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January 2, 2002

Federal Election Commission
Office of General Counsel
999 E. St. NW
Washington, DC 20463

AOR 2002-01

Dear Sir or Madam:

This request for an advisory opinion is submitted, through the undersigned attorney, by various participants in what can be broadly called the independent political movement who seek guidance from the Federal Election Commission ("Commission") on legal and regulatory issues pertaining to strategies for the 2004 presidential election.

It was originally submitted by mail on November 30, 2001, but, I have been advised, was not received, probably because of anthrax related mail problems. In any event, this letter is identical to the previous one except that one additional participant has been added.

We are: Myla Belston, Seattle Independent Organizing Committee; Kingsley Brooks, Chairman, Natural Law Party; Linda Curtis, Founder, Independent Texans; Murray Dabby, Organizing Committee to Build the Georgia Independence Party; Joyce Dattner, Chair, San Francisco Reform Party County Council; Caroline Donnola, Seattle Independent Organizing Committee; Evelyn Dougherty, Coalition of Massachusetts Independents; Diane Ennis, Seattle Independent Organizing Committee; Jessie Fields, Member, State Executive Committee, Independence Party of New York; Charles Flynn, Second Vice Chair and Member, State Executive Committee, Independence Party of New York; Lenora B. Fulani, Chairperson, Committee for a Unified Independent Party; Senator Mike Gravel (U.S. Senate 1969-81), President, Direct Democracy and Philadelphia II; Patrick Haggerty, Seattle Independent Organizing Committee; Elizabeth Hechtman, Director, CUIP PA; Harriet Hoffman, Seattle Independent Organizing Committee; Rae Larson, Seattle Independent Organizing Committee; James Mangia, President, Coalition for Political Reform (Los Angeles); Ann Manly, Seattle Independent Organizing Committee; J. R. Myers, Chairman, Montana Independence Party; Kipp Pells, Member, State Executive Committee, Independence Party of New York; Lawrence Redmond, Esq., Former Chairperson, Reform Party of Illinois; Cathy L. Stewart, Member, State Executive Committee, Independence Party of New York.¹

¹ Organizational affiliations are listed for identification purposes only.

Two of these participants, Lenora B. Fulani and James Mangia are presently testing the waters to determine whether or not to run for president in 2004. Their activities include: meeting with and speaking by telephone with persons to determine the level of support within the independent movement for such a candidacy and whether or not it is possible to raise sufficient funds for a viable campaign; discussing with these people the issues presented by this AOR to determine how a campaign structured along these lines would affect the potential for support. The likelihood of their becoming active candidates depends, in part, on whether there is a positive response by the Federal Election Commission to this AOR. Neither of them will seek nor accept the nomination of the Democratic or Republican Party in a presidential campaign they run for 2004.

BACKGROUND

As the Commission is aware, in the year 2000 the candidate of the Reform Party qualified for general election funding under 26 U.S.C. Sec. 9004. The Commission had before it the question of which of two contenders for the Reform Party's funding, Patrick J. Buchanan or John Hagelin, should be funded and after considerable internal dialogue elected to award the funding to Buchanan. John Hagelin campaigned without federal funding as the candidate of the Natural Law Party, the New York Independence Party and as an independent.

In addition, several other candidates ran for president on independent or "third party" ballot lines, including: Ralph Nader, Green Party; Harry Browne, Libertarian; and Howard Philips, Constitution. Only Mr. Nader came close to the 5 percent of the vote threshold necessary to qualify for general election funding in the year 2004, having received approximately 3 percent. Despite vigorous prosecution of several lawsuits, no candidate other than the candidate of the Democratic and Republican Parties was allowed to participate in the presidential debates sponsored by the Commission on Presidential Debates. Forty-nine percent of Americans eligible to vote did not. A significant percentage of these people as well as those who did vote consider themselves independents, unaligned with either the Democratic or Republican Party.²

Our goal is to develop a strategy to attract these voters to the one or more third party candidates in the 2004 presidential election in a manner that would qualify the candidate or candidates of the independent movement for general election funding for the 2008 presidential election cycle. It is our belief, however, that such an effort cannot succeed if it is identified with a single third party. The effort must be broadly coalitional as the American people have made manifest their reluctance to support a "third" party which they believe is simply a miniature of the Democratic and Republican parties and practices the same partisan brand of politics which characterized all participants in the 2000 presidential election.

