FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

**CONCURRING OPINION OF
COMMISSIONERS AIKENS, ELLIOTT & POTTER
TO ADVISORY OPINIONS 1992-1 & 1992-4**

On February 27, 1992 and March 5, 1992, the Commission discussed, but was unable to approve the General Counsel's drafts affirming two candidates' right to use campaign funds to pay themselves a salary or pay their living expenses.[1] In our opinion, Counsel's drafts correctly applied the Commission's precedent which allows candidates to receive compensation from their committees during the campaign.

This is not an instance where the Federal Election Campaign Act of 1971, as amended ("the Act"), and the Commission's regulations are silent on the question we are asked to address. Nor is this an instance where the Commission has before it a new statutory provision not yet interpreted. Rather, the question

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1. Advisory Opinion Request 1992-1 was made by Roger Faulkner, a candidate for the U.S. Senate in Wisconsin. Mr. Faulkner asked about the legality of entering into a contractual arrangement with his committee granting Mr. Faulkner a monthly salary of $3,000. The request maintains this salary will remunerate the candidate for his management of the campaign and the making of appearances on behalf of the campaign. Faulkner asserts this taxable salary should enable him to meet all of his personal expenses such as "rent, food while at home, child support, health care, utilities and insurance."

Advisory Opinion Request 1992-4 was made by John Michael Cortese, who is considering running as an independent in one of California's 1992 U.S. Senate races. Mr. Cortese stated he needs to utilize campaign contributions to defray his monthly living expenses, because he will be working on campaign matters full-time for a number of months.

we face in these Advisory Opinion Requests is one where the answer is clear upon a reading of the Act, the regulations, and the Commission's previous advisory opinions.[2]

The General Counsel's draft opinions in these two matters evaluated the situations by applying Section 439a of the the Act. That section reads:

> Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, may be contributed to any organization described in section 170(c) of title 26, or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office (emphasis added). 2 U.S.C. § 439a

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2. Some of our colleagues do not like what they read. They argue the Act ought to prohibit candidates from benefiting personally from the expenditure of any campaign funds during a campaign. Without agreeing or disagreeing with this proposed new requirement (although it raises questions of government's role in reviewing each and every campaign spending decision to determine whether it impermissably benefits a candidate), we conclude that the Commission must leave to Congress the decision of whether to amend the Act to read as three of our colleagues would wish.

By its own language, Section 439a is limited to prohibiting candidates from converting excess campaign funds to personal use. The Commission defines "excess campaign funds" as contributions a candidate "determines are in excess of any amount necessary to defray his or her campaign expenditures." 11 C.F.R. 113.1(e). Accordingly, a campaign expenditure is not made from excess funds, but is from current receipts and reported as an expenditure under 2 U.S.C. § 434(b)(4)(A).[3]

The Commission gives committees wide latitude in determining what its campaign expenditures should be. The Commission wisely has never taken on the role of second-guessing whether a committee can or should make any given expenditure. The Act and Commission precedent only provide that (1) excess campaign funds may not be converted to personal use; and (2) the determination of what is "excess" is left up to the committee.

Accordingly, an examination of Section 439a is inapplicable to any use of campaign funds for the purpose of influencing a federal election.[4] The only proper examination is whether a candidate's salary is within the wide discretion given

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3. This is in contrast to non federal election influencing disbursements made from excess funds, which are reported separately on line 21 as "other disbursements." 2 U.S.C. § 434(b)(4)(G); Advisory Opinion 1984-50.

4. The more Section 439a is relied upon in reviewing on-going campaign expenditures, the more the Commission inches toward making subjective value judgments about the legitimacy, appropriateness, and ultimately, the legality of expenditures. See Advisory Opinion 1988-13 (concurring opinion of Aikens, Elliott & Josefiak).

candidates to determine what constitutes a campaign expenditure. We believe a campaign committee can reasonably conclude a candidate's salary or living expenses are necessary campaign expenditures. That decision is within the discretion of the candidate, and is called for by a proper reading of the Act and Commission precedent. See Advisory Opinions 1988-13, 1984-8 and 1980-49.

The Commission has determined candidates' principal campaign committees have discretion to use campaign funds to provide (to name merely a few possibilities) the use of a car, lodging or meals consumed by the candidate while on campaign travel. See Advisory Opinions 1980-29, 1984-8 and 1987-2. In fact, the Commission has a history of Advisory Opinions confirming that campaign contributions may be used for virtually any of a candidate's ordinary and necessary personal living expenses during a campaign. See Advisory Opinions 1976-53 and 1978-5. Advisory Opinion 1978-5 specifically stated that payments for the requesting candidate's "personal living expenses would be permissible expenditures under the Act although subject to disclosure pursuant to 2 U.S.C. § 434 . . ." Most importantly, the Commission has held that this result was not altered by the addition of Section 439a to the Act in the 1979 Amendments.

