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September 9, 1998

AOR 1998-20

BY FACSIMILE (202) 219-3923 AND FCM
Federal Election Commission
Office of General Counsel
999 E. St., NW
Washington, D.C. 20463
Attn: N. Bradley Litchfield
Associate General Counsel

Re: *Advisory Opinion Request of Lenora B. Fulani for President (1992) and Dr. Lenora B. Fulani, AOR 1998-___*

To the Office of General Counsel:

The undersigned, as authorized agent of Dr. Lenora B. Fulani and Lenora B. Fulani for President (the "Committee"), submits this request for an advisory opinion pursuant to 2 U.S.C. §437(f) and 11 C.F.R. Part 112. The general subject matter of this request is the permissibility of various means for raising funds that are needed to make a repayment to the United States Treasury under the Primary Matching Funds Account Act arising out of the 1992 election cycle.

Factual and Procedural Background

On March 6, 1997, the Commission issued a final repayment determination requiring that the Committee repay the sum of $117,269.54 to the United States Treasury. The Committee petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the repayment order, and applied to the Commission for a stay pending appeal. On December 5, 1997, the Commission granted the stay request.[1] On June 23, 1998, the Court of Appeals issued a decision affirming the repayment order.

Dr. Fulani wants to satisfy this repayment obligation and put closure on the 1992 election cycle. However, the fund-raising model she used to raise matchable contributions of $2 million in 1992 cannot be applied to the task of raising the funds six years later to retire the obligation to the Treasury. Dr. Fulani ran a thoroughly grass roots campaign during the election season -- she received about 100,000 contributions that averaged approximately $20 each. She

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[1] The Commission did not condition the stay upon the funding of an escrow account or the posting of a bond. Documents submitted in support of the stay application demonstrated that neither the Committee nor Dr. Fulani had the financial resources to fund an escrow account or to procure a surety bond.

successfully appealed to tens of thousands of people to make small contributions to support her efforts to voice their public policy concerns, and to project independent politics into the presidential election process. When the repayment order was issued in March 1997, nearly five years after the election, the conditions for resuming the 1992 fund-raising effort had ceased to exist. The situation is the same today and will not change for the better in the future.

Today, as in 1992, Dr. Fulani does not have thousands of supporters who can be appealed to for contributions of $500 - $1,000. Her constituency is not sufficiently affluent for such a fund-raising strategy. She believes that the only potentially viable means for raising the funds necessary to repay the Treasury would involve contributions by a small number of close supporters in excess of $1,000. The purpose of this AOR is to determine whether, in the Commission's opinion, such a fund-raising plan can be carried out in these limited and special circumstances, without violating federal campaign finance laws.

Questions

Question #1: May an individual make contributions aggregating in excess of $1,000 to the Committee when the purpose of the contribution and intended use of the funds is solely to make a repayment to the United States Treasury?[2]

Question #2: May an individual make loan(s) aggregating in excess of $1,000[3] to the Committee when the purpose of the loan and intended use of the funds by Dr. Fulani is solely to make a repayment to the United States Treasury?

Question #3: Can Dr. Fulani, individually, receive personal gifts of money (or personal loans) and subsequently use some or all of the proceeds to satisfy her joint and several individual liability to the Treasury for the audit repayment order?

Discussion

We submit that there are at least three grounds for the Commission to answer these questions affirmatively. First, the Commission can rely upon precedents in which it has exercised its discretion to lift otherwise applicable restrictions upon contributions, after the

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[2] We would assume that an affirmative answer to this question would permit the use of some of the contributed funds to pay reasonable operational and out-of-pocket costs of the fund-raising/repayment operation itself.

[3] The loans would also be aggregated with any contributions from the same individual.

conclusion of the election campaign, in order to make it possible for debts to be repaid. Second, the Commission may determine that under certain circumstances payments to the Committee would not be deemed "contributions" subject to the Act's $1,000 individual contribution limit. Third, the Commission may find that in light of the existing exceptions it has enacted in its regulations or permitted in previous advisory opinions, to deny Fulani an exception to the individual contribution cap would deny her constitutional rights of equal protection and due process.

