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By Commission Secretary's Office at 5:24 pm, Apr 27, 2016



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 16-18-B
AGENDA ITEM
For meeting of April 28, 2016
SUBMITTED LATE

April 27, 2016

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DP by ljs*
Acting General Counsel

Adav Noti *AN*
Acting Associate General Counsel

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Acting Assistant General Counsel

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Attorney

Subject: AO 2016-03 (Holding) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on April 28, 2016.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-03

2

3 Craig Engle, Esq.

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7

8 Brett Kappel, Esq.

9 Akerman LLP

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11 Washington, D.C. 20001

12

13 Dear Messrs. Engle and Kappel:

14 We are responding to your advisory opinion request on behalf of George Holding for

15 Congress, Inc. (the “Holding Committee”), concerning whether, under the Federal Election

16 Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations, the Holding

17 Committee may raise additional contributions subject to a new contribution limit for the North

18 Carolina congressional primary election on June 7, 2016. The Commission concludes that the

19 Holding Committee may do so.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on March

22 16, 2016.

23 George Holding currently represents the 13th congressional district of North Carolina in

24 the U.S. House of Representatives. Advisory Opinion Request at AOR001. The Holding

25 Committee is his principal campaign committee.¹

26 George Holding was running unopposed for his party’s nomination for reelection in the

27 primary election scheduled for March 15, 2016. But on February 5, 2016, a three-judge panel of

28 the U.S. District Court for the Middle District of North Carolina found that two congressional

¹ George E. Holding, FEC Form 2 at 1 (Feb. 20, 2015),
<http://docquery.fec.gov/pdf/344/15950807344/15950807344.pdf>.

1 districts constituted impermissible racial gerrymanders in violation of the Equal Protection
2 Clause of the U.S. Constitution. *Id.* (citing *Harris v. McCrory*, Case No. 1:13-cv-949, 2016 WL
3 482052, at *2 (M.D.N.C. Feb. 5, 2016)). The court ordered the North Carolina legislature to
4 enact a remedial plan by February 19, 2016. North Carolina filed emergency motions to stay the
5 court's order with both the three-judge panel and the U.S. Supreme Court; both motions were
6 denied on February 9 and February 19, 2016, respectively. *Id.* (citing *Harris v. McCrory*, Case
7 No. 1:13-cv-949, Defs.' Emergency Mot. to Stay Final J. & to Modify Inj. Pending Sup. Ct. Rev.
8 (M.D.N.C. Feb. 9, 2016), ECF No. 145; *McCrory v. Harris*, 136 S. Ct. 1001 (Mem), 84 USLW
9 3450 (U.S. Feb. 19, 2016)).

10 By the time of the court's decision, the primary election was "already well underway."
11 AOR002. As of February 7, 2016, county elections officials had mailed 8,621 absentee ballots
12 to voters, and more than 400 absentee ballots had already been returned. Moreover, according to
13 the Executive Director of the North Carolina State Board of Elections, given the proximity
14 between the date of the court's order and the March 15 primary election, "congressional
15 candidates will remain on ballots" issued to absentee and early voters, and presented to voters at
16 the polls on March 15. *Id.*

17 To comply with the district court's order to enact a remedial plan, the North Carolina
18 General Assembly held a special two-day session to redraw the district lines. The General
19 Assembly adopted two separate bills during the special session, both on February 19, 2016. The
20 first bill approved a remedial redistricting plan that redrew the two impermissibly gerrymandered
21 districts by redrawing several congressional districts across the state. This included shifting the
22 "majority of the old 13th [c]ongressional district" into the 2nd congressional district. AOR002.

1 The second bill revised the procedures for conducting the 2016 congressional primary
2 elections. AOR012-13 (attaching S.L. 2016-2, Special Session (N.C. 2016)). The bill
3 established June 7, 2016, as the new congressional primary election date and required any
4 candidates running in that election to file notices of candidacy between March 16 and March 25,
5 2016, while allowing any person who had previously filed a notice of candidacy for the 2016
6 congressional primary to obtain a refund of his or her filing fee.² S.L. 2016-2 §§ 1(b)-(c), (f).
7 The bill stated that the winner of the June 7 election “shall be determined by a plurality,” and
8 prohibited the holding of second primaries during the 2016 election cycle.³ *Id.* at § 2(a).
9 Finally, the bill prohibited the State Board of Elections from certifying any ballots cast for the
10 U.S. House of Representatives in any district in the March 15 primary. *Id.* at § 4. The Governor
11 signed the legislation into law on February 23, 2016.

