ADVISORY OPINION 1975-11

Funding Limitations and Separate Committees for Dual Candidates

This advisory opinion is rendered under 2 U.S.C. 437f in response to requests submitted by Senator Lloyd Bentsen and Congressman Alan Steelman and published as AOR 1975-11 in the July 9, 1975, Federal Register (40 FR 26660). Interested parties were given an opportunity to submit written comments pertaining to the requests.

A. Request of Senator Bentson by Counsel: Contribution and spending limits applicable to candidate for two Federal offices.

Senator Bentsen expects to simultaneously seek nomination for election to the Presidency and the Office of United States Senator. His specific questions are as follows:

(a) May a candidate seeking nomination for election to the Presidency and the Office of Senator at the same time take advantage of two expenditure limits, so that he may spend the amount designated by 18 U.S.C. 608(c)(1)(C) on behalf of his senatorial primary campaign and twice that amount with respect to his presidential primary campaign in the State in which he seeks the Office of Senator pursuant to 18 U.S.C. 608 (1)(A)?

(b) Do the personal and immediate family expenditure limits of 18 U.S.C. 608 (a)(10 apply separately to an individual's simultaneous candidacy for nomination or election to the Presidency and for nomination to the Office of Senator, so that the individual may spend $35,000 with respect to his senatorial race and another $50,000 with respect to his presidential race?

(c) Do the contribution limits in 18 U.S.C. 608 (b)(1) and (2) apply separately in the case of simultaneous candidacy, so that, for example, an individual may contribute $1,000 to the candidate with respect to his Senate primary election and another $1,000 with respect to his candidacy in the State's presidential primary?

1. The relevant expenditure limitations in 18 U.S.C. 608 (c) are as follows:

(1) No candidate shall make expenditures in excess of –

(A) ten million dollars, in the case of a candidate for nomination for election to the Office of President of the United States, except that the aggregate of expenditures under this subparagraph in any one State shall not exceed twice the

> expenditure limitation applicable in such State to a candidate for nomination for election to the office of senator * * *.
> * * *
> (C) in the case of campaign for nomination for election by a candidate for the office of Senator ***,
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> (i) eight cents multiplied by the voting age population of the State ***;

On the basis of the facts asserted by Senator Bentsen, the Commission concludes that this statute must be construed so as to prohibit a candidate who is simultaneously seeking nomination for election to the Presidence and the office of Senator from making, in the State in which he seeks election as Senator, expenditures in an amount which exceed the amount applicable to his senatorial campaign. This conclusion should not be construed as applying to dual candidates for federal offices other than the Presidency; in this part of the Opinion the Commission addresses an entirely distinct situation which in the Commission's view requires a separate ruling. (See Part B of the Opinion.)

On its face, the portions of 18 U.S.C. 608(c) previously enumerated merely set forth expenditure limitations applicable to candidates seeking nomination for the office of President or Senator; there is no indication as to how the statute is to be applied in the case of a proposed dual candidacy such as that of Senator Bentsen. However, despite the lack of specific statutory direction, it is clear that the ruling of Commission, supra, is the only interpretation which effectively harmonizes the statute with applicable principles of constitutional law.

A uniform application of the senatorial nomination expenditure limit to Senator Bentsen and his rivals avoids the unfair advantages which Senator Bentsen would undoubtedly gain by being able to spend more money statewide than opposing candidates who seek only one office. These expenditures, which could run as much as three times greater than Senator Bentsen's senatorial rivals (as well as one half more than opposing presidential candidates), would obviously give him a significant publicity advantage over his opposition. If the law is read to require that such an advantage be conferred or permitted, it runs afoul of the constitutional right of Senator Bentsen's rivals to communicate with the affected constituency on a basis substantially equivalent to that enjoyed by the Senator. In short, the law thus read would so discriminate against these rivals' power to communicate as to deny them the equal protection of the laws, as that concept is embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution. Cf. Bolling v. Sharpe, 347 U.S. 497 (1954); Bullock v. Washington, 468 F.2d. 1096, 1104-05 (D.C. Cir. 1972). The Commission finds no rational basis, much less a compelling one, for so limiting a challenger's ability to compete for the electorate's attention. Nor may it be argued that the discriminatory effect which the Commission here perceives can be avoided if Senator Bentsen's rivals for the Senate seat adopt the expedient course of simply declaring themselves to be presidential candidates as well; this would only serve to make a sham of the spending limitations of the Federal Election Campaign Act Amendments of 1974, and would be sure to encourage a

