Re: AOR 1975-131

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OC 1975-116

Honorable Robert H. Michel
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Michel:

This responds to your letter of December 2, 1975, requesting an advisory opinion as to several issues involving persons simultaneously seeking Federal office and selection as convention delegates.

The Supreme Court recently held in Buckley v. Valeo, 44 U.S.L.W. 4127 (S.C. January 30, 1976), that the Commission as constituted could not be given statutory authority to issue advisory opinions. Although this part of the Court's judgment was stayed for 30 days, the Commission has determined that it will not issue further advisory opinions under 2 U.S.C. §437f during the stay period. Thus, this letter should be regarded as an opinion of counsel rather than an advisory opinion.

You inquire (1) as to the application of the contribution and expenditure limits under the Federal Election Campaign Act of 1971, as amended (the Act), to a candidate for Federal office who is simultaneously a delegate-candidate; (2) whether the status of a delegate-candidate as "authorized" or "unauthorized" may affect the contribution or expenditure ceilings for such a dual candidate; and (3) what guidelines may be followed for the allocation of expenses for the separate campaigns to their respective expenditure limits.

As you know, the Buckley decision invalidated or narrowly construed several provisions of the Act on which the Commission had relied in issuing its earlier opinion concerning delegate selection (Advisory Opinion 1975-12, 40 FR 55596, November 27, 1975). To bring the delegate selection requirements into

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conformance with the Court's decision, the Commission on February 10, 1976, adopted the enclosed FEC Policy Statement and Guidelines on Delegate Selection. I base my answers here on the conclusions contained in this recently adopted guideline.

Please note that as used in this opinion the word "delegate" means a candidate for delegate at any stage of the selection process. Because a delegate-candidate is not a candidate for Federal office, any reference to "dual-candidate" should not be read to imply the contrary. Also, please note the distinction drawn in the guideline between a delegate who is financially authorized by a presidential candidate and a delegate who is unauthorized. Since the questions you pose are somewhat interrelated, I will seek to address them within the context of these two major categories of delegates.

1. Dual candidate: Unauthorized delegate/Congressional candidate.

There is no limit on the amount that may be spend by a candidate seeking selection to Federal office, nor is there any limit on expenditures by an unauthorized delegate. As according to the guideline, it is possible for a delegate to publicly favor or to be known as committed to a specific presidential candidate without being financially authorized by that candidate. I would caution here, however, that if such an unauthorized delegate makes any expenditure for communications advocating the election (or defeat) of any clearly identified presidential candidate, such expenditures must be truly independent of that candidate. (See Buckley, supra, fn. 53, pp. 40-41, Slip Op.)

A "dual candidate" in this category must file separate reports for the delegate campaign and the congressional campaign. If campaign literature or advertising contains reference to both campaigns, the expenditures should be apportioned to the appropriate campaign in accordance with the Commission's Proposed Regulation on Allocation, which was transmitted to Congress on January 19, 1976. A copy of this is also enclosed.

As to limits on contributions, it is my opinion that the provisions of 18 U.S.C. §608(b) limit the total contribution of any single donor to such a "dual candidate" in the primary election period to $1,000 (for persons) or $5,000

(for qualified multi-candidate committees). This view is warranted since any contribution to the dual candidate may significantly influence the course of both delegate and Federal election campaigns, particularly where references to both are blended in campaign materials. If such a dual candidate were permitted unlimited contributions for his delegate campaign, he would enjoy an inevitable advantage in fundraising over other persons seeking only Federal office. Were the Act read to permit such a benefit, it would so discriminate against the opponents' power to communicate as to deny them the equal protection of the laws, as the concept is embodied in the Due Process clause of the Fifth Amendment to the United States Constitution. See Buckley, supra, Slip Op. at p. 97. CF. Bolling v. Sharpe, 347 U.S. 497 (1954); Bullock v. Washington, 468 F.2d 1096, (D.C. Cir. 1972). Contributions by individuals to such a dual candidate would count toward the $25,000 annual ceiling on all contributions by an individual. (18 U.S.C. §608(b)(3))

2. Dual candidate: Authorized delegate/Congressional candidate.

There is no limit on expenditures by candidates for Congress. It is my opinion, however, that an individual who is simultaneously a congressional candidate and a delegate authorized by a presidential candidate may make expenditures for the delegate race only when specifically authorized, reimbursed or directed by that presidential candidate or the candidate's campaign committee. Such delegate expenditures count against the presidential spending limit if that candidate has accepted public financing.

These expenditures by authorized delegates are reported by the presidential candidate. If the "dual candidate" blends references to the delegate campaign and his/her congressional campaign in literature or advertising, the presidential candidate's committee will finance and report that portion of the expenditure which may reasonably be expected to benefit the presidential candidate. (See FEC Proposed Regulation on Allocation, supra.) Expenditures to advance the congressional campaign are, of course, reported by the congressional candidate, including any portion of "blended" expenditures allocated to that campaign.

Contributions to the "dual candidate" to advance his delegate campaign are considered contributions to the presidential candidate who has authorized the delegate. Such contributions to an authorized delegate count against the donor's $1,000 or $5,000 limit to that presidential candidate.

Contributions to the "dual candidate" for the congressional campaign should be earmarked for that purpose. Such contributions are subject of course to the donor's $1,000 or $5,000 limit for that candidate for that election.

This response constitutes an opinion of counsel which the Commission has noted without objection.

Sincerely yours,

Signed: John G. Murphy, Jr.

John G. Murphy, Jr.
General Counsel