

Candidate-Organized Political Action Committees: The Subversion of Federal Campaign Regulation

I. Introduction

The 1988 presidential campaign has already begun. With it has come widespread circumvention of federal campaign regulation. Potential presidential candidates have formed political action committees to promote their candidacies, and in so doing have dodged the letter and frustrated the spirit of the Federal Election Campaign Act of 1971 (FECA).¹ Although this type of evasion occurred in earlier elections, it has burgeoned in the current campaign. As a result, we are in the process of electing a president without the benefit of critical safeguards against excessive candidate spending and fundraising.

The Federal Election Campaign Act of 1971 and the FECA Amendments of 1974 form the backbone of modern federal campaign regulation. These laws addressed two central problems: first, campaign expenditures were spiralling beyond all sensible limits,² and second, campaign spending was being funded by large private contributions to candidates.³ Congress' solution to these problems was to set statutory limits on both contributions to federal campaigns⁴ and overall campaign expenditures,⁵ and to use public funds to finance all phases of presidential campaigns.⁶ Congress

1. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (1972 Act); amended by Pub. L. 93-443, 88 Stat. 1263 (1974) (1974 Amendments), Pub. L. 40-283, 90 Stat. 475 (1976) (1976 Amendments), Pub. L. No. 96-187, 93 Stat. 1339 (1980) (1979 Amendments); codified as amended at 2 U.S.C. §§ 431-54 (1982).

2. The House Report accompanying the 1974 Amendments explains that in response to the problem of spiralling campaign costs and increasing campaign expenditures, the committee has adopted specific limits on the amount a candidate and the committees that support his candidacy may spend.

H.R. REP. NO. 1239, 93rd Cong., 2d Sess. 6 (1974) [hereinafter HOUSE REPORT].

3. *Id.* at 13, citing "the dangers of . . . the influence of excessive private political contributions." This interest in regulating an "aspect of political association where the actuality and potential for corruption have been identified" was deemed weighty enough to make the contribution limits of the FECA Amendments of 1974 constitutional, despite their effects upon first amendment freedoms. See *Buckley v. Valeo*, 424 U.S. 1, 28-29 (1976) (per curiam).

4. 1974 Amendments, Pub. L. No. 93-443, § 101a, 88 Stat. 1263 (1974).

5. 1972 Act § 203.

6. Pub. L. No. 92-178, §§ 801-02, 85 Stat. 497, 562-74 (1971); 1974 Amendments, Pub. L. No. 93-443 §§ 406 and 408. Other important provisions of these reforms in-

was also aware of two types of action that would render its efforts to regulate campaigns futile: campaign spending by groups not officially affiliated with a candidate, and spending by candidates prior to the time in the campaign when federal regulations become applicable. Thus, to protect its regulatory scheme from subversion, Congress also limited "independent" expenditures.⁷

Similarly, because the authors of the FECA Amendments of 1974 also sought to equalize the financial resources of presidential candidates,⁸ public financing was made available to primary candidates.⁹ As the Senate Report explained, "[u]nless primary election candidates can be relieved of their excessive dependence on large amounts of private money, a system of public financing in general elections will only move the evils it seeks to remedy upstream to the primary phase of the electoral process."¹⁰ The present use of candidate-organized political action committees (COPACs) undermines campaign regulation in precisely the ways that Congress intended to forestall, for such organizations reintroduce the problems of campaign contributions and expenditures that are not subject to full federal regulation.

cluded the required reporting of contributions and expenditures, 1972 Act §§ 302-06, limits upon independent expenditures, 1974 Amendments § 101(a), and the establishment of the Federal Election Commission to oversee compliance with the law, 1974 Amendments § 208(a).

The constitutionality of the 1974 Amendments was immediately challenged. In the landmark case of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) the Supreme Court found that a number of the law's provisions violated the first amendment's guarantee of free speech. "Independent" expenditures and expenditures from the candidate's personal funds were held not subject to limitations because they represented the speech of the person supplying the funds. However, the Court upheld limitations on the use by candidates of money contributed to them by others. Such limits only indirectly impinged upon the free speech rights of the contributors, the Court said, and so could be regulated in order to avoid the fact or appearance of corruption.

7. 1974 Amendments § 101(a). Congress recognized that "[a]bsent a limitation on this activity, well-heeled groups and individuals could spend substantial sums and thus severely compromise the limitations on spending by the supported candidate himself." HOUSE REPORT, *supra* note 2.

8. As the Senate Committee report on the 1974 Amendments recognized, simply limiting contributions and expenditures would not keep private money from unduly affecting campaigns:

[W]ith the introduction of specific limitations upon contributions and expenditures, concern developed that major political parties and well-known individuals, including incumbent office-holders, would have greater access and appeal to donors than would minor parties and unknown individuals who desired to enter the political arena. Therefore, a movement for the public financing of Federal elections evolved in the Senate.

S.REP. NO. 689, 93rd Cong., 2d Sess. 2 (1974) [hereinafter SENATE REPORT].

