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THE UNCERTAIN FUTURE OF THE PRESIDENTIAL PUBLIC FINANCING SYSTEM

By Audrey Perry*

The future viability of the once robust presidential public funding system is now questionable. First implemented in 1976, the system has helped presidential candidates focus less on fundraising and more on campaigning, and given major-party candidates enough money in the general election to finance their campaigns.¹ In the 2008 election cycle, however, only one major candidate, Senator John Edwards, received public funding during the primary election.² Furthermore, it is possible that at least one major-party nominee will not accept the general election public funds in 2008—for the first time since the system began in 1976.

The system has seen its share of controversy this election cycle. In February 2007, Senator Barack Obama requested advice from the Federal Election Commission (FEC) about public funding in the general election.³ Obama wanted to raise private funds at the time, but still preserve the option of taking public funding for the general election.⁴ In its request for an advisory opinion, Obama's campaign stated that "should both major party nominees elect to receive public funding, this would preserve the public financing system, now in danger of collapse, and facilitate the conduct of campaigns freed from any dependence on private fundraising."⁵

Since then, however, Senator Obama has backed away from his commitment to the public funding system.⁶ Even though he will, if eventually nominated by the Democratic Party, face in Senator John McCain an opponent who has repeatedly expressed his desire to accept public funds in the general election, Obama has recently called the system "creaky" and said that he may not accept federal funds.⁷

The currently non-functioning FEC further complicates the issue. At the moment, the Commission has only two of six Commissioners seated. It takes four Commissioners' votes to approve a public funding request. The remaining Commissioners' nominations have been held up in a Senate deadlock for months, with no end in sight. So, even if the presidential party nominees decide to take public funding for the general election, the FEC may be unable to certify the candidates' entitlement to the U.S. Treasury funds (raising the question of whether a court order or unusual Treasury Department action would be required to release the funds).

HISTORY OF THE SYSTEM

The presidential public funding system was put into place as part of the sweeping election reform adopted in response to the Watergate scandal. The public funding portion of the Federal Election Campaign Act (FECA) was designed to reduce corruption in the political process by providing public funds to candidates to diminish candidates' reliance on raising private funds.

Since the 1976 election, presidential elections have been financed to some extent by public money, which is provided by voluntary tax check-off.⁸ The tax check-off was meant to build the public funding system on a mass base of small donors. However, participation in the program has been waning—in 1980, the high point of the tax check-off was 28.7%, and in 2004 the check-off rate was 9.2%⁹

In 2000, George W. Bush became the first presidential candidate win a major-party nomination without taking matching public funding in the primary election.¹⁰ In 2004, George Bush, John Kerry, and Howard Dean all did not accept public funds in the primary election.¹¹ 2008 may be the first year that a major party candidate does not accept public funding for the general election.

PRIMARY MATCHING FUNDS

The primary matching funds portion of the public funding scheme has been less than useful to viable candidates in recent years. In fact, no eventual major party presidential nominee has received primary matching funds since Al Gore in 2000.¹²

To qualify for primary matching funds, a presidential candidate must establish that he or she is a serious candidate with broad base support by raising more than \$5,000 in at least twenty states.¹³

Furthermore, if they receive primary matching funds, presidential candidates must agree to limit campaign spending. In 2008, for example, candidates are allowed to spend about \$42 million. Their campaign spending in each state was limited to a specified amount based on the number of voting-age individuals in the state.¹⁴ Candidates must also contribute no more than \$50,000 to their own campaign and agree to a post-campaign financial audit by the FEC.

If a candidate meets these eligibility requirements, the federal government will match \$250 of an individual's total contributions to the candidate. Only contributions received after January 1 of the year before the election will be matched. The first matching fund payments are not made until at least January 1 of the election year, and made monthly thereafter.

The increasingly frontloaded timing of state primaries and caucuses has contributed to the primary matching fund program's increasing irrelevancy. Frontloading has made the spending limits unrealistic by making the campaign longer and increasing the length of the primary period. In the 2008 election cycle, a candidate who accepted primary matching funds would not have been eligible to receive any such funds until a few days before the Iowa caucus. As of May 1, 2008, Republican candidates had spent over \$250 million in the primary; the Democratic candidates have far surpassed that and are still spending.¹⁵ The primary contribution spending limit is clearly inadequate for waging the sort of primary campaigns that have become standard in recent cycles.

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Furthermore, the frontloaded 2008 primary season made the acceptance of primary matching funds impractical for serious candidates because the eventual major party nominee could have been chosen (and was in the case of the Republicans) by early February. If, for example, Senator McCain had accepted primary matching funds and the attached spending limits, he would have been crippled against the Democratic nominee by the spending caps which would have been in force until the September Republican Convention.