multitude of frivolous or spurious candidacies. These obviously unacceptable effects are avoided by the Commission's ruling today. The ruling also preserves the basic spirit of the Federal Election Campaign laws, which seek to foreclose the possibility that one federal candidate will hold an insurmountable financial advantage over another.

It may be argued that the effect of the Commission's ruling is to deny equal protection to Senator Bentsen himself. However, at worst, this is only true with regard to Senator Bentsen's presidential primary spending in Texas; it is certainly not true with regard to any other presidential primary or, for that matter, with regard to the total expenditure limitation on the Senator as a prospective presidential nominee. Moreover, within Texas, the reduced presidential primary expenditure limitations applicable to Senator Bentsen are compensated for by the fact that he is already the Senator from Texas and thus, within Texas, begins with a significant exposure advantage over his rivals. Furthermore, the financial resources which, because of this ruling, may not be used in Texas, are not thereby wasted; they may clearly be applied in other jurisdictions, and may there provide a de facto expenditure advantage over rival presidential candidates. Finally, whatever disadvantages Senator Bentsen may suffer from the Commission's ruling are outweighed by the higher constitutional purpose the ruling serves with regard to his senatorial rivals. See, analogously, American Party of Texas v. White, 415 U.S. 767 (1974).

Because the express provisions of the Federal Election Campaign Act Amendment of 1974 did not clearly foreordain the foregoing conclusion regarding the applicable expenditure limitations, it is the Commission's view that the limitation set forth above should be applied only prospectively. Therefore, potential dual candidates for the Presidency and the Senate, if they have already declared their presidential candidacy or are deemed to be a presidential candidate under the candidate definition of 18 U.S.C. 591(b), may, for purposes of the 1976 elections alone, hereafter spend the full amount allowed for a senatorial candidate in the relevant state.

(2) The Commission's conclusions stated in Section 1 of Part A of this opinion also apply with respect to the candidate's personal fund expenditure limitations in 18 U.S.C. SS 608(a). That section states that:

> No candidate may make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year for nomination for election, or for election, to Federal office in excess of, in the aggregate--
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> (A) $50,000, in the case of a candidate for the office of President or Vice President of the United States;
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> (B) $35,000, in the case of a candidate for the office of Senator or for the office of Representative from a State which is entitled to only one Representative; or.

(C) $25,000, in the case of a candidate for the office of Representative, or Delegate or Resident Commissioner, in any other State.

The Commission is concerned that candidates for one federal office may frivolously seek another federal office at the same time solely to expend more personal funds. Therefore, the Commission concludes that in the state where an individual simultaneously seeks nomination for election to the Presidency and the office of Senator he or she may spend from personal funds, including those of the "immediate family," no more than $35,000 in connection with both campaigns. Such personal expenditures may be allocated as the candidate sees fit. However, to the extent that any portion of the $35,000 is spent for the presidential campaign within that state, the portion so spent must be deducted from the $50,000 which a candidate may permissibly expend from his personal funds, or those of his immediate family, in the country as a whole.