9. See 26 U.S.C. § 9032(2) (1982).

10. SENATE REPORT, *supra* note 8, at 6.

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II. *Federal Regulation of Presidential Campaigns*

Federal regulation of presidential campaigns is designed to begin as soon as an individual legally becomes a candidate. Under the FECA, individuals are deemed to be “candidates” for the presidency as soon as they have received contributions or made expenditures in excess of \$5000.¹¹ No further actions or announcements are necessary to establish their candidacies, and once \$5000 is raised or spent, no actions or announcements can prevent their being branded official candidates. Such status makes the full panoply of federal regulations applicable to the candidates and their campaign committees. These regulations require 1) that they must keep and make public records of their receipts and expenditures, 2) that they may not accept contributions of over \$1000 from any one individual, nor any contribution exceeding \$5000 from a political action committee, 3) that all campaign expenditures prior to the nomination may not exceed a specified amount (most recently \$20.2 million), and 4) that spending in each state also may not exceed certain ceilings.¹² Needless to say, candidates often find these constraints onerous.

A limited exception to these strict rules has been made for exploratory or so-called “testing the waters” activity.¹³ Funds raised for or spent on certain activities (such as polling or travel to meet with party leaders) may be handled by an exploratory committee formed for the purpose of evaluating a candidacy’s potential. This exception allows a potential candidate to take some tentative steps towards running without being ascribed official “candidate” status by the Federal Election Commission (FEC). The potential candidate must take the initiative in forming such a committee, and it may undertake actions designed only to explore, not to further, the contemplated candidacy. Under such circumstances, the committee may spend over \$5000 without triggering official “candidate” status. Should a candidacy later emerge, however, these “testing the waters” expenditures must be retroactively reported and counted against the overall and state-by-state ceilings.¹⁴ Similarly, contributions to an exploratory committee count towards limitations on contributions to presidential candidates.¹⁵

11. 2 U.S.C. § 431(2) (1982).

12. 2 U.S.C. §§ 432b, 441e-441g (1982).

13. 11 C.F.R. §§ 100.7(b)(1), 100.8(b)(1) (1986).

14. See 11 C.F.R. § 101.3 (1986); 11 C.F.R. §§ 9032.9(c), 9034.4(a)(2) (1986). See also 50 Fed. Reg. 9995 (1985).

15. See 11 C.F.R. § 101.3 (1986). See also 50 Fed. Reg. 9995 (1985).

The FEC is charged with overseeing campaign and "testing the waters" activity, and with enforcing all applicable law. Where existing regulations are unclear, the FEC is empowered to respond to specific questions by issuing Advisory Opinions to guide individuals or PACs in obeying the law. These Opinions are designed to apply only to the precise circumstances set forth in the request.¹⁶

III. COPACs' Subversion of Federal Regulation

COPACs serve some legitimate functions. Spokesmen for these PACs regularly assert that their organizations serve solely to promote candidacies of fellow party members, not to advance the candidacy of their organizer,¹⁷ and so are like all other "multicandidate" political action committees. Indeed, COPACs are uniquely suited to their professed, and proper function. The national name-recognition of the COPAC's organizer makes fund-raising relatively easy, and the COPAC, at least in theory, channels those funds to deserving candidates.

Of course, even the professed function of COPACs is not without substantial advantages for their organizers' presidential aspirations. Ann Lewis, political director of the Democratic National Committee, explained that "it is widely conceded that a campaign contribution [from the COPAC to a local, state or federal candidate] helps in winning a presidential endorsement [from the recipient candidate] later on."¹⁸ Whether it simply spreads a little good will or establishes long-term political alliances, such a contribution benefits the donor as well as the recipient.

The gains from organizing a PAC extend far beyond the gratitude

16. See generally 2 U.S.C. § 437(f) (1982). Such Opinions are to be relied upon only by persons "involved in the specific transaction or activity with respect to which such advisory opinion is rendered" or in a "transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. § 437(f)(1).

17. When Vice-President Walter Mondale formed the Committee for the Future of America, one of his advisors insisted that "[t]his is not a Mondale campaign operation. We see this as a means of getting good Democrats elected." Light, *Challenging the Right: New Liberal Money Groups Compete for Campaign Funds*, 39 CONG. Q. 1905, 1908 (1981). The speaker, Michael Berman, was later appointed treasurer of Mondale's campaign committee.

18. *Campaign PAC Contributions*, 40 CONG. Q. 2075 (1982). See also Light, *supra* note 17, at 1907 ("the new PAC offers a way for Kennedy to spread good will . . . between now and the next national election"). See also Bonafede, *Mondale at the End of the Beginning of the Long Road to the Oval Office*, 15 Nat'l. J. 162 (1983) (Mondale so far has followed "a carefully designed series of steps . . . early on, he created a political action committee . . . to . . . support . . . Democratic candidates, thereby broadening and solidifying his own political base").

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of fellow office-seekers. For a potential candidate, a COPAC can serve as an all-purpose expense account. Vice-President George Bush and Representative Jack Kemp, both likely contenders for the 1988 Republican presidential nomination, “expect to make some 150 PAC-financed political appearances this year [1986].”¹⁹ Lest they appear to be selfless servants of their party, it should be noted that “[b]oth have scheduled frequent trips to early presidential primary states of New Hampshire, Iowa, and Michigan in the hope appearances on behalf of fellow Republicans will also enhance their own recognition and standing in key states.”²⁰ Such use of a COPAC is time-honored. In 1984, both Mondale’s COPAC and Senator Edward Kennedy’s Fund for a Democratic Majority lavished attention upon Democratic candidates in Iowa, the site of the earliest presidential caucuses.²¹ And the earliest COPAC, formed in 1977 by an ex-Governor named Ronald Reagan, was used to finance that future presidential candidate’s travels across the country.²²

