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FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

September 17, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Alternative Draft Advisory Opinion 1996-36

Attached is the alternative draft of the subject opinion for circulation and tally vote with a 48 hour deadline.

This draft is prepared according to the Commission's directions at the meeting of September 12, 1996, when it considered Agenda Document #96-96. The alternative draft concludes that a separate, special general election contribution limit will apply to contributions made after August 5 for each requesting candidate's special general election campaign. Contributions made towards this separate limit do not have to be aggregated with regular general election contributions made by the same donors before August 6.

As a result of the conclusion that there are, in effect, two general elections in this situation, the draft also states that a new coordinated expenditure limit, under 2 U.S.C. §441a(d), will be available for party coordinated expenditures made after August 5. All coordinated expenditures made after August 5 will, however, be subject to one limit.

The alternative draft retains the conclusions in the original OGC draft (Agenda Document #96-96) as to counting contributions toward an individual contributor's $25,000 limit.

The Commission also voted on September 12 that this alternative draft will be approved and issued if four affirmative votes are entered and if no objections (except objections for the record only) are made. If the alternative draft is not approved in this manner, both it and the original OGC draft will be placed on the agenda for September 26, 1996.

Attachment

DRAFT

ADVISORY OPINION 1996-36

Robert F. Bauer
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

Dear Mr. Bauer:

This responds to your letter dated August 12, 1996, as supplemented by your letter dated August 21, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the application of contribution limits to elections in Congressional Districts where the boundaries have been altered pursuant to a court order.

You represent the following Members of Congress from Texas: Sheila Jackson Lee, Martin Frost, Ken Bentsen, Gene Green, and Eddie Bernice Johnson.[1] Each of these Members won the Democratic primary in his or her Congressional District, held on March 12.[2] All of these Members are candidates for re-election who either won nomination or were unopposed in their party's primaries held on March 12, 1996.[3]

On August 5, a three-judge panel of the United States District Court for the Southern District of Texas issued a Memorandum Opinion on Interim Remedy and an Interim Order Regarding 1996 Special Elections. These directions by the court redraw the boundaries of 13 Congressional Districts in Texas and result from an earlier judicial determination that three of those districts were "created as a product of overt racial gerrymandering." *Vera v. Bush*, No. H-94-0277, slip. op. at 2 (S.D. Tex. August 5, 1996). Under the court's plan, voters in the 13 districts will participate in a general election that shall follow the Texas special election law. The election is to be held along with the presidential elections on November 5, and all qualified candidates may compete. *Id.* The court's plan provides that, if no candidate captures a majority of the votes in a

[1] They presently represent the 18th, 24th, 25th, 29th, and 30th Districts of Texas respectively. Ms. Jackson Lee, Mr. Bentsen, and Mr. Green represent districts in the Houston area, and Mr. Frost and Ms. Johnson represent districts in the Dallas area.

[2] All dates herein are in 1996 unless otherwise stated.

[3] According to the March 16 issue of *Congressional Quarterly*, Mr. Green won a contested primary election. The other four requesters were unopposed.

district, a runoff election for the seat between the two candidates receiving the most votes will be held on December 10.[4] The five named members will compete with other candidates who qualify for the ballot in their respective districts.[5]

You ask a number of questions, and you premise your inquiry on your characterization of the March 12 primary as a "voided election." You are also concerned that the special election will now involve candidates who had not been competing in the general election prior to the court's decision. Your questions are restated as follows:

(1) May a candidate assume that any contribution made for the March 12 primary has been "voided" for purposes of the §441a limits, so that a contributor who gave $1,000 for that primary may also give $1,000 for the November election? Must a general election contribution made prior to the August 5 *Vera* decision be aggregated, for the purposes of the §441a limits, with contributions made after August 5 for the special general election?

(2) May a candidate who has won the March 12 primary transfer surplus funds from that election to an account used for the court-ordered November election? Are such transfers subject to conditions, such as a determination of which transferred contributions would exceed the contribution limits when combined with contributions received after the primary?

(3) In raising funds for the November and December elections, may a candidate assume that contributions previously made for the March 12 primary and contributions made before the August 5 decision do not count against the contributor's $25,000 annual aggregate limit under 2 U.S.C. §441a(a)(3)?

(4) Before the November election, may a candidate establish a separate account or otherwise institute an appropriate accounting system to collect contributions for a possible December election?

(5) May a candidate conduct his or her fundraising on the assumption that party committees will have one limit under 2 U.S.C. §441a(d) for spending on both the November and December elections?

Response to Questions 1 and 2

[4] The relevant Texas State law providing for the runoff of the top two finishers in a special election is found at Election Code §§2.021, 2.023, 203.003, and 204.021. See Advisory Opinion 1993-2.

[5] The Interim Order provides that August 30 is the filing deadline for all congressional candidates in the special elections and that September 5 is the "deadline for the Secretary of State to certify the names of candidates for the ballot for the November 1996 special elections" in the redrawn districts. *Vera v. Bush*, Interim Order Regarding 1996 Special Elections, at 3.