12 Following the General Assembly’s adoption of the bill, the State Board of Elections
13 encouraged voters to “mark their preferences in all primary contests,” including for
14 congressional candidates appearing on the March ballot. AOR003. The Board urged citizens to
15 “[v]ote the whole ballot and let us worry about what will count.” *Id.*

16 On March 15, 2016, Representative Holding filed with the Commission an amended
17 statement of organization and a new statement of candidacy, changing the office that he is
18 seeking from North Carolina’s 13th congressional district to the 2nd congressional district.⁴

² The filing period for the primary to be held on March 15, 2016 ran from December 1, 2015 to December 21, 2015. N.C. Sess. Laws 2015-258 § 2(b).

³ Generally, state law requires a primary candidate to receive a “substantial plurality” of votes cast to be declared the winner, with a second primary available if no candidate receives a substantial plurality or in the event of a tie. N.C. Gen. Stat. 163-111 §§ (a), (b), (d).

⁴ George Holding for Congress Inc., FEC Form 1 at 2 (Mar. 15, 2016), <http://docquery.fec.gov/pdf/277/201603159009754277/201603159009754277.pdf#navpanes=0>; George E. Holding, FEC Form 2 at 1 (Mar. 15, 2016),

1 Representative Holding also withdrew his candidacy for the 13th congressional district under
2 North Carolina law, and stated that he will file as a candidate for the 2d congressional district
3 once the filing period opens for the June 7 primary election. As a candidate in North Carolina's
4 2nd district, Representative Holding will run against incumbent Representative Renee Elmers
5 (R-NC). AOR004. According to the requestor, as of February 19, 2016, the Holding campaign
6 had raised \$873,431.65 and spent \$708,100.68, leaving it with \$165,330.97 cash on hand.

7 ***Question Presented***

8 *May the Holding Committee raise additional contributions subject to a new contribution*
9 *limit for the June 7, 2016, North Carolina congressional primary election?*

10 ***Legal Analysis and Conclusion***

11 Yes, the Holding Committee may raise additional primary contributions subject to a new
12 contribution limit because the June 7, 2016, North Carolina congressional primary election is a
13 different election from the March 15, 2016, election.

14 Under the Act, candidates and their authorized committees are entitled to separate
15 individual contribution limits with respect to "any election for Federal office." 52 U.S.C.
16 § 30116(a)(1)(A). For the purposes of the Act and Commission regulations, an "election"
17 includes "a general, special, primary, or runoff election," *id.* at § 30101(1)(A), where an
18 individual, "whether opposed or unopposed, seek[s] nomination for election, or election, to
19 Federal office." 11 C.F.R. § 100.2(a). The present request involves a primary election, which is
20 an election "held prior to a general election, as a direct result of which candidates are nominated,
21 in accordance with applicable State law, for election to Federal office in a subsequent election."
22 11 C.F.R. § 100.2(c)(1).

1 Because contribution limits “apply separately with respect to each election,” 11 C.F.R.
2 § 110.1(j)(1), participating in multiple distinct elections can render a candidate eligible for
3 separate contribution limits. Although “[g]enerally, each [nominated] candidate will participate
4 in two elections: the primary . . . and the general election,” Explanation and Justification for
5 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, at 40-41
6 (1st Sess. 1977); *see also* Advisory Opinion 1994-29 (Levy) at 2 (permitting committee one
7 contribution limit while competing in multiple primaries for same federal office), the
8 Commission has previously noted that “the plain language of the Act and Commission
9 regulations . . . on their face place no limit on the number of ‘elections’ eligible for separate
10 contribution limits.” Factual and Legal Analysis at 6-7, MUR 6438 (Art Robinson for Congress)
11 (Oct. 5, 2012) (finding no reason to believe that candidate violated Act and Commission
12 regulations by utilizing separate contribution limit for state-administered party primary and
13 internet-based independent party primary).

