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RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT
2006 JUL 25 A 11: 53

2006 JUL 21 A 11: 12

July 13, 2006

Rosemary C. Smith, Esq.
Associate General Counsel for Policy
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

AOR 2006-22

Dear Ms. Smith:

Pursuant to 2 U.S.C. § 437(f), the principal campaign committee of David G. Wallace ("Wallace") called Wallace for Congress ("Committee") respectfully requests an advisory opinion from the Commission addressing the following two issues:

1) whether the value of pro bono legal services ("Services") of a law firm in preparing an amicus brief on behalf of the Committee seeking the reversal of a federal district court judgment in connection with the constitutional challenge of the declaration of Tom DeLay's ineligibility under state law, will not be characterized as a "contribution" within the meaning of 2 U.S.C.§431(8), and

2) whether the Services may be made directly to the principal campaign committee as opposed to a legal defense fund.

Background Facts

On March 7, 2006, incumbent Congressman Tom DeLay ("Incumbent") won the Republican primary election for Texas congressional district 22 ("District 22"). After the primary Incumbent decided to move to Virginia and began taking steps to complete that move. Incumbent has testified that he intends to be an inhabitant of Virginia indefinitely. Incumbent notified the Chair of the Republican Party of Texas ("RPT") in a letter dated May 30, 2006, that "he was no longer eligible to remain on the electoral ballot" because he had moved to Virginia.

On June 7, 2006, the RPT declared in writing that Incumbent was no longer eligible to be the Republican Party's nominee on the November general election ballot.

Texas law provides that an unexpired term in the office of a U.S. representative may be filled by a special election. Governor Perry did not call for a special election due to the short period of time remaining this year before the general election in November. Under these circumstances, Texas law provides that the Republican precinct executive committee for District 22 may nominate a replacement candidate to fill the vacancy in the nomination for the ballot.

Wallace registered with the Federal Election Commission (FEC) his Statement of Candidacy on April 17, 2006 in anticipation of a Republican vacancy in District 22. The Committee was registered as Wallace's principal campaign committee on April 24, 2006. At this time, Wallace is merely a potential candidate for District 22.

Litigation

On June 8, 2006, the day after the RPT's determination of Incumbent's ineligibility, the Texas Democratic Party filed a lawsuit contesting RPT's declaration of ineligibility on constitutional grounds. Motions for Temporary Restraining Order and Preliminary Injunction were filed. The case was removed to Federal court on June 15, 2006 and on July 5, the motions were granted. Federal District Court Judge Sparks ruled that Article I, §2, cl. 2 of the U.S. Constitution ("Qualification Clauses") mandated that "inhabitancy" in a state must be determined only on the day of election and held RPT's declaration invalid. On July 6, 2006, Judge Sparks permanently enjoined and restrained RPT from certifying to the Texas Secretary of State any candidate other than Incumbent to appear on the ballot in the 2006 general election in November as the Republican Party nominee. RPT filed a notice of appeal in the United States Court of Appeals for the Fifth Circuit along with a motion to expedite. On July 13, 2006 the Fifth Circuit granted RPT's motion to expedite with an accelerated briefing schedule (attached hereto as Exhibit 1). The case is set for submission on July 31, 2006.

At this time, the only Republican candidate for District 22 is Incumbent and not Wallace. If the Fifth Circuit reverses, the Republican Party District 22 precinct executive committee can commence the process of selecting a candidate within their discretion as the replacement nominee for the Republican Party on the general election ballot. The attached motion to expedite (Exhibit 2), summarized the timeline and procedures for nominating a new candidate in District 22. Importantly, while Wallace is a leading contender for the nomination in the event of reversal, there is no assurance that he will be nominated by the executive committee.

Pro Bono Legal Services

The undersigned counsel is the appointed treasurer of the Committee and a shareholder with the national law firm Jenkens & Gilchrist, a Professional Corporation ("Firm") On July 11, 2006, the Firm entered into a legal representation agreement ("Agreement") with the Committee. Firm agreed to submit an amicus brief to the Fifth Circuit in connection with the litigation referenced above supporting reversal of the district court judgment on constitutional grounds. The Agreement specified that Firm would seek an advisory opinion from the Commission and, if the Commission determined that the Firm's Services constituted a contribution, the Committee would agree to pay the Firm a normal fee for its Services. Committee agreed to pay all routine expenses (photocopies, postage, etc.) in any event. The Services have been and will be performed by several employees of the Firm. The amicus brief has been prepared and will be filed tomorrow July 21, 2006. Under the Firm's normal billing procedures, bills for work performed in July would be processed in August and sent in September and payments are expected within 30 days of receipt by clients.