"Exceptional Circumstances"

The Act clearly bars a presidential candidate who receives primary matching funds from contributing more than $50,000 of her personal (or family) funds to her campaign. Nevertheless, the Commission issued AO 1993-19 to Senator John Glenn, in which it declared, inter alia, that it was waiving this limitation and permitting Senator Glenn to contribute more that $50,000 to his 1984 presidential campaign committee. "[T]he Commission concludes that in these exceptional circumstances, Senator Glenn may now spend an unlimited amount of his personal funds for the purpose of retiring the Committee's debt." (emphasis supplied) AO 1993-19, p. 4

In an earlier advisory opinion concerning debt repayment by Sen. Glenn's 1984 committee, the Commission indirectly lifted the $1,000 individual contribution limitation. In AO 1987-4, the Commission approved the tranfers of excess funds totaling approximately $800,000 from Sen. Glenn's principal Senate campaign committee for his 1986 re-election campaign, to his 1984 presidential campaign committee. AO 1987-4 expressly stated that Sen. Glenn did not have to trace the contributions of the excess Senate committee funds to the original donors and aggregate the contributions with any previous contributions by the same individuals to the 1984 presidential committee. Id. at 3. This meant that an individual could contribute $1,000 directly to the presidential campaign in 1984, and then contribute another $1,000 to the Senate campaign in 1986 after all of the Senate obligations had been paid. The $1,000 in excess funds thereby created could be transferred by Glenn to his presidential committee for debt repayment. Effectively, the individual would have contributed $2,000 to Glenn's 1984 presidential committee, twice the otherwise applicable legal limit.

The Commission reaffirmed AO 1987-4 when it revisited the Glenn campaign's debt problems six years later in AO 1993-19 (see pp. 4-5).[4] It also pointed out that it had

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[4] "Under these precedents, the Committee may accept an unlimited transfer of any excess campaign funds that are available from Senator Glenn's 1992 Senate campaign." AO 1993-19, p. 5

recently approved a similar transfer of funds in the context of its audit of the Gephardt for President Committee --

> [T]he Commission did allow a transfer of funds between an authorized committee of a candidate for Congress and the same individual's Presidential committee, where the Presidential committee did not have funds available to meet its debt obligations to the United States Treasury. See Gephardt for President Committee, Inc. Audit, October 22, 1992, open meeting discussion.

(emphasis supplied) AO 1993-19, p. 5

Through these precedents, the Commission has established an interpretation of the contribution limitations that permits the agency to authorize direct and indirect waivers of the limitations in special circumstances involving post-election debt repayment, where the waivers do not undermine the purposes of the statutory scheme.

Dr. Fulani is entitled to the benefits of these precedents. Not only has she demonstrated special circumstances, but also her request for a limited waiver of contribution caps is considerably stronger than Senator Glenn's in an important respect. Senator Glenn was trying to retire a campaign debt of approximately $3 million owed to banks and other creditors. By contrast, Dr. Fulani is trying to raise funds to repay the United States Treasury. Significantly, the rationale for the repayment order is not that Fulani received excess contributions during her 1992 campaign or that the government gave her money to match contributions that an audit revealed were not eligible for a match. The entire repayment order is based on a finding by the Commission that certain expenditures were not qualified campaign expenses. In other words, for the purposes of this advisory opinion, it is a given fact that the contributions she would solicit are not going to pay for goods and services that were used in 1992 to further her campaign.

Amounts To Be Received Should Not Be Considered "Contributions"

The Commission's regulations provide that when a candidate solicits funds to help pay a civil enforcement penalty or a criminal fine, the receipts are not "contributions" for the purposes of the individual contribution caps. Analogously, the amounts that Dr. Fulani proposes to receive from supporters to reimburse the Treasury for matching funds corresponding to non-qualified campaign expenses also should not be considered "contributions."