Travel is not the only expense COPACs have been used to defray. At the headquarters of Jack Kemp’s COPAC, the Campaign for Prosperity, “they are [now] working with his [official] aides and outside advisors . . . to organize Kemp’s travels; they are gathering names of supporters, sending local Republican leaders fact sheets on Kemp’s economic views and targeting congressional races for the PAC to invest in.”²³ Walter Mondale spent two years, courtesy of his Committee for the Future of America, “travelling the national political circuit . . . sounding out supporters, assembling a staff, drafting a campaign script and raising money — all with the obvious intent of winning the 1984 presidential election. In effect, . . . conducting what an aide called a ‘shadow presidential campaign.’ ”²⁴

19. Reuters, Jan. 24, 1986 (NEXIS newsfile).

20. *Id.*

21. *Campaign PAC Contributions*, *supra* note 18.

22. *Id.* These appearances are defended as designed to help other candidates raise money. Indeed, Bush’s PAC claims that his travels in 1985 helped Republican candidates raise \$11 million. Associated Press, Feb. 12, 1986 (NEXIS newsfile).

23. Brownstein, *Sands of Time Move Quickly for Manager of Kemp’s PAC*, 17 Nat’l J. 162 (1985).

24. Bonafede, *supra* note 18. See also Kirchsten, *If Reagan Chooses Not to Run Again, The GOP Battle Could Be A Bloody One*, 15 Nat’l J. 6081 (1983) (“If [Senator Howard] Baker finds himself as a candidate in 1984, his political fund [PAC] can be used to advance his cause in the presidential primaries”); Associated Press, Feb. 11, 1986 (NEXIS newsfile), reporting on COPAC expenditures (“The PACs expenditures covered mostly political costs such as printing and postage, consultant fees, travel, office equipment, and payrolls”); United Press International, Jan. 23, 1986 (NEXIS newsfile) (“The PACs of potential candidates can be used to pay travel expenses, hold rallies, pay for food and drink at hospitality suites — all the normal activities of a candidate”).

Underwriting travel and administrative costs is a legitimate part of each COPAC's official mission of providing assistance to party candidates. However, an analysis of COPACs' spending patterns reveals that defraying the organizer's expenses is of paramount rather than incidental importance. The first COPAC, Reagan's Citizens for the Republic, gave less than 15 percent of the money it raised in 1978 to Republican candidates and party organizations. The lion's share of that COPAC's funds went to underwrite Reagan's expenses between his 1976 and 1980 presidential campaigns.²⁵ Similarly, when Mondale and Kennedy launched their COPACs in 1981, over 90 percent of the funds raised were spent on staff, travel, and further fund-raising, leaving under 10 percent for the COPACs' supposed beneficiaries — other federal, state, and local candidates.²⁶ Through 1982, Mondale's Committee for the Future of America raised and spent \$2.4 million, while using only about \$700,000 for activities related to Democratic candidates' campaigns. "The remainder was spent in start-up expenses, fund raising, research, travel, operational costs, staff . . . and direct mail. An estimated 2.5 million fund-raising letters were sent."²⁷ The Committee was thus tremendously inefficient at its professed task of aiding other candidates. It did, however, provide Vice-President Mondale with a formidable machinery of financial, organizational, intellectual, and public relations assistance. In other words, the COPAC served as a "shadow presidential campaign."²⁸

Present potential candidates have demonstrated the same propensity to form COPACs with the official goal of helping other candidates, only to use the money for their own expenses. Kemp's COPAC raised \$245,207 for the 1982 elections, but channelled only \$104,500 to Republican candidates.²⁹ Senator Robert Dole's COPAC, "Campaign America," raised \$231,376 during the same period, but disbursed only \$165,728 to other campaigns.³⁰

The most recent FEC figures demonstrate how widespread this practice has become:³¹

25. *Campaign PAC Contributions*, *supra* note 18, at 2074.

26. *Id.* at 2075.

27. Bonafede, *supra* note 18, at 163.

28. This willingness to use political committees creatively became a major campaign issue once the primary season began and the Mondale organization began using delegate selection committees to finance campaign expenditures as a means of escaping the spending ceilings mandated by the FECA. See generally Glen, *Another Campaign, Another Loophole — This Time It's Delegate Committees*, 16 Nat'l J. 873, 874-75 (May 5, 1984).

29. Kirschten, *supra* note 24, at 610.

30. *Id.* at 609.

31. Associated Press, Feb. 12, 1986 (NEXIS newsfile). Representative Jack Kemp's

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COPAC (Organizer)	\$ Raised	\$ Spent	\$ Spent on other candidates
Fund for America's Future (Vice-President George Bush)	820,089	1.2 million	121,000
Campaign America (Senator Robert Dole)	417,976	not available	57,785
Committee for Freedom (Rev. Pat Robertson)	161,339	56,287	11,583
Effective Government Committee (Rep. Richard Gephardt)	361,546	240,734	6,590
Americans for the National Interest (Gov. Bruce Babbitt)	51,219	45,746	250

As this table indicates,³² COPACs are only marginally in the business of helping other candidates. They chiefly serve to help their founders travel, speak, hobnob, and tout themselves as presidential timber. This fact has been acknowledged in the media³³ and by COPAC staff.³⁴ Most recently it was forcefully expressed by Federal Elections Commissioner Thomas E. Harris:

Only persons just alighting from a U.F.O. can doubt that activities of

COPAC, Campaign for Prosperity, has raised \$1.2 million. That COPAC's spending figures are not available. *Id.*

32. COPACs' spokesmen assert that the percentage of funds reported as having been given to candidates in 1985 is misleading, as candidates have been saving their funds for the election year of 1986. Kirschten, *supra* note 24, at 610. The ultimate proof of this contention will be found in next year's FEC data. However, it is worth noting that past COPACs have not spent a significant percentage of their funds on helping nonpresidential candidates' campaigns. Moreover, COPACs' contributions to candidates to date are low not only as a percentage of funds raised and available, but as a percentage of funds actually spent.

