FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION

FROM: MARJORIE W. EMMONS/BONNIE J. ROSS

DATE: SEPTEMBER 10, 1996

SUBJECT: TIMELY SUBMITTED COMMENT ON DRAFT ADVISORY OPINION 1996-36.

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FROM *Marc E. Elias* Date *September 10, 1996*

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September 10, 1996

N. Bradley Litchfield
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Draft Advisory Opinion 1996-36

Dear Mr. Litchfield:

We have reviewed the draft advisory opinion 1996-36 ("Draft AO 1996-36") replying to the questions posed in our request, and offer the following comments, on the public record:

Draft AO 1996-36 suggests that reference to "voided" contributions is misguided, and that contributions made prior to or on March 12, 1996--the date of the voided election--remain valid and fully effective even if the elections were not. This conclusion seems to follow from the claim that the elections were conducted "under color of state law." In this way, the draft opinion suggests that so long as the elections were in appearance lawful, those appearances should control, even though the contributions received for that election were made to assist these candidates in a now-futile effort to secure their party's nomination.

Appearances notwithstanding, the court in Vera v. Bush, 1996 U.S. Dist. LEXIS 11135 (Aug. 5, 1996) held that elections were unlawfully conducted, and thereby "void." As a result, the court required the scheduling of new elections in their place. It does not seem logical or fair to find that the "contributions" made for an election since held null and void, to support candidates since required to start over, must be charged to the individual's $25,000 annual aggregate contribution limit. Similarly, it does not seem appropriate to ignore the practical impact of the Court's August 5, 1996 Order, which, in effect, created a new set of elections with new districts, and to deny candidates the opportunity to seek a separate contribution for the separate (special) election established by Court Order on August 5.

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The practical problem with the draft opinion's approach is that it penalizes candidates and contributors for flaws in the electoral process for which they were not responsible. The penalty consists of sharply reduced resources for political activity when more rather than less resources are needed to meet the extraordinary conditions caused by the voiding of the election. The draft opinion suffers a similar problem with respect to its treatment of the Court's August 5 decision and its impact on contribution limits. That decision created not only new elections but new districts as well, and as important, it completely altered the character of the campaign and therefore the resources required to conduct it. The affected candidates are now forced to essentially compete under completely different conditions for the support of a different set of voters . As such, the Commission should recognize the need for increased resources. Thus, even those candidates who ran unopposed, and maintain a surplus from the primary now available for transfer to the general, are struggling with inadequate resources in these conditions.

The costs of this radical change in conditions cannot be overestimated. The affected candidates have been preparing for a general election contest in which they would have appeared as the only candidates of their party, able to draw votes in straight ticket voting. Now, the all-party primary imposed by the Court places candidates of the same party against each other, altering every aspect of their campaign and adding substantially to its expected cost. In addition, the candidates must bear the added cost of seeking majority victory in the all-party primary, not the plurality victory available in the regular general election under Texas law. Perhaps most importantly, the candidates must spend money to reach voters with a message not necessary in normal circumstances; namely, that they must vote in both the general election and the special held the same day. This educational campaign would be expensive under any circumstances. In this case, however, the candidates must face the additional expense that parties cannot help them with "generic" messages but must couple with the standard "Vote" message, an additional reference to the candidate in the special election along with the advisory that a separate vote must be cast for him or her. This specific reference must be paid by the candidate, or the party will be required to charge the cost to the spending limit for that election available under section 441a(d)(3) of the Act.

For these reasons, the fact remains that holding contributors to one limits contributions received before or after August 5, and maintaining the $25,000 limit for contributions to the voided election severely compromises the ability of candidates to

prepare the very different campaign now facing them. All of the affected candidates who participated in the "voided" election must turn, with little time remaining, to the most committed contributors mostly likely to support them; and yet, at this late stage in the election year, these are precisely the contributors approaching or reaching both their "per election limit" as well as their annual limit. Neither the candidates, nor the contributors could have reasonably foreseen or planned for this situation. The Commission's proper concern should lie with making appropriate resources available to these candidates through a considered application of the annual limit to allow for additional contributions, within the per election limit, for the coming elections.