Analysis and Argument

The facts of this case are unique and do not directly fit any of the previously decided Commission advisory opinions. Moreover, it is unlikely that this fact pattern will arise again as the constitutional issue will be resolved by the U.S. Court of Appeals and possibly the U.S. Supreme court. The Committee's engagement of the Firm, if successful, would support removing the Incumbent from the ballot allowing Wallace to be considered as a potential Republican nominee.

2 U.S.C §431 defines "contribution" as the donation of anything of value "for the purpose of influencing any election for Federal office." In order to influence an election, the donation of money or services must be related to an election. In Advisory Opinion 2003-15, the Commission found that expenses by a candidate relating to a legal challenge to Georgia's open primary system were not "in connection with a Federal election" and thus funds received and spent to pay these litigation expenses would not be treated as contributions or expenditures for the purpose of the Federal Election Campaign Act ("FECA" or "Act"), provided the funds were raised and spent by an entity other than a political committee.

FECA §431 establishes that "contribution" and "expenditure" do not include any legal or accounting services rendered to or on behalf of an authorized committee of a candidate or any other political committee as long as the services provided are paid for by the regular employer of the individual and if such services are in sole furtherance of compliance with the Act, and for the purposes of paid legal services, compliance with the Act cannot be construed to mean defending violations of the Act.

The Commission has previously determined in Advisory Opinions 1979-37, 1981-16, 1981-13 and 1983-21 that donations and disbursements made for the purpose of defending a Federal officeholder with respect to activities unrelated to compliance with the Act were not contributions or expenditures. Additionally, the Advisory Opinions 1981-16 and 1980-4 also determined that monetary or *in-kind* donations to a principal campaign committee of a presidential candidate, or a fund established by it, were *not contributions* if donated for the purposes of defending against violations of the Hatch Act, the Appropriations Act, or *constitutional rights*. The pending litigation in Texas pertaining to District 22 is similar in several aspects to the challenges asserted in Advisory Opinions 1982-35, 1983-30 and 1983-37.

In Advisory Opinion 1982-35, a Democratic candidate for nomination to the U.S. Senate sought a determination of whether a legal defense fund could be established to defray the legal cost associated with a constitutional challenge of Democratic Party rules that prevented him from being a candidate. The Commission reasoned that the constitutional challenge was necessary to determine the candidate's ability to participate in the primary election and thus within the purview of the Act.

The Commission reasoned in Advisory Opinion 1983-30 to the extent that proposed funds were used for legal costs and expenses resulting from a Federal court challenge of an Arizona constitution provision precluding candidate eligibility, donations and disbursements would not be considered contributions.

A similar conclusion was reached in Advisory Opinion 1983-37. Donations and disbursements for legal expenses for a constitutional challenge to a party rule preventing a candidate from garnering the Party convention nomination were determined not to constitute contributions or expenditures.

In Advisory Opinion 1980-57, the central issue was whether a current U.S. Representative could use legal defense funds solicited on his behalf to initiate litigation to contest an opponent's placement on the ballot. The Commission reasoned that the legal action encouraged was solely for the purpose of influencing a Federal election by eliminating the ability of one to vote for his opponent. Thus any funds solicited were determined not to be exempt from contribution limits.

Advisory Opinions 1980-4 and 2003-15 provide additional support for the contention that the donation of pro bono legal services are exempt from contribution limits. The current litigation involving the Texas Democratic Party's objection to Incumbent's ineligibility has, in-effect, converted Wallace from an interested party to an affected party even though he is not a

named party. If Incumbent remains on the ballot, it forecloses any opportunity for the Wallace to participate in the electoral process and implicates significant constitutional issues.

