



128 DORRANCE STREET, SUITE 220
PROVIDENCE, RI 02903
401.831.7171 (t)
401.831.7175 (f)
www.riaclu.org

COMMENTS ON PROPOSED ETHICS COMMISSION REGULATIONS
TO LIMIT PRE-ELECTION COMPLAINTS
JULY 19, 2016

This proposal would bar members of the public from filing any ethics complaint against a candidate for office within ninety days of a general or special election. The ACLU of Rhode Island strongly opposes such a moratorium and urges its rejection.

The Commission defines the purpose of this regulation as being to “prevent the filing of complaints that are politically timed to influence elections.” But we find this explanation problematic for a few reasons. First, it implies that any complaint filed within 90 days of an election is “politically timed to influence” it. We recognize that, during the heat of election campaigns, some complaints of dubious merit may get filed with the Commission in an attempt to score political points. But the timing of many complaints is almost inherent in the election season itself, and complaints simply should not be minimized on such a basis.

In supporting a moratorium, Common Cause Rhode Island noted in a recent letter to the Commission that there is a large spike in the number of pending complaints reported at October and November Commission meetings. This leads them to conclude, similar to the Commission’s explanation, that the “complaint process is being used in a political manner during elections.” As we discuss below, the Commission’s own statistics suggest that any such concern is greatly exaggerated; regardless, this hardly strikes us as a reason to create a moratorium.

The fact that the process for challenging the ethical conduct of elected officials – i.e., politicians – may be used in a “political manner” should not be surprising, nor should it ultimately matter. When, for example, the Republican Party files a complaint against a

Democratic office-holder, or vice-versa, one can assume that there are, at least in part, political motivations for doing so, but this does not render the complaint invalid. Politically motivated complaints simply are not synonymous with unwarranted complaints, and the motivation of a complainant should not be relevant to the Commission's deliberations.

It should also not be a surprise that there is a spike in complaints to the Commission around election time. That is the period when people become most engaged in politics and have the greatest interest in examining the record and conduct of politicians and in holding them accountable. To demand that people file their complaints before the "election season" will, in many instances, simply be infeasible. And if the complaint is against a new candidate for office, a moratorium leaves complainants with literally just a few weeks from the time the candidate formally qualifies for the ballot to file any pre-election complaints. (In fact, by the time the Commission promulgates these regulations, that window will have closed for this year's elections.)

The Commission's rule-making notice states that "[a]ny valid complaint may be filed and investigated following the moratorium period." But the motivation to file even meritorious complaints after the election season is over may, understandably, dissipate in many instances. A complainant may feel it is not worth the energy – perhaps because the candidate lost the election and the complainant believes pursuing the matter would be gratuitous. Or perhaps he or she will feel that, in the absence of an electoral campaign, the public will have little interest in the allegations and consider them "sour grapes." Or he or she may feel, if the candidate is elected, that the harm is already done. Actual misconduct may go uninvestigated as a result.

According to the Commission's data, in the election years between 2006 and 2014, 23 ethics complaints were filed by the public against a candidate during the "election season," and of those 23, 11 – **almost half of them – resulted in a finding of violation.** And while 12

of the 23 complaints may not have resulted in a violation finding, that is a far cry from suggesting that they were frivolous. (The charts provided by the Commission did not provide statistics on how this 48% violation rate compares with complaints filed outside the “election season” window, but it clearly remains a significant number.)

Even if one focuses solely on frivolous complaints, there are at least two problems with using a moratorium in an attempt to stifle them. First, it does not stop unfounded allegations against political figures; it just prevents them from being formally filed with your agency. Will an allegation of impropriety receive that much less public attention if an accuser waves around a complaint form that he claims he would file with the Commission were it not for the moratorium? Indeed, accusers may be more reckless with their allegations if they *don't* have to commit them to writing, notarize them and file them with an agency that can fine them for filing a frivolous complaint. There is therefore potentially *less* accountability when news releases, social media or campaign flyers become the sole vehicle for pursuing allegations of ethical lapses.

More importantly, while a moratorium eliminates the filing of frivolous complaints, it bars the filing of any *meritorious* complaints as well. As noted above, a not-insubstantial number of complaints filed during election seasons are in fact found to be meritorious. It strikes us as strange, to say the least, to have a state agency designed to investigate ethics complaints put up a “Closed for Business” sign during what should be the busiest time of the year. To do so because some of the complaints it receives may not be valid is the quintessential example of throwing the baby out with the bathwater.

In any event, we further believe there is absolutely nothing inappropriate in petitioning a government agency to investigate an alleged violation of the law by a public official or candidate, even if part of the motivation is to influence an election. The ethical conduct of candidates is a

quintessential area of discussion in a political campaign, whether filed in a formal complaint with the Ethics Commission or through public allegations of impropriety.

Further, if the Commission's concern is truly about how the timing of complaints may "influence elections," an even stronger argument could be made for a moratorium on the Commission *itself* initiating any complaints, or issuing any findings, during the election season. Indeed, accepting the logic behind this proposal, there is something even more troubling in allowing the Commission to directly "influence elections" by the timing of *its* actions, which, unlike a complaint from a member of the public, have the imprimatur of a government agency. After all, why can't the Commission also wait 90 days to initiate a complaint (or issue findings) unless it desires to "influence" an election?

The citizenry's ability to file complaints with an agency like the Ethics Commission is central to their First Amendment right to petition government for the redress of grievances. Because a moratorium would undercut this important principle, we urge the Commission to refrain from relying on this "solution" to address the problem of frivolous complaints. More appropriate approaches could include quicker dispositive action by the Commission to promptly weed out frivolous allegations, and routine public acknowledgements that acceptance of a complaint says nothing about its validity. They may not eliminate the problem, but they do much less harm to the public's petition rights and the Commission's charge.

We therefore respectfully urge the Commission to reject and withdraw this proposal. Otherwise, we request that, pursuant to R.I.G.L. §42-35-2.6(1), you provide us with a statement of your reasons for not accepting the arguments we have made in opposition to this proposal.

Thank you for your time and attention to these concerns.