3. With respect to how contribution limitations under. 18 U.S.C. 608(b) apply to persons and potential committees who contribute to a candidate simultaneously seeking nomination for both the offices of President and Senator, the Commission concludes that contributions may be made to the same extent as would be permissible if two individuals rather than one, were seeking the described offices. The Commission is of the view that the concern for equal protection of the law expressed supra in Section 1, with regard to expenditure limitations, has minimal relevance with regard to limitations on contributions. Moreover, the Commission emphasizes that such a dual federal candidate must establish and maintain two entirely separate campaign organizations. Contributions made with respect to one campaign may not be expended with respect to the other campaign, unless the contribution is actually returned to the contributor and he or she thereafter contributes to the other campaign. Transfers between the separate campaign committee structures are not permissible. In no event, of course, may a contributor give more than $1,000 (or $5,000 in the case of a committee qualified. under 18 U.S.C. 608(b)(2)) with respect to each election held in connection with each candidacy..

B. Request of Congressman Alan Steelman: Creation of separate campaign committees for Congressional and Statewide Office.

Congressman Steelman requested an opinion as to whether a Congressman contemplating running for the office of Senator may form a new campaign committee to accumulate and spend campaign funds for that purpose. The Congressman specifically inquired whether, for example, such a committee may be formed to raise $25,000 to pay for a Statewide poll and for travel around the State over a period of six months to sound out party leaders and to "test the political waters."

The Commission concludes that in the case of a candidate who is seeking the office of Congressman and Senator from the same state the candidate may spend funds up to the expenditure limitation applicable to a senatorial campaign in that state, subject to the further restrictions set forth hereinafter. While the Commission is necessarily

sensitive to the equal protection implications of its conclusion, it is of the view that the Constitution permits, within the framework of a complex statute designed to advance a major public interest, a good faith regulatory effort to accommodate competing constitutional considerations to the maximum extent feasible, even though certain limited inequalities inevitably remain despite that effort. This is precisely the Commission's effort in this instance. See, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

In the case of dual candidates for Congress or Senator, it is clear that a ruling restricting the candidate to the lower of the two applicable spending limitations would effect the candidate's entire campaign for the other office. Such a limitation would have a total, irreversible impact on the candidate's senatorial campaign. The discrimination he would suffer is utterly different from the potential problem in the case of a dual candidate who is running for the Presidency. As already noted in Part A of this Opinion, whatever diminution of equal protection (if any) which a dual Presidential candidate may suffer in his home state is more than counterbalanced by the fact that in all other states the candidate would enjoy at least the same spending power as his rivals. The same simply cannot be said with regard to the Senate candidate restricted to House campaign limits; such limits effectively nullify his or her Senate race.

It also should be noted that a Congressman who is running for Senator would not, in the typical situation, have the same advantage of prior exposure vis-a-vis his rivals as has a favorite son presidential candidate such as Senator Bentsen. Indeed, at least some of Congressman Steelman's potential senatorial rivals might initially. be better known than the Congressman himself. This would only serve to exacerbate the invidious effect of a lower spending limitation on Congressman Steelman.

It may be argued that the Commission's ruling herein has the reverse effect of its ruling on Senator Bentsen's request -- namely, that it discriminates against Congressman. Steelman's rivals in his Congressional race. However, the Commission minimizes, if it does not obviate this difficulty by setting out the following requirements. Each such dual candidate must establish and maintain completely separate campaign committee structures for the senatorial and Congressional races. The Congressional campaign structure may make expenditures only with respect to the Congressional district Such expenditures may not exceed the applicable. House limits for that district, and at the same time each dollar expended in the district will count toward the state-wide senatorial limit. Expenditures within the district by the candidate's senatorial campaign structure will be counted toward the House expenditure limit for that district.

Transfers between the two separate campaign committee structures are impermissible. Contributions made with respect to a campaign may be expended with respect to the other campaign only if the contribution is actually returned to the contributor and he or she thereafter contributes to the other campaign. And, of course, in no event may a contributor give more than $1,000 or $5,000 in the case of a committee qualified under 18 U.S.C. SS 608(b)(2) with respect to each election held in connection with each candidacy.

This advisory opinion is to be construed as limited to the facts of the request and should not be relied on as having any precedential significance except as it relates to those facts at the time of its issuance.

(signed)
Date: Thomas B. Curtis
Chairman, for the
Federal Election Commission