² In a 1999 survey, 38 percent of Americans described themselves as independents, 34 percent as Democratic and 28 percent as Republican. Saad, Lydia, "Independents Rank as Largest U.S. Political Group.: The Gallup Organization, April, 1999.

QUESTION

Can general election presidential funding be allocated in a way which permits distribution to a coalition running one or more candidates in the year 2004, who in the aggregate obtain five percent of the vote, for redistribution to members on the basis of the performance of the various candidates, even though no one member of the coalition constitutes a political party which received five percent of the vote for its candidate?

DISCUSSION

As we understand it, 26 U.S.C. Sec 9004 provides two routes to qualify for general election matching funds:

(1) to a particular candidate when that candidate received five percent of the vote in the preceding presidential election.

(2) to a "minor" political party when that party's candidate received five percent of the vote in the preceding presidential election.

Following the 1996 election, the Commission approved a variant of these routes when Ross Perot, who achieved more than five percent of the vote as an independent candidate in the 1996 presidential election, was permitted to transfer his eligibility for funding in the 2000 election to the Reform Party, founded after his 1996 run. (See, AO 1998-2)

Prior to the 2000 general election the Reform Party went through an intense internal battle over which of two candidates supported by two competing Reform Party factions could lay claim to the general election funding. Two competing national conventions were held, two candidates nominated, Patrick J. Buchanan and John Hagelin. Both applied for distribution of the approximately \$12.5 million in available funding. After a public hearing held on September 12, 2000 and after a decision by the Superior Court of California which ruled the faction supporting Buchanan as legitimate, the Commission awarded him the general election funding. Both Buchanan and Hagelin conducted presidential campaigns and neither came close to achieving the necessary five percent to secure funding for a presidential candidate in the year 2004.

In a memorandum to the Commission dated September 1, 2001 former General Counsel Lawrence M. Noble stated that in his opinion FECA did not bar awarding general election funding to two candidates of a minor party so long as the amount given to them, in the aggregate, did not exceed the amount for which that party qualified.

At the September 12, 2000 hearing a lively debate was sparked by Commissioner Sandstrom over the proper interpretation of 26 U.S.C. 9002(2) which, in defining a candidate eligible for such funding, states:

The term "candidate" means with respect to any presidential election, an individual who –

(A) has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party, or

(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election ballot) as the candidate of a political party for election to either such office in 10 or more states.³

Commissioner Sandstrom took the position that, while qualification for a ballot position in 10 or more states was a necessary condition, it was not a sufficient one, and a candidate need also establish that he or she had succeeded in winning the nomination of the national party whose showing in the preceding election had insured the availability of funds in the first place. Sandstrom's position was the minority position and the other Commissioners appeared ready to award the funds to Buchanan, who had met the 10 state requirement, without the necessity of a finding that he had won the Reform Party nomination. The issue was mooted, however, when on September 13, 2000, the day before the Commission was to make its final determination, the California Superior Court found that Buchanan had in fact secured the nomination.

These deliberations suggest that a candidate on the ballot in 10 states could be eligible even though he or she has not been nominated by any political party. How is this to be reconciled with the requirement in Sec. 9004 that a predicate for candidate eligibility is that the particular candidate or the political party which ran him or her for president received five percent of the vote in the preceding election? Another way of stating this contradiction is that non-major party candidates have a party affiliation requirement imposed on them to secure the possibility of

³ 11 C.F.R. Section 9002.15 defines political party as, "an association, committee, or organization which nominates or selects an individual for election to any Federal office, including the office of President or Vice President...." Clearly, this definition is broad enough to include a coalition of persons and organizations. Moreover, the use of the term "individual" does not preclude more than one individual. In common usage the term means at least one person. The regulation does not say only one individual. Indeed, a political party nominates many individuals to run for many offices. Section 9002.15 uses the formulation, "an individual," but statutes and regulations commonly the term "individual" or "person" to mean one or more persons. Indeed, FECA itself defines "person" to include a group of persons. 2 U.S.C. Sec. 431(11). Thus, 2 U.S.C. Sec. 431(17) defines "independent expenditure" as "an expenditure by a person expressly advocating...." Clearly it would include an expenditure by two or more persons.

funding but the nomination of that party is not a sufficient condition for its candidate to actually obtain the funding in the next presidential election cycle.