33. For example, Reuters News Service recently reported that "[a]t present, most of the potential candidates are using so-called multicandidate PACs to finance their national travels without having to comply with limitations on presidential campaign spending." Reuters, Jan. 24, 1986 (NEXIS newsfile) *See also* Light, *supra* note 17, at 1906 ("Senator Edward M. Kennedy's Fund for a Democratic Majority and former Vice-President Walter F. Mondale's Committee for the Future of America are widely thought to be vehicles for the 1984 presidential campaign"). *See also* Porter, *Washington's Movers and Shakers; Where They're Going*, 13 Nat'l J. 329 (Feb. 21, 1981) ("Two defeated Democrats [Mondale and Kennedy] are busy pulling together political action committees for possible 1984 runs for the presidency").

34. In moments of candor, the heads of COPACs indicate that they are in the business of presidential politics. John Maxwell, executive director of Kemp's Campaign for Prosperity, recently explained why he accepted his post in this way: "It was too interesting a thing not to do, having run politics at all levels except this one. His interviewer adds: "having worked on gubernatorial, House, and Senate races, Maxwell didn't have to explain exactly what level of politics 'this' is. Hold on to your hats, it's on to Iowa [site of the first party caucuses]." Brownstein, *supra* note 23.

these sorts [public appearances, partisan publications, and the organizing of volunteers in early primary states], which are engaged in over a period of many months, will promote the candidacy of the founding father [of the COPAC]. . . . Disbursements for these activities are made for the purpose of influencing a federal election . . . [and so] should trigger . . . reporting obligations, and should count against the national and state expenditure ceilings³⁵

IV. *Harms From COPAC's Circumvention of Federal Campaign Law*

A. *Campaign Contributions*

COPACs are being used by presidential candidates to finance the activities essential to the beginnings of a presidential primary campaign. As such, they undermine the structure of federal campaign regulation established by the FECA.³⁶ That law explicitly recognizes that potential candidates may desire to conduct certain preliminary activities without becoming full-fledged "candidates," and so provides for a middle ground between candidacy and non-candidacy: "testing the waters." However, potential candidates are presently ignoring the middle ground created by statute in order to enjoy unregulated COPAC financing of their exploratory activities.

These actions subvert important policies regarding both campaign contributions and campaign spending. An official candidate, as well as an individual who is "testing the waters," may not be given more than \$1000 by any individual;³⁷ that candidate's PAC, however, may be given five times as much by the same individual.³⁸ Congress established the \$1000 ceiling on individuals' contributions to presidential candidates so that wealthy persons could not secure excessive gratitude from or influence over candidates for the presidency.³⁹ The \$1000 limit also militates against even the appearance of undue influence. The limit on contributions to COPACs is higher because money given to a potential presidential candidate's COPAC is supposedly redistributed to local, state, and federal candidates. Potential candidates are less likely to be or seem corrupted

35. Advisory Opinion 1986-6, Federal Election Commission, *FED. ELECTION CAMP. FIN. GUIDE* (CCH) ¶ 5849 at 11,261 (Mar. 14, 1986) (Harris, Comm'r, dissenting) [hereinafter *Advisory Opinion 1986-6*]. This comment was provoked by the circumstances described in the text accompanying notes 47 through 66.

36. The FECA assumes that campaign expenditures of over \$5000 — no matter how they are characterized — make an individual an official "candidate" and therefore subject to reporting requirements and limits on contribution and spending levels. 2 U.S.C. § 431(2) (1982).

37. 2 U.S.C. § 441a(a)(1)(A)(1982).

38. 2 U.S.C. § 441a(a)(1)(C)(1982).

39. See *supra* note 3 and accompanying text.

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by money given to them for redistribution than by money given to help them pursue their individual ambitions. Also, contributions to COPACs are in theory contributions to organizations, not individuals.

In practice, however, COPACs are neither conduits for the redistribution of funds to a variety of candidates nor organizations with interests apart from those of their founder. They are shadow presidential campaigns,⁴⁰ and a donation to a COPAC is equivalent to a donation to the individual who organized it. There is therefore no reason for allowing higher contribution ceilings to COPACs than to official candidates; money received for the purpose of beginning a campaign carries the same potential for impropriety as money received once the primaries have begun and candidacies have been officially announced.

Indeed, contributions to COPACs may be even more dangerous and suggestive of undue influence than regular contributions. Such contributions are buried in the COPAC's reports to the FEC, and there they are not immediately associable with the candidate behind the PAC. They also occur early in the campaign season, when candidates may find money particularly scarce. Hence, the potential for a candidate to become or seem to become beholden to wealthy (\$5000) givers is heightened, not diminished, when the money is given to his or her COPAC rather than his or her subsequent, "official" campaign committee.⁴¹ COPAC donations allow the big givers of pre-FECA elections to reassume their unduly powerful positions, and thereby a critical purpose of federal election regulation is thwarted.

