



FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

September 23, 1992

MEMORANDUM

TO: The Commission
THROUGH: John C. Surina
Staff Director
FROM: Lawrence M. Noble
N. Bradley Litchfield
Subject: Draft AO 1992-35

Attached is a proposed draft of the subject advisory opinion.

This request is subject to consideration under the expedited 20-day advisory opinion procedure. 2 U.S.C. §437f(a)(2); 11 CFR 112.4(b). The 20th day is September 30, 1992.

Accordingly, the draft opinion should be presented for Commission decision at the meeting of September 24, 1992, and we request suspension of Commission rules on timely submission in order to consider this document.

Attachment

**SUBMITTED LATE
AGENDA ITEM**
For Meeting of: SEP 24 1992

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ADVISORY OPINION 1992-35

**George Cochran
The University of Mississippi
Law Center
University, MS 38677**

Dear Mr. Cochran:

This responds to your letter dated September 6, 1992, on behalf of Jon Khachaturian concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the proposed acceptance of excessive contributions.

You represent Jon Khachaturian, an independent candidate for the United States Senate in Louisiana in the October 3, 1992, open primary. You state that, on August 20, 1992, Mr. Khachaturian "qualified" in Louisiana as a candidate for the Senate by paying a filing fee of \$600. The candidate's name appears on the primary ballot. In addition, Mr. Khachaturian submitted a Statement of Candidacy and his PCC submitted a Statement of Organization, which were received by the Secretary of the Senate on September 10, 1992.

In an affidavit enclosed with your letter, Mr. Khachaturian states that he needs to raise \$250-300,000 to mount an effective campaign against the Democratic incumbent. Mr. Khachaturian states that he can make a personal contribution of \$50,000 and that he has 15 contributors willing to donate contributions aggregating \$200,000, if

3 permitted by law.^{1/} Mr. Khachaturian states that the \$1,000
4 limit [at 2 U.S.C. §441a(a)(1)(A)] "eliminates [him] as a
5 serious candidate" and renders the incumbent unbeatable. He
6 also states that, although "party candidates" are subject to
7 the same limit, they "have greater access to political
8 action committees (PACs) which can contribute up to \$5,000"
9 and are eligible for substantial party coordinated
10 expenditures.

11 You describe Mr. Khachaturian as "an independent
12 candidate who clearly demonstrates that the [section 441a]
13 restriction precludes the mounting of an effective campaign
14 against party candidates," and ask whether those limits
15 should be applicable to him. You enclose a memorandum of law
16 challenging the statutory limit as applied to the candidate;
17 you argue that there is an unequal impact, with advantages
18 extending to major party candidates, and that the First
19 Amendment rights of Mr. Khachaturian may be impaired.

20 Section 441a(a)(1)(A) of Title 2 was enacted in 1974 as
21 an amendment to the Act, which the Commission is required to
22 administer and enforce. 2 U.S.C. §437c(b). The wording of
23 section 441a(a)(1)(A) applies to all candidates and makes no
24 exceptions. Generally, Federal administrative agencies are
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26
27 ^{1/} You have enclosed copies of fifteen letters from
28 contributors stating their willingness to contribute \$5,000
29 or \$10,000 (and, in one case, \$75-100,000) if it becomes
30 legally permissible or if the candidate can obtain a ruling
or a change in the law permitting it. You have also enclosed
a campaign plan drawn up by a consultant illustrating the
need for substantial funding.

3 without power or expertise to pass upon the constitutionality
4 of legislative action. Spiegel, Inc. v. Federal Trade
5 Commission, 540 F.2d 287, 294 (7th Cir. 1976). See Johnson
6 v. Robison, 415 U.S. 361, 368 (1974). Therefore, even if the
7 Commission were persuaded as to the merits of your position,
8 it could not accede to Mr. Khachaturian's request and
9 conclude that the limit is inapplicable.

10 Moreover, the Commission notes that the
11 constitutionality of 2 U.S.C. §441a(a)(1)(A) has been upheld
12 in Buckley v. Valeo, 424 U.S. 1 (1976). The Court concluded
13 that the \$1,000 limitation was constitutionally justified
14 because of the need "to limit the actuality and appearance of
15 corruption resulting from large individual financial
16 contributions." 424 U.S. at 26. The Court determined not to
17 question the amount of the limit established by Congress and
18 concluded that a possible lack of "fine tuning" by Congress
19 as to the amount did not constitute an infringement, as
20 overbreadth, of First Amendment rights. 424 U.S. at 30. The
21 Court admitted that the charge of discrimination against
22 minor party and independent candidates is more troubling than
23 a similar charge with respect to major party challengers.
24 Nevertheless, the Court, in viewing the situation of minor
25 party and independent candidates in general, referred to such
26 countervailing factors as the resultant inability of major
27 party candidates to receive large contributions (i.e.,
28 contributions they were more likely to receive), and the fact
29 that minor party and independent candidates may have a
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3 substantial impact on the outcome of elections. 424 U.S. at
4 33-35. See Goland v. United States, 903 F.2d 1247, 1258 (9th
5 Cir. 1990).

6 Based on the foregoing analysis, the Commission
7 concludes that the limits of 2 U.S.C. §441a(a)(1)(A) are
8 applicable to Mr. Khachaturian. His campaign may not accept
9 contributions in excess of \$1,000 from any individual with
10 respect to the October 3 open primary.

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

15 Sincerely,

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17 Joan D. Aikens
18 Chairman for the
19 Federal Election Commission
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