11 C.F.R. sec. 9034.4(b)(4) provides, in part:

> Civil or criminal penalties paid pursuant to the Federal Election Campaign Act are not qualified campaign expenses and cannot be defrayed from contributions or matching payments. Any amounts received or expended

to pay such penalties shall not be considered contributions or expenditures
. . . .

(emphasis supplied) Hence, a candidate raising money to satisfy a civil penalty obligation clearly has the option of soliciting large gifts -- far above the $1,000 contribution limit -- because the gifts are not considered "contributions."

In the instant case, no civil enforcement penalty or criminal fine was assessed against Dr. Fulani or her Committee. As noted above, however, Dr. Fulani's entire repayment order is based on findings that certain disbursements were not qualified campaign expenses. 11 C.F.R. sec. 9037.4(b)(4) recognizes a distinction between funds given to a candidate that are used for qualified campaign expenses, and funds given to a candidate to be used to defray non-qualified expenses. In the instant case, Dr. Fulani is entitled to draw upon that same distinction, so that the Commission should determine that "[a]ny amounts received or expended to pay" an audit repayment based upon non-qualified campaign expenses "shall not be considered contributions or expenditures." [5]

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The repayment order is a joint and several liability of the Committee and of Dr. Fulani individually. If the Commission answers Question #1 in the negative, i.e. disallowing individual contributions in excess of $1,000 to Dr. Fulani's campaign committee, then the question arises as to what kind of personal gifts or loans Dr. Fulani could accept and use to retire the repayment liability. See Question #3.[6] Besides electoral politics, Dr. Fulani is active in many projects involving youth programs, psychology and human development, civil rights advocacy, international human rights, etc. It is possible that a some individuals may be willing to give Dr. Fulani, personally, gifts of money in excess of $1,000 where the proceeds are not earmarked.

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[5] This conclusion is bolstered by at least two precedents in which the Commission permitted receipts in excess of the $1,000 cap on individual contributions by finding that under the facts and circumstances of the cases the receipts should not be considered "contributions." See AO 1976-68; AO 1978-63.

[6] Question #3 should not diminish the importance of affirmative answers to Questions ##1 and 2. There are a number of factors that might make the means described in Question #3 impractical, even if it is allowable. For example, potential givers might be deterred by gift tax liabilities.

Constitutional Requirements

The third basis for the Commission to answer the three Questions in the affirmative, is that to do otherwise would violate the first and fifth amendments of the United States Constitution. The exceptions that have been expressly recognized in the Commission's regulations and advisory opinions benefit candidates from wealthy families,[7] and incumbent Senators and Congressmen.[8] Once the Commission begins to exercise its discretion to make exceptions to the Act's contribution limitations, or to interpret the Act to find that some categories of receipts are not "contributions" at all, it may not refuse to extend the same (or analogous) exceptions to other candidates absent a compelling and nondiscriminatory governmental purpose.

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Thank you for your consideration of these questions. We will look forward to the Commission's response. If you have any questions or need further information, please feel free to contact the undersigned.

Respectfully submitted,

Arthur R. Block

cc: Lenora B. Fulani, Ph.D.
Francine Miller, Esq., Treasurer

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[7] A rich candidate can run a federally funded presidential campaign knowing that even though she can only contribute $50,000 of personal funds during the campaign, she can incur debts to private parties far exceeding her current receipts (AO 1993-19); a substantial repayment obligation to the Treasury (11 C.F.R. sec. 9035.2 lifts the $50,000 cap on candidate/family contributions); or even civil enforcement penalties and criminal fines (11 C.F.R. sec. 9037.4(b)(4)); and then bail herself out after the election using her family wealth.

[8] If an incumbent like Senator Glenn or Representative Gephardt runs an unsuccessful presidential campaign, he is likely to be in a position to generate excess campaign funds in a future re-election campaign for the Senate or House of Representatives. By comparison, a person who runs against an incumbent for a Senate or House seat rarely will have excess funds on hand at the end of race to pay off debts from a previous presidential bid.