B. Campaign Spending

In addition to regulating campaign contributions, a second critical

40. See *supra* notes 17-35 and accompanying text.

41. Candidate-organized foundations, though less common than COPACs, can likewise serve to finance campaign activities outside of FECA regulation. Because the foundations may accept unlimited sums of money from individuals or organizations, they pose the risk of even greater violations of the policies behind campaign contribution limitations. For example, Senator Gary Hart, preparing for the 1988 campaign, has established a tax-exempt foundation, The Center for a New Democracy, which has accepted ten gifts of \$25,000 each. Such gifts are substantially larger than those that could legally be given to an official campaign committee, even though the foundation "appears intended to flesh out Hart's 1984 'new ideas campaign' in preparation for another run for the Presidency in 1988." Edsall, '88 Candidates' New Tricks Stretch Federal Election Law: Tax-Free Foundations Proliferate, *Washington Post*, Oct. 20, 1985, at A18, col. 1. The article also mentions similar foundations established by Senator Kennedy and Representative Kemp.

purpose of the FECA is to limit campaign spending. These limits are designed to equalize spending levels between candidates by placing ceilings on the total amount a candidate may spend prior to his or her party's nominating convention and upon the amount a candidate may spend in each particular state.⁴²

COPAC expenditures have not been counted towards these ceilings because neither any COPAC nor the FEC has been willing to characterize them as candidate expenditures.⁴³ Thus, potential candidates are eager to spend COPAC money in key primary states, saving room under the ceilings for later spending. For example, the Freedom Council, a political organization established in 1981 by evangelist and potential presidential candidate Pat Robertson, has dedicated five of its thirty field staffers to Michigan, which is the first state to begin the process of choosing delegates to the Republican national convention.⁴⁴ Similarly, Kemp's COPAC has seen fit to fly the New York Representative to Michigan, Iowa and New Hampshire (each of which begins choosing its delegates to the nominating convention early in the primary season) more often than to any other state in the union.⁴⁵ Despite these activities, Robertson and Kemp may later spend as much as any other candidate in these critical states because their COPACs, not their official campaign committees, have been doing the early spending.

Such activities subvert limitations on campaign spending, with unfortunate consequences. Candidates using COPACs are positioned to outspend rivals without COPACs, who must count travel to early primary states as campaign expenditures. Similarly, candidates with large COPAC budgets and staffs will be able to outspend those with smaller COPACs. This ability to outspend will have both cumulative effects over the primary season and special force in the critical, earliest primary states. By spending COPAC funds, candidates may create state and national organizations and support without officially spending any money. This loophole induces some candidates to lengthen the campaign season, since they need not worry about approaching the FECA ceilings. Most importantly, this loophole systematically favors well-known and well-financed candidates over candidates who cannot command COPAC contributions⁴⁶ by al-

42. 2 U.S.C. §§ 441a(b),(c) (1982).

43. The limits apply to expenditures made by a candidate or his or her authorized committee or agents. 2 U.S.C. § 441a(b)(2)(1982).

44. Edsall, *supra* note 41.

45. *Id.*

46. For example, former Vice-President Walter Mondale used COPAC funding ex-

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lowing the former to accept large contributions and outspend their lesser-known rivals.

V. *FEC Reactions to COPAC Activities*

Twice in the past year the FEC has been asked to issue an Advisory Opinion explaining the applicability of the FECA to particular types of COPAC expenditures.⁴⁷ The FEC's responses⁴⁸ are schizophrenic; one recognizes that these activities are indeed designed to further presidential ambitions, but the other represses this insight by refusing to count these expenditures against the spending ceiling.

The first of these requests was made late in 1985, when Senator Howard Baker's COPAC, the Republican Majority Fund, asked the FEC to clarify whether certain expenditures planned by the Fund would be considered in-kind contributions to the Senator's "testing the waters" committee.⁴⁹ The FEC ruled that the Fund's expenditures on a variety of activities — Senator Baker's and his representatives' travel to party events, hospitality suites in his honor at party events, the formation of COPAC steering committees in individual states, and newsletters and solicitations referring to Senator Baker's potential candidacy — all would help the Senator evaluate his potential candidacy and so would constitute contributions to his "testing the waters" committee.⁵⁰ The Opinion also advised that such expenditures would be considered contributions to an official campaign if the Senator indicated he had definitely decided to seek the nomination.⁵¹

tensively in 1981-82, while the lesser known Senator Gary Hart did not. See Glen, *supra* note 28, at 874.

47. Letter from James M. Cannon, Vice Chairman, Republican Majority Fund to Federal Election Commission requesting Advisory Opinion (Nov. 25, 1985) (copy on file with YALE LAW & POLICY REVIEW); Letter from Jan Baran, Esq. on behalf of the Fund for America's Future to Federal Election Commission (Jan. 22, 1986) (Copy on file with YALE LAW & POLICY REVIEW).

48. Advisory Opinion 1985-40, Federal Election Commission, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5842 (Jan. 28, 1986) [hereinafter Advisory Opinion 1985-40]; Advisory Opinion 1986-6, *supra* note 35.