PARTY CONVENTION FUNDING

The presidential campaign public financing system also provides national party committees with an optional public grant to pay for their nominating convention costs. If a party committee accepts public funds, it may not spend more than the amount provided, which is indexed for inflation. This year, both the Democratic and Republican Party have already applied for and received the full \$16 million in available public money to fund their conventions.¹⁶

In addition to the public funds national parties may spend directly on their conventions, the FEC allows cities that host conventions to establish non-profit "host committees."¹⁷ That committee may raise money to spend on convention-related projects that might otherwise have been sponsored by the national party with public funds. For example, a host committee may spend money to welcome convention attendees to the city with information booths or receptions, facilitate commerce, furnish a venue for the party's use, and offer construction and convention-related services, etc.¹⁸

FEC regulations regarding host committee fundraising are decidedly more relaxed than those for other committees. A host committee may receive unlimited donations from corporations, banks, labor unions, and individuals for permissible expenditures.¹⁹ Since 2003, there has been no requirement that the organizations contributing to the host committee have a local presence in the host city.²⁰ The use of host committees has been criticized by some because the committees may accept unlimited money from corporations and other normally prohibited sources. Critics argue that this allows for the use of "soft money" for nominating conventions, and thus in effect circumvents the Bipartisan Campaign Reform Act (BCRA).²¹

In 2004, the New York Host Committee (for the Republican Convention) received \$85.7 million and the Boston Host Committee (for the Democratic Convention) received \$56.8 million²²—which combined was more than four times the amount the national parties received in public funds.²³ Although presidential candidates may not "establish, finance, maintain, or control" host committees,²⁴ they may make a "general solicitation of funds" for these committees.²⁵

GENERAL ELECTION FUNDING

Major party presidential nominees are eligible for a public grant for the general election. In 2008, the Democratic and Republican nominees will be eligible to receive \$84.1 million in public funds once their parties officially nominate them at their respective conventions.²⁶ Candidates may accept general election funding even if they turned down primary matching

funds. In order to be eligible for general election public funding, a candidate must limit spending to the amount of the grant and may not accept private contributions for the campaign. Candidates are also not allowed to spend more than \$50,000 of personal funds in the general election and must permit an FEC audit after the election.

The FEC allows candidates who accept general election public funds to establish a special account exclusively to pay for legal and accounting expenses associated with complying with campaign finance law. Expenses of this fund, commonly known as "GELAC," are not subject to normal expenditure limits, and the legal fund may accept private contributions within the federal limits and source prohibitions.²⁷ Candidates may fund GELAC accounts by re-designating primary-election contributions²⁸ or soliciting GELAC contributions.²⁹ Past major-party nominees have raised significant amounts in GELAC contributions. In 2004, George W. Bush raised \$18.8 million and John Kerry raised \$11.9 million.³⁰

GELAC funds may be used to pay for many of a campaigns administrative, legal, and accounting expenses. For example, "payroll, overhead[,] ... computer services" and other costs associated with "legal and accounting services provided solely to ensure compliance with" federal campaign laws and regulations;³¹ non-reimbursable costs incurred in providing transportation services for the Secret Service and national security staff;³² costs associated with voting recounts;³³ and winding down expenses for legal and accounting compliance activities. A candidate may not solicit GELAC funds before April 1 of the election year, and GELAC contributions must be returned if a candidate does not accept the general election grant.³⁴

Since the 1976 election, every major party nominee has accepted the general election grant. This year, however, could be an exception. As discussed above, Senator Obama has wavered on his commitment to accept public funding in the general election. Senator McCain, however, seems likely to take public funding, although he has said he will reconsider if his opponent does not accept public funds.³⁵ At this point, Senator McCain has not been raising general election funds, and has publicly expressed a desire to opt into the public financing system. It makes sense for Senator McCain to accept public funds this cycle.³⁶ The Republican National Convention is late this year, not concluding until September 4, 2008. Senator McCain would have just over two months to spend the \$84.1 million public grant. Furthermore, Senator McCain's well known support of the public funding system and commitment to clean elections and campaign finance make it a natural fit for him to accept public funding in the general election.

CONCLUSION

Participation in the presidential public financing system has been declining in recent years, as the system has received increased attention—with periodic calls for either the program's abolition or reform. Several portions of the system are outdated, which has generally eroded the system's value. The way the presidential public financing system functions during the remainder of the 2008 election cycle could determine whether the program is revived or abandoned.

Endnotes

1 From 1976 through 2004, of eight-two candidates generally considered as “serious” (based on media standards, name recognition, etc.) only eight did not participate in the primary matching fund system. These eight were John Connally (1980), Ross Perot (1992), Steve Forbes (1996), Steve Forbes and George W. Bush (2000), and Howard Dean, John Kerry, and George W. Bush (2004). U.S. Congressional Research Service, *The Presidential Election Campaign Fund and Tax Checkoff: Background and Current Issues* (RL32786; Dec. 12, 2005), by Joseph E. Cantor at 5.