14 The Commission has previously concluded that a separate contribution limit is available
15 when a judicial decision places candidates in a “new electoral situation,” thereby creating a
16 separate election. For example, in Advisory Opinion 1996-36 (Frost), the Commission
17 determined that five members of Congress from Texas were entitled to a separate contribution
18 limit for a special election after a federal district court redrew the boundaries of thirteen
19 congressional districts and ordered a new special election, thereby placing each candidate “in a
20 new electoral situation” and creating a new “election contest.” *Id.* at 3; *see also* Advisory
21 Opinion 2006-26 (Texans for Henry Bonilla) (approving separate contribution limit for newly
22 scheduled special election after prior election was nullified by court order); Advisory Opinion
23 1996-37 (Brady) (same). The Commission has also determined, however, that a candidate’s

1 decision to run in a different congressional district in the same primary election after a court-
2 ordered redistricting does not entitle the candidate to a new contribution limit. Advisory Opinion
3 1982-22 (Bartlett).

4 Therefore, the relevant question here is whether the court order requiring North Carolina
5 to enact a remedial plan, and the state legislation establishing a primary election on June 7, 2016,
6 created a new election under the Act and Commission regulations. *See* 52 U.S.C. § 30101(1)(A);
7 11 C.F.R. § 110.1(j). For the reasons given below, the Commission concludes that they did.

8 As indicated in the request, voting in the March 15 congressional primary election was
9 already well under way by the time the three-judge panel issued its order: 8,621 absentee ballots
10 had been mailed to voters, and more than 400 absentee ballots had already been returned as of
11 February 7, 2016. Moreover, the names of congressional candidates remained on the ballot for
12 the March 15 election even after the court's order, including ballots presented to voters at the
13 polls on election day. Indeed, the Board of Elections encouraged voters to "[v]ote the whole
14 ballot and let us worry about what will count." AOR003. Thus, the March 15 primary elections
15 were held as planned, with congressional candidates on the ballot, even if the State Board of
16 Elections could not subsequently certify the votes cast for congressional candidates.

17 Moreover, state law treated the March 15 and June 7 elections differently. For example,
18 congressional candidates who had qualified for the March 15 ballot by filing a notice of
19 candidacy for that election could not any run in the June 7 primary unless they filed another
20 notice of candidacy for the June election within the new filing period of March 16 and March 25,
21 2016. AOR005; S.L. 2016-2 § 1(c). The law also changed the percentage of votes that a
22 candidate must receive to win the primary from substantial plurality to plurality, and eliminated
23 the possibility of a second primary. S.L. 2016-2 § 2(a).

1 Finally, the factual situation presented here, like the one considered in Advisory Opinion
2 1996-36 (Frost), presents highly unusual electoral circumstances stemming from judicial
3 intervention in congressional elections. Prior to the court order and new state law, congressional
4 candidates in North Carolina were just a few weeks away from election. But as a direct result of
5 the court order and change in state law, they were required to prepare, plan, and campaign for an
6 election that was now more than three months away. Because the court order and state
7 legislation created a new electoral situation, the Commission concludes that the June 7, 2016,
8 election constitutes a separate election under 11 C.F.R. § 110.1(j), and provides for a separate
9 contribution limit.⁵

10 This response constitutes an advisory opinion concerning the application of the Act and
11 Commission regulations to the specific transaction or activity set forth in your request. *See*
12 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
13 assumptions presented, and such facts or assumptions are material to a conclusion presented in
14 this advisory opinion, then the requestor may not rely on that conclusion as support for its
15 proposed activity. Any person involved in any specific transaction or activity which is
16 indistinguishable in all its material aspects from the transaction or activity with respect to which
17 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
18 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
19 affected by subsequent developments in the law including, but not limited to, statutes,

⁵ The Commission notes that not every court order will entitle candidates to a new contribution limit. In Advisory Opinion 1982-22 (Bartlett), for example, the Commission determined that pre-election, court-ordered redistricting did not entitle a candidate to a new contribution limit. The circumstances presented in that request differ materially from the one considered here, however, because the court-ordered redistricting in Advisory Opinion 1982-22 (Bartlett) occurred several months before the election and did not result in a change in the election date, electoral procedures, or candidate eligibility requirements.

1 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
2 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen
Chairman