Contrast this to the situation of the major parties. There, the predicate for availability and distribution of the funds is the same – the nomination by a party that received 25 percent of the vote in the prior election. Under the literal wording of the statute the candidate of the Democratic or Republican Party could become eligible for funding in the 2004 election even if its affiliates lost ballot status in 42 of the fifty one states (including the District of Columbia). Conversely, no candidate could claim this funding if he or she failed to secure the nomination of the national Democratic or Republican Party no matter how many states agreed to place him or her on their ballots.

This anomaly expresses the ambivalence of Congress and the Commission towards the legal status of minor parties and their candidates. Viewed from the vantage point of those who like us, seek to further the growth of the independent political movement, this anomaly is but one of the ways in which the existing legal framework impedes their efforts. By restricting the availability of funding to a particular candidate or a particular party, the independent political movement has been deformed by requiring it to function in a manner which severely limits its growth or to forego funding altogether.⁴ The effect of this deformation can be seen by the following contradictory phenomena that was revealed in the 2000 election – despite the fact that far more than five percent of the American people identified themselves as independents, these same people were, for the most part, unwilling to vote for the candidate of the several minor or third parties that competed in the 2000 election. Indeed, the total vote for all independent candidates was less than five percent. Independents (some nineteen million of whom voted for Ross Perot in 1992, giving him some twenty percent of the vote) will not vote for the candidate of a political party they identify as a smaller version of the two major parties.

It is our belief that in order to realize its full potential for growth, the independent movement must seek the support of the American people as a broad coalition - of parties, activists, networks, movements – committed to opening up the political process and breaking the two-party gridlock. The coalition must, by its very structure, demonstrate that it has moved

⁴ Perusal of AO 1998-2 reveals the extent to which the Reform Party was required to structure itself along the lines of the major parties in order to qualify as a minor political party, a predicate for the receipt of general election funding:

The Commission has applied a number of criteria to determine whether a political party or its committees have demonstrated sufficient activity on a national level to attain national committee status. A party committee demonstrates that it is a national committee of a political party by the nomination of its candidates for various Federal offices in numerous states; by engaging in certain activities on an ongoing basis (rather than with respect to a particular election) such as supporting voter registration and get-out-the-vote drives; and by publicizing issues of importance to the party and its adherents throughout the nation. Other indicia include the holding of a national convention, the establishment of a national office and the establishment of state affiliates. *Id.*, at 2-3.

beyond the partisanship which, particularly post-Florida, is so characteristic of the major parties. The coalition must promise to take the country out of and beyond the partisan gridlock. An independent political movement characterized by partisan entities whose internal battles and competition with each other appear to be the same partisan mode of behavior associated with the major parties, only on a smaller scale, cannot claim the allegiance of the American people. It can neither promise to elect a president nor to usher in a new era for politics in America.

We submit that the choice imposed by the present legislative matrix violates the constitutional guarantee of freedom of association. We should not be required to abandon our objectives and sacrifice our best possibilities for growth or forfeit federal funding. We submit that the Constitution no more permits political activity to be channeled in this manner (into political parties) than it would permit the government to channel religious activity into membership in a church that replicates one of the major religions in its structure and activity.

It is for this reason that we ask the Commission to construe Chapter 95 of the Internal Revenue Code which in 26 U.S.C. Sections 9001 *et. seq.*, in a manner which would ensure the availability and distribution of general election funds to an effort consistent with the objectives outlined above. We believe that the statutory ambiguity revealed by the deliberations regarding the distribution of the \$12.5 million available to the Reform Party candidate in the 2000 presidential election, and the other points discussed above, provide a sufficient basis, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984), for the Commission to adopt an approach which would:

(1) recognize a coalition consisting of the undersigned and those who join with us as an entity to which can earn general election funds for the 2008 election provided the candidate or candidates it runs in the 2004 election secure, in the aggregate, five percent of the vote;

(2) permit distribution of those funds for the 2008 election on the basis of the performance of the various candidates in the 2004 election; and

(3) make available to the coalition "convention funding" (pursuant to 26 U.S.C. Section 9008) to finance the process by which the coalition determines to which candidates it will allocate funds for the 2008 election and the amount of funding allocated to each as well as activities designed to achieve the broadest participation by the American people in the process.⁵

Respectfully yours,
Harry Kresky

⁵ It should be noted that in AO 2000-6 the Commission approved the use of convention funding made available under 26 U.S.C. 9008 to a Reform Party nominating process that was fundamentally different than that of the Democratic and Republican Parties or contemplated in the applicable regulations.

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November 30, 2001

Federal Election Commission
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999 E. St. NW
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