In responding to your questions, the Commission must first address your premise that the March 12 election is a "voided election." You state that this election was not a "true" election because, as a result of the court decision, it had no legal effect on nomination or qualification for the ballot. You conclude, therefore, that moneys received by the candidates for that election were not "contributions." For purposes of the Act, however, this characterization of the election is erroneous. The March 12 election was a primary election held under the color of Texas State law for the purpose of nominating candidates for election to Federal office. See 11 CFR 100.2(c)(1). The candidates were, in fact, nominated as a direct result of these elections. Significantly, the District Court, in the *Vera* case, issued an order in 1994 staying the 1996 elections in the affected districts, but the U.S. Supreme Court stayed that order, and the March primary elections were held. See *Vera*, slip. op. at 6-7. Hence, the Federal elections in the 13 districts went forward in accord with judicial supervision and cannot be regarded as "void."

The Commission notes the implications of considering the March 12 primaries as "voided" for purposes of the Act. At the time contributions were made to the candidates for the March 12 primary, they were made for the purpose of influencing a Federal election. 2 U.S.C. §431(8)(A)(i); 11 CFR 100.7(a)(1). To conclude that the primaries were voided for purposes of the Act would retroactively negate the obvious election influencing purposes of contributions and expenditures made for that election. It would mean that there was no obligation for the candidates' committees to register and report, no limit or prohibition on funds received, no prohibition on the personal use of funds received, and, obviously, no ability by the Commission to conduct enforcement activity with respect to this election.

In partial response to the first two questions, the Commission therefore concludes that any contribution to a candidate for the March 12 primary election was and remains a contribution for all purposes of the Act. Such a contribution does not have to be aggregated with any contribution received for the November election, but remains subject to the limits of 2 U.S.C. §441a. The surplus of lawful primary election contributions remaining unused after the March primary may be transferred to the same candidate's campaign account for the special election in November. 11 CFR 110.3(c)(3). There is no

need for these surplus contributions to be redesignated by their donors as special election contributions.

With respect to contributions made for the November election, the Commission notes the unusual circumstances presented. From March 13, each requesting candidate was running in a general election for Federal office as their party's nominee. The court's decision, while not "voiding" the holding of the primary election for purposes of the Act, nullified the results of the primary. After August 5, therefore, each candidate was placed in a new electoral situation, created by the district court, whereby he or she was no longer the party's nominee, but was instead a candidate in an election that could involve other candidates of the same party. The effect of the court's decision, therefore, was to create a new general election contest, beginning on August 6 and lasting until November 5; this created, in effect, a different election campaign period from the one that lasted from March 13 to August 5.

The Commission emphasizes that the situation of the requesting candidates is both extraordinary and a matter of first impression for the Commission. With respect to the issue of general election contributions made to the Committee before August 6, each requester's situation is also distinguishable in material respects from that addressed in Advisory Opinion 1982-22. In that opinion, a Congressional candidate changed the district in which he had originally filed his candidacy because of a court decision that altered the boundaries of the district several months before the scheduled date of the primary elections.[6] The 1982 situation did not entail a new, court-ordered election, and the candidate still ran for the same office in the same, regularly scheduled primary election held under Texas law. He was in the same electoral position that he was in

[6] In the 1982 case, a candidate for the House solicited and received contributions and made campaign expenditures to influence voters in the Fifth District of Texas, but later withdrew his candidacy for that seat and refiled as a candidate in the Third District. He made this switch several months before the primary election and after a U.S. District Court ordered a change in the boundary lines of the Fifth District. The Commission concluded that his candidate filing change did not entail a different election for a separate Federal office. The Commission reasoned that neither the Act nor Commission regulations identify House seats as separate Federal offices, and that the Constitution and other Federal law define the office of Representative by the State represented and not by the geographic boundaries of the particular district. Thus, contributions from the same contributors, whether before or after the filing district change, had to be aggregated and could not exceed the limits of 2 U.S.C. §441a(a)(1) and (2). Advisory Opinion 1982-22.

before the court's decision since no primary election had been held before he changed the district of his candidate filing. Here, the *Vera* court decision has nullified the results of prior elections in which each requester has participated as a candidate and has ordered the holding of a new, *special* general election in November as a remedy.

The Commission concludes, therefore, that a general election contribution made to a candidate prior to August 6 will not need to be aggregated with contributions made after August 5 for the court-ordered special general election to determine compliance with the limits at 2 U.S.C. §441a(a)(1) and (2).[7] Separate contribution limits are available for the contributions made before August 6 for the regular general election and for the contributions made after August 5 for the special general election.

The Commission points out, however, that no election was held on August 5. Therefore, the allowance for two general election limits in this highly unusual circumstance where there is, in effect, a second election period does not extend to permitting the candidate's authorized committees to determine their net debt situation as of August 5 and to collect contributions after that date that are designated by contributors for the regular general election. See 11 CFR 110.1(b)(3) and 110.2(b)(3). The candidate's committees may only do this with respect to the special general election that will be held on November 5.