49. Letter from James M. Cannon to Federal Election Commission, *supra* note 47; see also Advisory Opinion Request 1985-40, by James M. Cannon, Vice Chairman, Republican Majority Fund, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 3924.

50. As of April 1986, Senator Baker was the only potential presidential candidate to have established a "testing the waters" committee. Aides to the Senator indicated that Baker's Fund sought to have COPAC expenditures characterized as "testing the waters" activity so that other candidates using COPACs would be forced to form exploratory committees. Reuters, Jan. 24, 1986 (NEXIS newsfile). Subsequent FEC action makes it clear that the Commission did not adopt this logic.

51. Advisory Opinion 1986-6, *supra* note 35. Contributions to "testing the waters"

On the heels of this ruling, Vice-President Bush's COPAC, the Fund for America's Future, requested an Advisory Opinion regarding similar expenditures.⁵² The FEC's response advised that it would not constitute campaign activity for the COPAC to finance Vice-President Bush's travel to party events, the formation of COPAC steering committees, publications and solicitations identifying Bush as the COPAC's founder, the training of volunteers, and the establishment of offices for these volunteers to staff.⁵³ Each of these conclusions included a reminder that these actions would be licit only so long as they remained unrelated to a potential Bush candidacy. Each conclusion also distinguished the Advisory Opinion issued to Baker's COPAC as involving expenditures aiding a candidate who had already begun "testing the waters."⁵⁴

One additional issue raised in the Fund for America's Future Advisory Opinion request was the status of the Fund's proposed expenditures to recruit, inform, and finance individuals seeking election as precinct delegates to the 1986 Michigan state Republican

committees are limited in the same ways as contributions to campaign committees. See 11 C.F.R. § 100.7(b)(1), 100.8(b)(1), 101.3 (1986) (establishing that the contribution source and amount limits applicable to campaign committees are applicable to exploratory committees) and at 2 U.S.C. § 441a (1985) (establishing contribution limits for campaign committees). See also 50 Fed. Reg. 9993-94 (1985). Thus a COPAC, like any other PAC, may give only \$5000 in cash or in-kind contributions to aid "testing the waters" efforts. This sharply limits the usefulness of a COPAC.

52. Advisory Opinion Request 1986-6, by Jan Baran, Esq. on behalf of the Fund for America's Future, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 3937. See also Letter from Jan Baran, Esq. to Federal Election Commission, *supra* note 47. This immediate reaction belied the words of Jan Baran, counsel to Bush's COPAC, who asserted that "[i]t doesn't appear this is going to affect the Fund for America's Future at all." A more realistic approach was taken by Fred Duval, the director of Governor Bruce Babbitt's COPAC, who said that "[w]hat the FEC is doing is going into this relationship between multi-candidate PACs and prospective candidates that is really really gray [S]ome of the areas are impossible to sort out." Associated Press, Jan. 16, 1986 (NEXIS newsfile).

53. Advisory Opinion 1986-6, *supra* note 35.

54. *Id.* This is, of course, a triumph of legalism over logic. The underlying premise of Advisory Opinion 85-40 is that certain activities clearly constitute "testing the waters" activity even though undertaken by an entity other than one designating itself as a "testing the waters" committee. The same situation was presented by the 1986 Advisory Opinion request of the Fund for America's Future. The difference between the two cases is that Vice-President Bush had yet to establish a "testing the waters" committee. Since the FEC cannot assign "testing the waters" status — as it *can* assign "candidate" status — the Commissioners were forced either to ignore the Bush COPAC's activities or consider them sufficient to trigger full "candidate" status. In choosing the former course, the FEC ensured that no potential candidate with a COPAC would form a "testing the waters" committee, since that candidate would thereby face limits on COPAC spending that his or her rivals would avoid. Had the FEC chosen to confer candidate status on these activities, which again had been characterized as "testing the waters" by the Commission just two months earlier, the Commission would have reaffirmed the approach chosen by Congress — that of not using the nature and amount of expenditures, and not simply the label assigned them by a candidate, to determine when a campaign begins.

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Convention. Such delegates will play a vital role in the selection of Michigan's delegates to the 1988 Republican National Convention. For this reason, the FEC's General Counsel, in a draft opinion which the Commission refused to adopt, concluded that expenditures to assist these potential delegates would constitute spending for the purpose of influencing the nomination of a presidential candidate, and so should be considered contributions to a Bush-for-President campaign. Expenditures of over \$5000 for such a purpose would, under the draft opinion, trigger candidacy status and be counted against expenditure ceilings.⁵⁵

In the draft opinion, the General Counsel took the crucial step of looking beyond the formal status of COPAC expenditures. Thus the draft rejected the suggestion that because these state delegates are not candidates for federal office, COPAC expenditures on their campaigns are not covered by the FECA. Furthermore, the General Counsel's draft refused to indulge the fiction that a COPAC is independent of its founder's influence. Instead, it presumed that a COPAC's founder consents to and is chargeable with the actions of his or her Fund.⁵⁶ Both of these approaches indicated a willingness to abjure mechanical application of the FECA and, in the words of Commissioner Harris, "acknowledge what everyone knows: that Vice President Bush is running for President and is financing his campaign through the Fund for America's Future, Inc., which he organized and controls."⁵⁷

The opinion of the General Counsel, despite the strong support it received from Commissioner Harris, did not prevail on the delegate selection issue. Instead, the Commission decided⁵⁸ that Bush's Fund could make expenditures to recruit and assist precinct delegates without triggering a Bush candidacy or accruing expenditures under the ceilings set by the FECA.⁵⁹

This decision was a serious misstep in the FEC's examination of COPACs, and demonstrates the need for reform in a number of ways. First of all, the result was "just plain ridiculous:"⁶⁰ COPACs

55. Draft Advisory Opinion 1986-6, Federal Election Commission, by Charles N. Steele and N. Bradley Litchfield, at 19 (Feb. 28, 1986) (copy on file with YALE LAW & POLICY REVIEW).