In reaching its conclusions, Draft AO 1996-36 relies heavily upon the Commission's prior opinion in Advisory Opinion 1982-22. However, despite the draft's suggestion, the facts presented here are indeed "materially different from the situation presented in Advisory Opinion 1982-22." Most notably, in Advisory Opinion 1982-22, the change in election districts occurred three months before the primary election was scheduled. Thus, in that instance, there was no "election" that was later voided and re-run. As a result, no contributor money in that instance was "wasted" on a futile effort to secure nomination in a meaningless election. The facts of this case are obviously quite different.

The draft opinion also placed significant reliance upon the remarkable conclusion that all House elections in a given state are, in fact, elections for a single office. In support of this proposition, the draft cites the Act and Commission regulations that even the General Counsel must admit are ambiguous and do not directly address the question. Indeed, in a similar discussion in Advisory Opinion 1982-22, the Commission noted specifically, that "[t]he legislative history and the Explanation and Justification of the Commission's regulations do not reflect that any consideration was given to this question." The sole support for the draft opinions conclusion is single sentence -- taken out of context -- from a 1892 Supreme Court opinion passing on the constitutionality of using congressional districts to chose presidential electors to the electoral college. McPerson v. Blacker, 146 U.S. 1,26 (1892). That case stands for nothing more than the unexceptional proposition that states may chose presidential electors by district much in the same way that they may chose Members by district. A fair reading of the case makes clear that the Court was not intending to opine at all on whether each congressional seat is a separate office and thus is subject to a separate election.

The draft opinion also appears concerned that the Act contains no "hardship" exception under the $25,000 limitation, and it offers the example of a vacancy occurring unexpectedly in a federal office. Although not addressed, the draft implicitly suggests that no such exception exists for the per election limits either. The draft suggests the $25,000 limit is not adjusted for the election made in the special election required to fill that vacancy. Yet the contribution made in that case, unlike here, has the intended effect of supporting an actual candidate in the pursuit of real victory in an election whose result will be honored and allowed to stand. The contribution made to a candidate in the special election is not "wasted" by any means. Nor could it be argued that vacancies and special elections to fill them are unforeseeable and thereby raise any special issues under the Act. The Act and Commission regulations specifically note in other contexts the possibility of "special elections." See 11 C.F.R. § 100.2(f). In this instance, had the Congress been concerned with the application of the annual limit, it would and could have made allowance for its expansion in these circumstances. It did not.

In contrast, Congress plainly did not take into account any possibility that courts might "cancel" an election already held and substitute others in its place. So the issue presented here is novel and it is urgent, bearing in the most immediate terms on the availability to candidates of the resources to recover from the lost election and campaign under radically changed conditions.

Draft AO 1996-36 is correct in stating that "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". This is true, but the conclusion, that the primaries were voided, is inescapable nonetheless. Similarly inescapable is the fact that August 5, 1996 marked the beginning of yet another campaign for election in a new congressional district, for a new congressional seat. .Furthermore, contrary to the suggestion in the draft, the court in Vera did not address either of these issues clearly one way or the other, except to state that it did not accept any claim of "FEC complications". In any event, the Court possessed no legal authority to pass on FECA implications of its decision to void these elections.

While this cancellation or voiding of the election and creation of new ones raises a host of issues, the two with which the Requestors are now principally concerned, with the most substantial impact on their campaign financing and prospects, are the application of the $25,000 annual limit and the draft's suggestion

that August 5, 1996 did not mark the beginning of a new election campaign for a new office for which contributions under a separate limit may be received. Those others issues, including those affecting Commission jurisdiction cited by the draft, may be addressed in appropriate fashion at a later date, on the Commission's initiative, or upon additional request. They should not control the issues presented here for the application of the limits.

Very truly yours,

Robert F. Bauer