2 Although John McCain applied for and was approved for the receipt of primary matching funds, he determined not to accept primary matching funds. See Press Release, Fed. Elec. Comm’n, *FEC Approves Matching Funds for 2008 Candidates* (Dec. 20, 2007) available at <http://www.fec.gov/press/press2007/20071207cert.shtml>.

3 See Fed. Elec. Comm’n, Advisory Opinion 2007-03 (2007), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=604&START=576396.pdf>.

4 *Id.*

5 *Id.*

6 See Jim Kuhnenn, *Obama Says Public Financing System is ‘Creaky’ and Needs Reform*, ASSOCIATED PRESS, April 11, 2008; *A Lapsed Principle*, WASHINGTON POST, April 14, 2008, at A14; *Creaky v. Cling: Public Financing of Elections*, ST. LOUIS POST-DISPATCH, April 16, 2008.

7 See Kuhnenn, *supra* note 6.

8 U.S. Congressional Research Service. *The Presidential Election Campaign Fund and Tax Checkoff: Background and Current Issues* (RL32786; Dec. 12, 2005), by Joseph E. Cantor at 1.

9 *Id.* at 3.

10 ANTHONY CORRADO, ET AL., *THE NEW CAMPAIGN FINANCE SOURCEBOOK 181* (The Brookings Institution 2005).

11 *Id.*

12 *Id.* at 189.

13 See 11 C.F.R. § 9033.2(b)

14 See Fed. Elec. Comm’n, *Presidential Spending Limits for 2008*, available at http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml.

15 See Center for Responsive Politics, *Banking on Becoming President* (2008), available at <http://www.opensecrets.org/pres08/index.php>.

16 Press Release, Fed. Elec. Comm’n, *Both Major Parties to Receive Public Funding for 2008 Conventions* (June 26, 2008) available at <http://www.fec.gov/press/press2007/20070626conventions.shtml>.

17 See 11 C.F.R. § 9008.50(b).

18 11 C.F.R. § 9008.52(b).

19 See Campaign Finance Institute, *The \$100 Million Exemption: Soft Money and the 2004 National Party Conventions 30-35* (2004), available at http://www.cfinst.org/legacy/eGuide/PartyConventions/financing/pdf/full_partyconventions.pdf (listing major donors to the 2004 New York Host Committee).

20 Corrado et al., *supra* note 10, at 191-92.

21 *Id.* at 192-93.

22 Fed. Elec. Comm’n, *Report of the Audit Division on the New York City Host Committee 1* (2005), available at http://www.fec.gov/audits/2004/20060112_ny_host_cmt_2004.pdf; Fed. Elec. Comm’n, *Report of the Audit Division on the Boston Host Committee 1* (2005), available at <http://www.fec.gov/audits/2004/20050531host.pdf>.

23 Corrado et al., *supra* note 10, at 192.

24 Fed. Elec. Comm’n, Advisory Opinion 2003-12 (2003), available at <http://saos.nictusa.com/aodocs/2003-12.pdf> (stating that the “general solicitation” exception to the ban on “soft money” solicitation does not apply to those organizations “establish[ed], finance[d], maintain[ed], or control[led]” by a federal candidate).

25 11 C.F.R. § 9008.55(d). See also 2 U.S.C. § 441i(e)(4)(A).

26 11 C.F.R. § 9004.1. See also Fed. Elec. Comm’n, *Presidential Spending Limits for 2008*, available at http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml.

27 11 C.F.R. § 9003.3(a)(1)(i)(B).

28 See 11 C.F.R. § 9003.3(a)(1)(ii)-(v).

29 11 C.F.R. § 9003.3(a)(1)(i)(A).

30 Fed. Election Comm’n, *Report of the Audit Division on Bush-Cheney ‘04, Inc. and the Bush-Cheney ‘04 Compliance Committee, Inc. July 2, 2003 – Dec. 31, 2004* (2007), available at http://www.fec.gov/audits/2004/20070322bush_cheney_compliance_04.pdf; Fed. Election Comm’n, *Report of the Audit Division on Kerry-Edwards 2004, Inc. and the Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund Feb. 18, 2003 – Dec. 31, 2004* (2007), available at

31 11 C.F.R. § 9003.3(a)(2)(i)(A)-(B), (F).

32 11 C.F.R. §§ 9003.3(a)(2)(i)(H); 9004.6.

33 Fed. Election Comm’n Advisory Opinion 2004-35 (2004), available at <http://saos.nictusa.com/aodocs/2004-35.pdf>.

34 11 C.F.R. § 9003.3(a)(1)(i).

35 See Kuhnenn, *Creaky v. Cling*, *supra* note 6.

36 *Id.*