56. *Id.*

57. Advisory Opinion 1986-6, *supra* note 35, at 11,260 (Harris, Comm'r, dissenting).

58. It is telling that the Commission's decision smacks more of political accommodation than of reasoned decision-making. The part of the General Counsel's draft that would have made Vice-President Bush's delegate financing a campaign expenditure was rejected because all of the Commission's Republicans voted against it.

59. Advisory Opinion 1986-6, *supra* note 35.

60. *Id.* at 11,261.

may spend unlimited amounts of money assisting precinct delegates who will later choose their state's delegation to the Republican convention. Although there is nothing inherently wrong with such expenditures, the FEC should be imposing on them the limits which Congress intended should constrain expenditures for a presidential nomination. COPAC money spent to aid potential delegates is money spent to help a particular individual become president. It ought to be regulated as such.

Secondly, the Commission's Advisory Opinion rejected the sensible line drawn by the FEC's counsel, a line that acknowledged both the real purpose of these expenditures and Vice-President Bush's control of the PAC he organized. Instead, the FEC elevated form over function. Because precinct delegates do not seek federal office, the Commission reasoned that the Fund's promotion of their candidacies could not be designed to further a presidential campaign. Similarly, because Vice-President Bush has not yet declared his candidacy, the FEC presumed that the actions of the Fund had nothing to do with his aspirations. By embracing these formalistic approaches to the COPAC problem, the Commission provided a way for presidential campaigns to be funded without significant federal regulation, as long as a pretense of noncandidacy is maintained.⁶¹

Lastly, the FEC's consideration of the Baker and Bush PACs' requests for Advisory Opinions revealed some of the limitations of the Advisory Opinion as a regulatory tool. Advisory Opinions are designed to help guide candidates through the gray areas of federal campaign regulation. A law-abiding candidate may request advice when puzzled by the law, and then follow the Commission's advice with the assurance that such compliance can serve as a defense against any later charges of improper action.⁶² However, Congress has specifically limited the applicability of Advisory Opinions so that the advisory opinion process cannot be used to establish general rules regarding the application of the FECA.⁶³ For this reason, Advisory Opinions may serve as a shield for candidates but not as a sword for the prosecution of activities deemed illicit by the FEC. They are also designed to be closely tied to the specific questions set forth in the advisory opinion request. Thus they invite warring

61. One commentator interpreted the Advisory Opinion to mean that "[w]hen it comes to being a presidential candidate, you can walk like a duck, travel like a duck and eat like a duck, but you still aren't a duck until you talk like a duck." United Press International, Jan. 23, 1986 (NEXIS newsfile).

62. 120 CONG. REC. 35,131 (1974) (statement of Representative Hays).

63. 2 U.S.C. § 437f(b),(c) (1982).

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PACs, such as Bush's and Baker's, to seek favorable rulings by felicitously phrasing their requests. Ultimately, the FEC's responses to the Bush and Baker requests have clouded rather than clarified the legal status of COPAC expenditures.

VI. *Proposed Reforms*

The FEC's responses to requests for Advisory Opinions have proven insufficient to the task of regulating COPACs. The threat these organizations pose to the central goals of federal campaign regulation is broad, and must be met with basic reform of the FEC's approach to COPAC expenditures. Such reform must prevent the facile characterization of campaign-related activities as COPAC-sponsored, and so not subject to full FECA regulation.

The problem with COPAC spending is that its form rather than its function has been relied upon in determining the applicability of federal regulation. The best solution to this problem is simply to recognize the reality that many COPAC expenditures further campaigns for a nomination to the presidency. Such an approach is hardly radical. Under § 431(9)(A) of the FECA, "expenditures" include "any payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." Official "expenditures" are limited⁶⁴ and must be reported.⁶⁵ Thus it is the purpose of spending rather than its name that determines its legal status. The rejected draft Advisory Opinion to the Fund for America's Future suggested just such an approach to the application of the FECA.

The FEC has gone amiss by ignoring this functional standard and focusing instead on the announced intentions of potential candidates. The Commission's Advisory Opinion to Bush's PAC emphasizes that Vice-President Bush has disavowed any official candidacy, and that the proposed financing of precinct delegates does not solicit support for a clearly identified presidential candidate.⁶⁶ These facts ought to be irrelevant. If Congress had intended to allow candidates to determine for themselves when their expenditures would begin to be subject to FECA regulation, it would not have needed to establish a \$5000 threshold; it could have designed expenditure and reporting requirements that begin when candidates feel they be-

64. These limits apply only to candidates who accept federal matching funds. See 2 U.S.C. § 441a(b)(1)(1982).

65. 2 U.S.C. § 434(b)(4).

66. Advisory Opinion 1986-6, *supra* note 35.

come appropriate. The unworkability of such a standard is obvious, yet it is towards such a rule that the FEC has been drifting.

