations that I discussed with the bipartisan leaders of the Congress _____ days ago.

First, I propose that the Federal Election Commission be reconstituted so that all of its six members are nominated by the President and confirmed by the Senate. This action should be taken before the February 29 deadline.

Second, to ensure that a full-scale review and reform of the election laws are ultimately undertaken, I propose that we limit the life of our current campaign laws through the end of the 1976 elections. When those elections have been completed and all of us have a better understanding of the problems in our current statutes, I will submit to the Congress a new, comprehensive election reform bill to apply to future elections. I also pledge that I will work with the Congress to enact a new law that will meet many of the objections of the current system.

I know there is widespread disagreement within the Congress on what reforms should be undertaken. That controversy is healthy; it bespeaks of a vigorous interest in our political system. But we must not allow our divergent views to disrupt the approaching elections. Our most important task now is to ensure the continued life of the Federal Election Commission, and I urge the Congress to work with me in achieving that goal.

(GERGEN)

February 11, 1976

POSSIBLE TV CLIP ON CAMPAIGN FINANCES

In less than three weeks time, unless there is affirmative action by the Congress, the Federal Election Commission will be stripped of most of its powers.

We must not allow that to happen.

The Commission has become a symbol of our commitment to clean elections. If it is gutted, we will erode public confidence and invite new chaos in our political process.

We can and must reconstitute the Commission in the next three weeks. I am today submitting essential legislation to get that job done, and I urge the Congress to join with me in quick action. There can be no retreat on an issue so fundamental to our democracy.