Consistent with the findings in Advisory Opinion 1996-39, the filing of a lawsuit to challenge the constitutionality of Incumbent's declaration of ineligibility is "a condition precedent" to the Wallace's potential participation in the general election. The pending litigation is required so that Wallace can begin to engage the process. Without this legal action his ability to participate is not possible while the issue of Incumbent's eligibility is unresolved.

It should be immaterial if the donation of pro bono legal services is made directly to the principal campaign committee instead of a legal defense fund in this particular fact pattern. As stated above, 2 U.S.C §431 defines "contribution" as the donation of anything of value "for the purpose of influencing any election for Federal office." It stands to reason, that in order to influence an election, the donation of money or services must be *related* to an election. Again, the Commission has already decided that expenses by a candidate relating to a legal challenge to an open primary system were not "in connection with a Federal election" (Advisory Opinion 2003-15). Equally important, unlike any of the above cited opinions, Wallace technically is not a political candidate as long as Incumbent's status, as a candidate for the November 2006 ballot is in question.

The Services associated with the amicus brief should not be construed as a financing of the campaign because the litigation is not "in connection" with the election, and is not within the purview of the Act (AO 1981-16, AO 2003-15). Furthermore, the pro bono work is not related to the election but rather constitutional challenges upholding the ineligibility of the Incumbent, which does not appear to be capable of "influencing" an election (AO 1982-35, AO 1983-30 and AO 1983-37). Therefore, according to 2 U.S.C. §431, the Services should not be construed as "contributions" or "expenditures."

We appreciate the Commission's expedited consideration of this important matter.

Sincerely,

Andrius R. Kontrimas

ARK/aks
Enc.

cc: Johnathon Levin

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 13, 2006

Mr James Goodspeed Bopp Jr
Bopp, Coleson & Bostrom
1 S 6th Street
Terre Haute, IN 47807

Ms Donna Garcia Davidson
Potts & Reilly
Suite 850
401 W 15th Street
Austin, TX 78701

No. 06-50812 Texas Democratic v. Benkiser
USDC No. 1:06-CV-459

Dear Mr Bopp and Ms Davidson:

The court has entered an order granting Appellant's motion to expedite briefing.

The following is the briefing schedule that was proposed in the appellant's motion to expedite. The briefs must physically be filed in this office on the due date.

Appellant's brief is due for filing on July 14, 2006.

Appellee's brief is due for filing on July 21, 2006.

Reply brief is due for filing on July 26, 2006.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Mary Stewart
Mary Stewart, Deputy Clerk
504-310-7694

/mcs

cc: Mr Chad Wilson Dunn

EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 06-50812

U.S. COURT OF APPEALS
FILED
JUL 13 2006
CHARLES R. FULBRUGE III
CLERK

TEXAS DEMOCRATIC PARTY; BOYD L RICHIE, In his capacity as Chairman of the Texas Democratic Party

Plaintiffs - Appellees

v.

TINA J BENKISER, in her capacity as Chairwoman of the Republican Party of Texas

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, Austin

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O R D E R :

IT IS ORDERED that Appellant's motion to expedite the appeal is GRANTED.

IT IS FURTHER ORDERED that Appellant's motion to expedite briefing is GRANTED. The case is set for submission on July 31. The panel will determine whether oral argument will be entertained on July 31.

/s/ Fortunato P. Benavides
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE

MOT-16

EXHIBIT 2

No. 06-50812

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY and BOYD L. RICHIE,
in his capacity as Chair of the Texas Democratic Party,
Plaintiff-Appellee

v.

Tina J. Benkiser,
in her capacity as Chairwoman of the Republican Party of Texas,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

MOTION TO EXPEDITE

Defendant-Appellant, Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas ("Benkiser" or "RPT"), by counsel, respectfully moves this Court, pursuant to 5th Cir. R. 34.5, to expedite the appeal in this matter. In support of said motion, RPT shows the Court as follows:

1. On July 6, 2006, the district court entered a permanent injunction in favor of Plaintiffs-Appellees, Texas Democratic Party and Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party (collectively "TDP")

and against RPT prohibiting RPT from declaring Tom DeLay ineligible and replacing him as the Republican Nominee for Texas Congressional District 22 in the 2006 general election because it held that Texas Election Code § 145.003 which allows administrative declarations of ineligibility, as applied to federal elections, adds an unconstitutional qualification for office.

