AGENDA DOCUMENT #96-96

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: SEP 12 1996

September 5, 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: Draft AO 1996-36

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 12, 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*, Civ. Action 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

[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.

the votes in a 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. Moreover, there is no indication from the court's decision that such a negative impact on the Act's application to campaign financing could have been contemplated with respect to a Federal election held under color of law.[6]

[6] The *Vera* decision indicates the district court's passing notice of arguments made by intervening candidates that "potential FEC complications" would arise under the Act if it were to rule the March primary results invalid. The court was not persuaded by this argument, and the Commission likewise does not agree that campaign financing complications would inexorably follow from the court's decision. *Vera*, slip. op. at 25.

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 refers to the situation it addressed in Advisory Opinion 1982-22. There, the campaign committee of a candidate for the House had solicited and received numerous contributions for election from the Fifth District of Texas, and had expended such funds for various campaign purposes directly related to persuading voters in that district to vote for the candidate in the primary and general elections. Several months before the primary election, a U.S. District Court ordered a change in the boundary lines of the Fifth District. As a result, the candidate withdrew his candidacy for the Fifth District seat and declared his candidacy in the Third District. In response to his question as to whether his Third District candidacy entailed a different election from his Fifth District candidacy for purposes of the Act, the Commission answered in the negative. 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.[7] Thus, contributions from previous contributors, when aggregated with

[7] The opinion also noted that, in contrast, two Senate seats from the same State are different offices, explaining that under the U.S. Constitution, art. I, §3, cl. 2, all Senate seats are divided into three classes of staggered six-year terms. Advisory Opinion 1982-22, n.5. See Advisory Opinion 1978-19 (where the Commission concluded that two Senate seats from the same State were different offices). See also Advisory Opinions 1986-31 and 1984-42 (where the Commission concluded that when a special election to fill a vacancy in a Federal office and the regular general election for the same office in the next Congress are held simultaneously, but voted on separately, those elections constitute separate elections to which the separate contribution limits of 2 U.S.C. §441a(a)(1) and (2) apply).

their previous contributions, could not exceed the limits of 2 U.S.C. §441a(a)(1) and (2). Advisory Opinion 1982-22.

The situation of the five requesting candidates is not materially different from the situation presented in Advisory Opinion 1982-22. Both present circumstances as to the voter composition of the Congressional District that did not exist at the time the candidacy commenced. Even though some voters have been added and some removed from the redrawn districts in question, the candidates are still running for election from a Congressional District in Texas and for the same Congress. See footnote 7. Although the requesters of this opinion have already spent a number of months seeking electoral support from a set of voters that will not completely coincide with the set of voters in the newly drawn districts, the same was true for the requester in Advisory Opinion 1982-22.[8] Moreover, although the set of opponents may change somewhat in the requester's redrawn districts, the same appeared to be true for the candidate in Advisory Opinion 1982-22. See Advisory Opinion 1982-22, n.2. The Commission concludes, therefore, that one limit shall apply for the special general election to be held on November 5 and that any contributions (for the regularly scheduled general election) made before August 6 must be aggregated with contributions (for the special general election) made after August 5 to determine compliance with the limits at 2 U.S.C. §441a(a)(1) and (2).[9] Contributions originally made for the regular general election do not have to be redesignated by the contributors for the special general election.

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 contributions were made for a Federal election held under color of law. Consistent with the analysis above providing for the aggregation of the contributions made for the election in November, contributions

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[8] The court in *Vera*, slip. op. at 25-26, commented: "With regard to the costs already incurred in the campaigns, there was no specific evidence that this has not been money well spent. As has been repeatedly noted, campaigning should be easier, not harder in the newly configured districts."

[9] 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).

made prior to August 5 for the November election also count toward the $25,000 limit. The Commission also notes that the Act contains no "hardship" exception allowing increases to the $25,000 limit when unforeseen election events develop. For example, if a special election had occurred earlier in 1996 due to an unexpected vacancy in a Federal office, an individual who made a contribution for that election would still be subject to the $25,000 annual limit, which is not 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). The candidate may therefore set up an account or appropriate accounting system to collect contributions for a possible December election.[10]

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

[10] 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.

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 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.[11]

The Commission concludes that there is no material difference between the situation presented in Advisory Opinion 1993-2 and the situation you present. Accordingly, the Commission concludes that the five candidates may conduct their fundraising activities on the assumption that the national and State party committees will each be limited to one coordinated spending limit under 2 U.S.C. §441a(d) for each candidate.

[11] 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)."

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, 1986-31, 1986-17, 1984-42, 1983-39, 1982-49, 1982-22, and 1978-19)