FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 10, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1983-16

The Honorable Vic Fazio
Sala Burton for Congress Committee
1601 Van Ness Avenue
San Francisco, California 94109

Dear Congressman Fazio:

This refers to your undated letter which we received on May 24, 1983, with an enclosed telegram from Michael P. Novelli, Campaign Manager for Sala Burton, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the special election of June 21 for the Fifth Congressional District of California.

The telegram from Mr. Novelli is dated May 23, 1983, and is addressed to you. It authorizes you as an agent of the Sala Burton for Congress Committee to request an advisory opinion from the Commission with respect to Mrs. Burton's candidacy in the June 21 special election to fill the vacancy in the Fifth Congressional District of California. You have asked specifically whether the June 21 special election would be considered as a general election under Commission regulations with the result that political party committees could properly make expenditures under 2 U.S.C. 441a(d) in connection with Mrs. Burton's campaign for that election.

Based on the Commission's understanding of the applicable California statutes which provide for holding this special election and on Commission regulations defining the terms election, general election, special election, and runoff election, the Commission concludes that the subject June 21 election is a general election for purposes of 2 U.S.C. 441a(d). Accordingly, subject to the limits and conditions prescribed for expenditures made under 2 U.S.C. 441a(d) and Commission regulations at 11 CFR 110.7, political party committees may make expenditures on behalf of Mrs. Burton in connection with her campaign for the June 21 special election.

California election law provides that a vacancy occurring in the office of Representative in Congress shall be filled by a special election. CAL ELECT. CODE §§ 7200--7204 (West 1977).

All candidates for the vacancy, whether affiliated with a political party or independent of any party, are required to enter the initial election to be held June 21. If any candidate receives a majority of all votes cast in that election he or she is declared elected and no further election shall be held. Id. § 7202. If a subsequent election is needed, the candidates in that election are limited to the top vote getter in each qualified political party or political body; in addition, any independent candidate entered in the initial election shall be placed on the ballot in the subsequent election.* Id. § 7203

The Act provides that political party committees may make limited expenditures in connection with the general election campaign of candidates for Federal office. 2 U.S.C. 441a(d)(1). The Act defines "election" to include a general election but does not separately define the term "general election." Commission regulations do, however, define "general election" to include an election which is held to fill a vacancy in a Federal office and which is intended to result in the final selection of one individual to fill the vacant office. 11 CFR 100.2(b)(2). Commission regulations also provide that a special election is an election held to fill a vacancy and that it may be a primary, general, or runoff election pursuant to the regulation definitions of those terms. 11 CFR 100.2(f); see 11 CFR 100.2(b), (c) and (d).

As indicated by the foregoing summary of the California Elections Code, the June 21 election must be entered by all candidates who wish to fill the vacancy and includes on one ballot all such candidates. That election may, in fact, fill the vacancy without any subsequent election. Under California law, the individual who receives a majority of all votes cast in the June 21 election shall be declared as elected to fill the vacancy. Even if a subsequent election is held (on August 16), the eligible candidates are limited to those who entered the June 21 election. Accordingly, in view of the definition of "general election" in Commission regulations and given the nature and intended effect of the June 21 election, as compared to the restrictive nature of the tentative election set for August 16, the June 21 election qualifies as a general election.

This result is not changed or affected by the possibility that, under California law, none of the candidates in the June 21 election may receive a majority of all votes. In that event, a subsequent election will be held to determine who will fill the vacancy from among those candidates who entered the initial general election. This second election, under Commission regulations, would be regarded as a runoff election held after a general election. 11 CFR 100.2(d)(2). The California statute prescribes such runoff election as the means for deciding which candidate from the prior general election should be chosen as the officeholder elect. Accordingly, the fact that such a runoff may, in fact, be necessary to fill the vacancy does not change the status of the first election as a general election since the California Code recognizes that the first election may fill the vacancy. Indeed no possibility exists for anyone, who was not entered in the June 21 special general election, to qualify to participate in any runoff election that may be held.

Although not expressly presented by your request, a further question raised is whether 441a(d) expenditures may be made on behalf of Mrs. Burton in connection with the runoff election scheduled for August 16 assuming it is necessary. In view of the somewhat unique circumstances of the special election process in California, as discussed above, the Commission concludes that for 441a(d) purposes the runoff election of August 16 may be viewed as a continuation of the general election campaign which begins in connection with the June 21 election. However, the

Commission also concludes that the August 16 runoff is not a separate or additional general election. Significantly, under Commission regulations an election is classified according to one type only. See 11 CFR 100.2. In the present context of special elections, the regulations provide that a special election may be a primary, a general, or a runoff election. 11 CFR 100.2(f). No provision is made for characterizing the same election as both a general and a runoff election. Thus, only a single set of 441a(d) limits is available with respect to the general election (on June 21) even though such general election limits may also be utilized in the party committee's election campaign for the August 16 runoff election. This conclusion is consistent with and does not change the status of the runoff election as a separate election for purposes of the contribution limits in 2 U.S.C. 441a(a). Those limits apply with respect to "any election" and "each election", rather than only to a general election. Compare 2 U.S.C. 441a(a)(1), (2), and (6) to 441a(d).

The Commission also points out that under the Act and Commission regulations, 441a(d) expenditure limitations apply only to the national and State political party committees (including any subordinate State committees) and that only a single set of two 441a(d) limits (one for national party and one for State party) is available in connection with each congressional and senatorial general election. 2 U.S.C. 441a(d)(3), 11 CFR 110.7(b). Accordingly, the fact that several candidates affiliated with the same political party are entered in the June 21 general election does not mean that separate 441a(d) limits are available for each of those candidates. On the contrary, only a single set of 441a(d) limits are available in connection with both the June 21 general election and the follow up August 16 election, regardless of the number of candidates entered in the June 21 election.

This advisory opinion supersedes an opinion of counsel (OC 1976-7) issued by the Commission's General Counsel on February 13, 1976, concerning the application of 2 U.S.C. 441a(d), then 18 U.S.C. 608(f), to a special election in the 22nd Congressional District of Texas. That opinion concluded that the special election was not equivalent to a general election since several candidates from each of the two major political parties were entered in the special election and notwithstanding the fact that the election would fill the vacancy if one candidate received a majority of the votes cast.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Danny L. McDonald
Chairman for the Federal Election Commission

Note: Commissioner Reiche voted against approval of this advisory opinion and will submit a dissenting opinion stating his views at a later date.

*/ A California appellate court decision in 1978 reviewed the various special election provisions of the Elections Code and concluded that the Code's references to a "special primary election" followed by a "special general election" did not accurately reflect the actual nature and purpose of those elections. The court explained that the:

> special primary election... differs fundamentally from the primary for a regular general election in two respects: first all candidates of whatever affiliation are grouped on a single ballot; and second, if any one candidate in the special primary receives a majority of the votes cast, "he shall be declared elected, and no special general election shall be held."... It is obvious that with this format there are no restrictions on cross-party voting in the primary. Thus, what occurs in a special primary election is actually in effect a preliminary general election with all candidates on a single ballot, and a subsequent "runoff" general election is held only if one of these many candidates does not receive a majority on the first ballot.

Kellam v. Eu, 83 Cal. App. 3d 463, 466 (1978). See also, Libertarian Party of California v. Eu, 83 Cal. App. 3d 470 (1978).