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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

SUBJECT: Draft AO 1996-37

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

1 ADVISORY OPINION 1996-37

2
3 Kindra L. Hefner, Director
4 Brady for Congress Committee
5 P.O. Box 8277
6 The Woodlands, TX 77387

7
8 Dear Ms. Hefner:

9
10 This responds to your letter dated August 12, 1996, requesting an advisory
11 opinion concerning application of the Federal Election Campaign Act of 1971, as
12 amended ("the Act"), and Commission regulations to the contribution limits that apply in
13 the 8th Congressional District of Texas as a result of altered boundaries pursuant to a
14 court order.

15 You represent Kevin Brady, who is a candidate for Congress from the 8th
16 Congressional District of Texas, and his principal campaign committee, Brady for
17 Congress ("the Committee"). Mr. Brady was a Republican party candidate in the March
18 12 primary election and in the subsequent primary run-off election on April 9 which he
19 won. (All dates herein are 1996, unless otherwise stated.)

20 On August 5, a three-judge panel of the United States District Court for the
21 Southern District of Texas issued a Memorandum Opinion on Interim Remedy and an
22 Interim Order Regarding 1996 Special Elections. These court directives redraw the
23 boundaries of 13 Congressional Districts in Texas, and result from an earlier judicial
24 determination that three of those districts were "created as a product of overt racial
25 gerrymandering." *Vera v. Bush*, Civ. Action No. H-94-0277, slip. op. at 2 (S.D. Tex.
26 August 5, 1996). One of the 13 districts is the 8th where Mr. Brady is a candidate.
27 Under the court's plan, voters in all 13 districts will participate in a "special election" that
28 shall follow the Texas special election law. The election is to be held along with the
29 presidential elections on November 5, and all qualified candidates may compete. The
30 court's plan provides that, if no candidate obtains a majority of the votes in a district, a
31 runoff election for the seat between the two candidates receiving the most votes will be

1 held on December 10.¹ Mr. Brady expects to participate and compete with all other
2 candidates who qualify for the ballot in the 8th district.²

3 You inquire as to the effect of the court-ordered November 5 special election on
4 "the contribution limits for those contributions already received for the [originally
5 scheduled or regular] general election and those future contributions to be solicited for
6 the new open election." You request an advisory opinion to verify that contributions
7 already received for the regular general election on November 5 will be subject to a
8 separate election limit from that which should apply to the "new open election" required
9 by the court's order. In other words, you propose to accept contributions for the *new*
10 *special* election from the same persons who have made contributions for the *regular*
11 *general* election without regard to the amount of their contributions to the latter election.
12 To illustrate, you apparently propose that an individual who has already contributed
13 \$1,000 to the Committee for the regular general election may also contribute an
14 additional \$1,000 for the special general election ordered by the court.

15 For the reasons set forth below, the Commission concludes that the special
16 general election which, according to the court order, will be held on November 5, is not a
17 separate election with separate contribution limits from those originally in effect for the
18 regular general election. Thus, any person who made lawful contributions to the
19 Committee with respect to the regular general election must count the amount of those
20 contributions towards the same limit that applies to the special general election. In the
21 event a special runoff election becomes necessary on December 10, a separate
22 contribution limit will apply for contributions to the Committee for that election,
23 provided Mr. Brady qualifies as a candidate therein.

24 The Commission's conclusion is premised on the fact that the March 12 primary
25 election and the subsequent April 9 runoff election were valid elections held under color
26 of State law for the purpose of nominating candidates for election to Federal office. See

¹ The relevant Texas State law providing for the run-off of the top two vote-getters in a special election is found at Election Code §§2.021, 2.023, 203.003, and 204.021. See Advisory Opinion 1993-2.

² 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 congressional districts. *Vera v. Bush*, Interim Order Regarding 1996 Special Elections, at 3.

1 11 CFR 100.2(c)(1). Mr. Brady was, in fact, nominated as a direct result of these
2 elections and conducted a general election campaign for nearly four months as his party's
3 nominee. Significantly, the District Court, in the *Vera* case, issued an order in 1994
4 staying the 1996 elections in the affected districts, but the U.S. Supreme Court stayed that
5 order, and the March primary elections (and later runoff elections) were held. See *Vera*,
6 slip. op. at 6-7. Hence, the Federal elections in those districts went forward in accord
7 with judicial supervision and cannot be regarded as null and void.

8 With respect to the issue of general election contributions made to the Committee
9 after the April 9 runoff and before August 6, the Commission notes the similarity of this
10 situation to that addressed in Advisory Opinion 1982-22. There, the campaign committee
11 of a candidate for the House had solicited and received numerous contributions for
12 election from the Fifth District of Texas, and had expended such funds for various
13 campaign purposes directly related to persuading voters in that district to vote for the
14 candidate in the primary and general elections. Several months before the primary
15 election, a U.S. District Court ordered a change in the boundary lines of the Fifth District.
16 As a result, the candidate withdrew his candidacy for the Fifth District seat and declared
17 his candidacy in the Third District. In response to his question as to whether his Third
18 District candidacy entailed a different election from his Fifth District candidacy for
19 purposes of the Act, the Commission answered in the negative. The Commission
20 reasoned that neither the Act nor Commission regulations identify House seats as separate
21 Federal offices, and that the Constitution and other Federal law define the office of
22 Representative by the State represented and not by the geographic boundaries of the
23 particular district.³ Thus, contributions from previous contributors, when aggregated with
24 their previous contributions, could not exceed the limits of 2 U.S.C. §441a(a)(1) and (2).
25 Advisory Opinion 1982-22.

³ 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).

1 The situation of Mr. Brady is not materially different from the situation presented
2 in Advisory Opinion 1982-22. Both present circumstances as to the voter composition of
3 the Congressional District that did not exist at the time the candidacy commenced. Even
4 though some voters have been added and some removed from the redrawn districts in
5 question, the candidates are still running for election from a Congressional District in
6 Texas and for the same Congress. See footnote 3. Although Mr. Brady has already spent
7 over four months seeking electoral support from a set of voters that will not completely
8 coincide with the set of voters in the newly drawn districts, the same was true for the
9 requester in Advisory Opinion 1982-22.⁴ Moreover, although the set of opponents may
10 change somewhat in the requester's redrawn districts, the same appeared to be true for the
11 candidate in Advisory Opinion 1982-22. See Advisory Opinion 1982-22, n.2. The
12 Commission concludes, therefore, that one limit shall apply for the special general
13 election to be held on November 5 and that any contributions (for the regularly scheduled
14 general election) made before August 6 must be aggregated with contributions (for the
15 special general election) made after August 5 to determine compliance with the limits at 2
16 U.S.C. §441a(a)(1) and (2).⁵ Contributions originally made for the regular general
17 election do not have to be redesignated by the contributors for the special general
18 election.

19 The Commission notes that it has concurrently addressed this same question, and
20 additional related ones, in Advisory Opinion 1996-36. Accordingly, because Mr. Brady's
21 situation is not materially distinguishable from that presented in Advisory Opinion 1996-
22 36, he and the Committee may rely on that opinion's responses to all the questions
23 addressed therein to govern their activities in the special general election for the 8th
24 Congressional District. See 2 U.S.C. §437f(c).

⁴ 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."

⁵ A contribution is considered "made" when the contributor relinquishes control over the contribution. For contributions mailed to the Committee, the postmark date on the envelope is the date the contribution was made. 11 CFR 110.1(b)(6), 110.2(b)(6); see 11 CFR 110.1(l)(4).

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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 1996-36, 1993-2, 1986-31, 1984-42, 1982-22, and 1978-19)