The FEC ought to look carefully at the purposes that underlie COPAC expenditures. This scrutiny must extend beyond the characterizations offered by the COPACs themselves. In other words, some common sense, if not political savvy, is required. The FEC should promulgate, and the Congress accept, regulations that explicitly focus on the true purposes of COPAC spending, as distinct from the justifications offered by potential candidates and their COPACs. Congress should also approve regulations that presumptively associate a COPAC's actions with the political goals of its organizer.

The examination of COPAC expenditures often will reveal varied purposes, only one of which is the furtherance of a campaign for nomination. In such circumstances, the FEC should allocate the amount of the expenditure between these purposes. Such an allocation system is already generally used when expenditures benefit a number of candidates.⁶⁷

The obvious problem with this functional analysis is that it requires close supervision by the FEC of COPAC expenditures, and so entails difficult decisions regarding the extent to which a particular activity furthers a potential candidacy, rather than some other purpose. Making such decisions is difficult,⁶⁸ but not impossible. For example, in its Advisory Opinion to Senator Baker's COPAC the FEC demonstrated a willingness and ability to characterize certain actions as "testing the waters" activities without regard to their stated purpose. Similar decisions could develop general guidelines as to what activities are presumed to constitute campaign activity, thereby giving content to the purpose standard.⁶⁹

More generally, a functional analysis would be in keeping with the original phrasing and purposes of the FECA. Indeed, the law presently asserts that certain general actions (the receipt or expenditure of \$5000) *by their nature* indicate that a candidacy has begun. The

67. See 11 C.F.R. § 106.1(a)(1986) ("Expenditures . . . made on behalf of more than one candidate shall be attributed to each candidate in proportion to . . . the benefit reasonably expected to be derived").

68. For example, the Commission was forced to decide in 1976 if buttons reading Carter/Mondale/Koch constituted an in-kind contribution from the New York Mayor's campaign to the presidential ticket. The Commission held that it did not. Malbin, *After Surviving Its First Election Year, FEC Is Wary of the Future*, Nat'l. J. 469, 471 (1977).

69. Some rules seem obvious. For example, it seems appropriate to assume that a COPAC is funding presidential campaign activity when it supports frequent travel to, or the presence of staff in, early primary or caucus states, or consistently features a potential candidate as a speaker or in its literature.

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law also establishes that expenditures over \$5000 are significant enough to require regulation. Thus a functional analysis of COPAC expenditures would simply reflect Congress' original conviction that the actions of a candidate are recognizable as such and ought to be regulated early in the nomination process. While this approach would not always work perfectly, it would certainly work better than the current approach to COPAC expenditures, which is to ignore them.⁷⁰

This stricter approach to COPAC expenditures would force potential candidates to make hard choices regarding the allocation of the money they may spend under the FECA. Activities financed in 1985 would mean lower expenditures in 1988, and money spent in New Hampshire today would limit spending in that state during the week before its primary. The necessity of such choices is inherent in the regulatory structure adopted by Congress. It may be that campaigns have significantly changed since the FECA was enacted, and now require longer and more expensive efforts. Indeed, the rise of COPACs may be in part attributable to this perceived need both to start early and to preserve the ability to spend later. Reinvigorating the FEC's treatment of COPAC expenditures would repressurize this situation.

In the face of such pressures, it may be tempting to regard COPAC activities as useful in filling the gap between one election and the beginning of the next official campaign season, and therefore not requiring regulation. However, such a *laissez-faire* approach ignores the very concerns that motivated the expenditure and contribution limits of the FECA Amendments of 1974. Congress applied those spending limits and public financing requirements to primaries lest its reforms of the general election process "only move the evils it seeks to remedy upstream to the primary phase."⁷¹ To ignore COPAC activities is to allow the polluting influence of large and unreported contributions to move up to and settle in at the earliest stages of the electoral process, and thereby to allow a consequence of campaign reform that Congress specifically sought to avoid.

If Congress should find that the lengthening of campaigns places

70. Of course, the Advisory Opinion issued to Senator Baker's PAC indicates that the FEC is aware that COPAC spending can constitute either "testing the waters" or campaign spending.

71. SENATE REPORT, *supra* note 8, at 6. These limits are indexed, so inflation from 1974 to 1986 does not account for a significant part of the perceived shortfall in permitted funding. See 2 U.S.C. § 441a(c) (1982).

undue stress upon existing campaign finance laws, it might wish to consider increasing the expenditure limits. Ceilings that are specific to each of the four years prior to the election might serve to cap expenditures while allaying candidates' fears of spending too large a part of an overall allowance early in the campaign. Unless and until Congress acts, however, the FEC must vigorously apply the Federal Election Campaign Act to all expenditures that further candidacies for the presidency, including those funded by COPACs.

VII. *Conclusion*

The question posed by present patterns of COPAC spending is this: Will our nation continue to restrict campaign spending? The Federal Election Campaign Act cannot play its proper role in controlling the conduct of campaigns until outlays by COPACs on potential candidates' activities are considered to be campaign expenditures. The FEC cannot deal with this problem by relying upon candidates' self-serving statements about the purpose of such spending. Instead, the Commission should adopt a more explicitly functional analysis of COPAC expenditures, so that neither the official source of this money nor the candidate's stated intentions allow a shadow presidential campaign to masquerade as a political action committee.

— *Eric Mogilnicki*