Response to Question 3

Based on the response to question 1, the Commission concludes that contributions made for the March 12 primary count toward an individual's $25,000 limit under 2 U.S.C. §441a(a)(3) and 11 CFR 110.5. The primary election contributions were made for a Federal election held under color of law. Contributions made at any time for the regular or special November election also count toward the $25,000 limit. The Commission notes that the Act contains no "hardship" exception allowing increases to the $25,000 limit when unforeseen election events develop, such as where special elections are held because of an unexpected vacancy in a Federal office. An individual

[7] A contribution is considered "made" when the contributor relinquishes control over the contribution. For contributions mailed to a political committee, the postmark date on the envelope is the date the contribution was made. 11 CFR 110.1(b)(6) and 110.2(b)(6); see 11 CFR 110.1(*l*)(4).

who made a contribution for a special election occurring in the same year as the regularly scheduled elections would still be subject to the $25,000 annual limit for that year, which is never increased or decreased by the number of separate elections held in any given year. 2 U.S.C. §441a(a)(3).

Response to Question 4

Commission regulations provide that an authorized committee of a Federal candidate may receive contributions prior to the primary election date that are designated for the general election if it uses an acceptable accounting method to distinguish between primary and general election contributions. These acceptable methods include the designation of separate accounts or the establishment of separate books and records for each election. 11 CFR 102.9(e). Using this regulation as a basis, the Commission has also permitted the acceptance of contributions for a runoff election before there is an established necessity for such an election, provided that such contributions are accounted for (as provided in the regulation) and are returned to the donor in the event no runoff is held or the candidate does not participate in the run-off. Advisory Opinion 1983-39; see Advisory Opinion 1982-49. See also 11 CFR 103.3(b)(3). Each requesting candidate may therefore set up an account or appropriate accounting system to collect contributions for a possible December election.[8]

Response to Question 5

The Act and Commission regulations provide that political party committees may make limited coordinated expenditures in connection with the general election campaign of candidates for Federal office. 2 U.S.C. §441a(d)(1); 11 CFR 110.7(b)(1). The national party committee (including any designated agent of the national committee) and State political party committee (including subordinate State committees) may each make such expenditures in connection with the general election campaign of a Senate or House candidate in that state who is affiliated with such party. 2 U.S.C. §441a(d); 11 CFR 110.7(b)(1) and 110.7(a)(4). In the case of a House candidate, the national party limit and

[8] The Commission also refers you to Advisory Opinion 1986-17 which sets out the limited uses of contributions designated for the general election and received prior to the primary. Such restrictions also apply with respect to contributions designated for the December election, but received prior to the November election.

the State party limit are each $30,910 for the 1996 general election campaign. 2 U.S.C. §441a(d)(3)(B) and 441a(c); 11 CFR 110.7(b)(2)(ii) and 110.9(c).

In Advisory Opinion 1993-2, the Commission considered a situation in which a national party committee sought to make §441a(d) expenditures in connection with a special election in Texas to fill a vacancy created when a Senator left office in the middle of his term. Candidates from all parties, including independents, competed in the election. Under Texas law, candidates of the same party could compete against each other in that election. Just as in this request, if no candidate received a majority of votes in the special election, a runoff between the top two finishers would occur to determine who would hold the seat. The Commission concluded that, although there were two elections capable of resulting in the final selection of an individual to the office at stake, only one section 441a(d) limit was applicable to spending by the national party committee. Advisory Opinion 1993-2.[9]

This situation is distinguishable from the situation presented in that opinion. That situation involved one general election, followed by a runoff. Similarly, in a court case involving the application of the section 441a(d) limit to a U.S. Senate race in Georgia where there was a run-off following the general election, it was held that, since there was only one general election, as defined in 11 CFR 100.2(b) and since the runoff, separately defined at 11 CFR 100.2(d), was not a general election, the use of only one set of limits by the national and State parties was permissible. *Democratic Senatorial Campaign Committee v. Federal Election Commission*, No. 93-1321 (D.D.C. Nov. 14, 1994). In this situation, as stated above, there are, in effect, two general elections; these are the regular general election, which was expected until the court's order on August 5 and the special general election ordered by the court to be held on November 5. The Commission concludes therefore that the national and State party committees will each have a new coordinated spending limit under 2 U.S.C. §441a(d) for each of the five requesting

[9] In that opinion, the Commission also noted the significant distinction between the application of the section 441a(a) limits and the 441a(d) limits. The Commission stated that its conclusion did not change the status of the runoff election as a separate election for the purposes of section 441a(a), pointing out that such limits "apply with respect to 'any election' or to 'each election' and do not relate specifically to the determination of what constitutes a general election or 'general election campaign' for the purposes of section 441a(d)."

candidates. This new limit becomes available on August 6, and expenditures attributable to this limit are separate from, and do not have to be aggregated with, any section 441a(d) expenditures made before August 6. In view of the fact that no regular general election will be held, and consistent with the inability of contributors to make contributions after August 5 for the regular general election, the national and State party committees are each limited to one section 441a(d) limit for any coordinated expenditures made after August 5 in connection with the campaign in each of the five districts represented by the candidate requesters.

This response constitutes an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Lee Ann Elliott
Chairman

Enclosures (AOs 1993-2, 1986-17, 1983-39, 1982-49, and 1982-22)