The requestor in AO 1980-49 asked "whether the Amendment to the Act [Section 439a] would, in your opinion, affect the use of

campaign funds, during the course of a campaign for personal living expenses of the candidate." (emphasis in original). The Commission responded:

> "The Commission concludes that the 1979 Amendments to the Act, specifically the provisions of § 439a, do not affect the result reached in Advisory Opinion 1978-5. The Commission has stated in several advisory opinions that candidates and their respective principal campaign committees have wide discretion under the Act as to how campaign funds may be spent. The Commission thus concludes that so far as the Act is concerned, your personal living expenses during the course of the campaign may be defrayed from your campaign funds. The issue of whether "excess campaign funds" may be used for the described purpose is not presented by your request and therefore, is not reached by the Commission." [5] (footnote omitted, emphasis added).

In Advisory Opinion 1986-36, the Commission allowed a candidate to utilize § 113.1(e) of our regulations and declare funds "excess" during the course of a campaign. However, the Commission has never attempted to abrogate to itself the decision of what constitutes "excess" campaign funds in the midst of a campaign.

Advisory Opinion Requests 1991-2 and 1991-4 merely ask the Commission to explicitly reaffirm a candidate's principal campaign committee's discretionary authority to pay for services rendered to the campaign by the candidate during the campaign. Advisory Opinion 1987-1 clearly confirms the contractual arrangement proposed by one of the candidates in the current

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5. This Advisory Opinion was approved on a vote of 5-0 (Commissioners Tiernan, Friedersdorf, McGarry, Aikens and Reiche in favor, Commissioner Harris absent).

requests is exactly what the Commission requires for a candidate to be compensated for lost wages or living expenses.[6] As noted in Advisory Opinion 1987-1, the Commission already permits a principal campaign committee to solicit contributions to repay a candidate's outstanding bank loans, which were used primarily to pay the candidate's living expenses during the campaign. See Advisory Opinion 1982-64. Thus, some Commissioners' discussion of the distinction between the "appropriate" purchasing of items for the furthering of a campaign and the "inappropriate" payment for services is not persuasive.

Not only do the Act, Commission regulations and past advisory opinions require the Commission to conclude a candidate's principal campaign committee has the discretion to pay the candidate a salary or defray a candidate's reasonable living expenses, but the practicalities dictate the wisdom of such a conclusion. It would be impossible for the Commission to step into a candidate's shoes and decide the daily questions of how best to expend campaign monies; nor would it be wise for the Commission to attempt to do so. Such an intrusive federal

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6. In rejecting a candidate's post-campaign claim against his principal campaign committee for lost wages, the Commission has stated that Section 439a "prohibits the use of excess campaign funds by a candidate or former candidate to confer a direct or indirect financial benefit . . . except in those situations where the financial benefit is in consideration of valuable services performed for the campaign." Advisory Opinion 1987-1 CITING Advisory Opinions 1986-39 and 1983-27 (emphasis added). In fact, Advisory Opinion 1987-1 turns on the fact that the candidate did not previously enter into a written agreement with his principal campaign committee that provided for compensation in exchange for valuable services to the campaign.

regulatory role in basic questions of campaign spending during a campaign was clearly not contemplated by Congress when it wrote the Federal Election Campaign Act. Of necessity, such determinations have wisely been left to that individual with the best understanding of the needs and priorities of his or her campaign, the candidate.

In leaving such determinations to the candidates the Commission should be satisfied with the knowledge that all candidate expenditures are fully disclosed for public critique. The press will know if a candidate is paid a salary by his principal campaign committee, and they will ensure that potential contributors know. Given such disclosure, the appropriate size of a candidate's salary (if any) will properly be the subject of public debate, and the object of public comment by the candidate's opponent.

Lastly, we wish to note that part of the Commission's discussion of these requests centered on the possible inequities which could arise if challengers are allowed to receive salaries from their campaign committees while incumbents are not. Much was made of the fact that elected public officials are restrained by 18 U.S.C. § 201(c) and 5 U.S.C. § 7353 from converting contributions into salary. The conclusion that incumbents are somehow disadvantaged by allowing challengers to receive salaries is a non sequitur because federal office holders continue to receive their full federal salary while campaigning for re-election. The salaries of Members of

Congress are not diminished one penny because of time spent away from Congressional offices campaigning. Yet, Commission regulations require a pro-rata reduction in the salary of any person privately employed who campaigns on office time. To our knowledge, no one maintains that incumbent Members of Congress campaign only on evenings and weekends, while working full days in Congress year round. Because the Act and the Commission's past interpretations of the Act prohibit challengers from receiving continued payment from their current employers without a demonstration of the work done for that compensation, it is only logical to allow challengers to receive compensation from their committees for services provided. See 11 C.F.R. 110.10(b)(2), Advisory Opinions 1977-68, 1978-6, and 1980-115.

Joan D. Aikens
Commissioner

Lee Ann Elliott
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Commissioner

April 3, 1992