2. In the district court, the Texas Secretary of State filed an amicus letter explaining the hardship on the State if this case is not finally decided in the most expeditious manner possible. A true and accurate copy of the *Amicus Letter*, filed June 23, 2006, is attached hereto as Exhibit A. Specifically, the State explains that the Texas Supreme Court decision in *In Re Francis*, – S.W. 3d –, 2006 WL 197976 (Tex. 2006), which required "changes to the official ballot" and "was handed down . . . some 18 days after the deadline for the parties to certify names for the March Primary Ballot," resulted in a scramble to "reprint[] ballots less than three weeks before early voting [was to begin]," a "delay[in] the mailing of ballots to military and overseas voters" and "several Texas counties not having accessible voting machines available for use for voters with disabilities during early voting for the primaries as required by HAVA." (*Amicus Letter* at 1-2.)

3. Therefore, this Court should be aware that August 25, 2006, is the "deadline for declaration of ineligibility" and that August 29, 2006, is the "deadline for party executive committee to deliver certification of a replacement nominee to the Secretary of State." (*Amicus Letter* at 2.) However, "[i]f a district executive committee fails to name a replacement nominee by August 29, the state executive committee may cure the failure by certifying a replacement nominee and delivering that certification no later than September 1." (*Amicus Letter* at 2.)

4. However, in order to meet those deadlines, RPT and its county committees, which may only call the appropriate meetings in accord with their bylaws, will need at least two weeks to choose its nominee. If that nominee happens to also be someone who is already on the November ballot, it will need another week to nominate a new person to fill that vacancy. Thus, should this Court reverse the decision of the district court, RPT would need to have that decision in hand approximately three weeks prior to the September 1 deadline so that it could replace DeLay on the ballot without causing undue hardship on the State. (*See Amicus Letter* at 3 ("The orderly running of the election, including key issues such as mailing of ballots to overseas military personnel, . . . depends heavily on the ballot's certification on September 6, 2006. If the

Republican Party is to be given the opportunity to certify a replacement nominee, it must do so by September 1, 2006, *at the very latest.*") (emphasis added).)

5. Because of the importance of deciding this case as quickly as possible, RPT proposes the following briefing schedule:

   a. RPT's opening brief be filed by July 14, 2006;

   b. TDP's response brief be filed by July 21, 2006;

   c. RPT's reply brief be filed by July 26, 2006.

   d. Oral argument to be held July 31, 2006.

6. Raeanna S. Moore has contacted opposing counsel, Chad Dunn and Cris Feldman, on July 10th and 11th, regarding this motion and they agree that the case should be expedited but disagree as to the proposed briefing schedule and to suggesting a date for oral argument.

WHEREFORE, Defendant-Appellant RPT respectfully moves this Court to GRANT its Motion to Expedite and set an appropriate briefing and oral argument schedule.

Dated: July 11, 2006

Respectfully Submitted,

/s James Bopp, Jr by RSM
James Bopp, Jr.
Raeanna S. Moore
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434
Counsel for Defendant-Appellant, Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas

CERTIFICATE OF INTERESTED PERSONS

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party,
Plaintiffs-Appellees,

v. No. 06-50812

TINA J. Benkiser, in her capacity as
Chairwoman of the Republican Party
of Texas,
Defendant-Appellant

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Texas Democratic Party, Plaintiff-Appellee

2. Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party, Plaintiff-Appellee

3. Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas, Defendant-Appellant

4. Republican Party of Texas and its affiliated local organizations because the injunction against its Chair has a direct impact on their ability to have a candidate on the ballot for Texas Congressional District 22.

5. Roger Williams, Secretary of State, State of Texas, enjoined by district court order, though not a party to this action.

James Bopp, Jr.
Raeanna S. Moore
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434
Counsel for Defendant-Appellant, Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas

CERTIFICATE OF SERVICE

I, Raeanna S. Moore, certify that today, July 11, 2006, a copy of the above Motion to Expedite, were served upon the following persons at the following addresses via first class mail and e-mail:

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/s Raeanna S. Moore
Raeanna S. Moore