FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

STATEMENT OF
COMMISSIONER JOAN D. AIKENS
AND
COMMISSIONER LEE ANN ELLIOTT
ON
ADVISORY OPINION REQUEST 1992-39

In Advisory Opinion Request 1992-39, the Republican National Senatorial Committee inquired about making expenditures under 2 U.S.C. § 441a(d)(3) during a run-off election in Georgia.

The General Counsel's draft response, which failed to pass by the required four votes, was based on Advisory Opinion 1983-16, and concluded that the run-off was not a separate election for the purpose of § 441a(d).

Advisory Opinion 1983-16 concerned a June 21st "special primary" to fill a vacancy for a House seat. All candidates of whatever party affiliation were together on one ballot. If any candidate received a majority, he or she would be declared the winner. If no majority was achieved, a subsequent run-off election would be held and the top vote getter from each "political party or political body" would be on the new ballot.

The question asked in Advisory Opinion 1983-16 was whether the "special primary" would fit the definition of a general election for purposes of 441a(d) expenditures. The Commission ruled that the election held on June 21st, though labeled a "special primary," would fit the definition of "special general election" because it was held to fill a vacancy in a federal office (i.e., a special election) and was intended to result in a final selection of the individual to fill the seat (i.e., a general election).

The Commission further concluded, though the question was not asked, that if a run-off were held it would be viewed as a "continuation" of the general election campaign and was not a separate or additional election for 441a(d) expenditure purposes.

While we voted for Advisory Opinion 1983-16, we believe its superfluous statement about one "continuing general election campaign" in the run-off without a separate 441a(d) limit is non-binding and erroneous. Nowhere in the FECA is there a definition of, or provision for, a "continuation of an election." Its use in Advisory Opinion 1983-16 was an accommodation to the requester to permit the spending of the 441a(d) limits in the "special primary election." Had Sala Burton not received a majority in the June 21st election, there would have been a second election which could have had as many as 5 or 6 candidates on the ballot - the highest vote getters in each "political party or political body." The first election was similar to the primary system in Louisiana. There it is possible to win the seat by winning a majority in the primary - making a general election unnecessary.

Georgia, however, is a different situation.1/ Unlike the primary situation in Louisiana or the California special, this is a special run-off election after the general election.

The Georgia law provides for a run-off election following the general election if none of the candidates receive a majority vote. Only the two highest vote getters are on the ballot and write-in votes are prohibited. While the Burton election was a "special election," the election in Georgia is a run-off election - which the law defines as a separate election. 2 U.S.C. § 431(1)(A). The Commission has, in fact, designated both the California and Georgia elections as two elections for purposes of the 441a(a) contribution limits.

1/ The Georgia law is unique and was changed in 1966 after a bitter and tightly fought gubernatorial race. This is the first election to which the amended provisions of the Georgia statute have been applied. It is reported that the Georgia legislature is prepared to repeal this provision in the near future.

The General Counsel's draft relies on the language in the Georgia law for purposes of who is permitted to vote as an underlying reason for calling this a "continuation" of the election. However, this provision is aimed at preventing voter fraud by closing registration rolls between the two elections and has no bearing on campaign finance law.

It would seem that since this election is designated in Georgia law as a run-off election (a term defined in the FECA), and since the Commission has allowed separate contribution limits for general and run-off elections, and since this election will definitively decide which of two candidates will serve in the U.S. Senate, we believe the Commission should permit both parties to spend additional 441a(d) money on behalf of their candidates.2/ As Commissioner Josefiak stated in his Concurring Opinion in Advisory Opinion 1986-31, with which we concurred, "increased party support for candidates, where the candidates and parties are being treated equally, does not constitute a threat to our political system."

2/ We also agree with Commissioner Potter's statement that there is no support in the FECA for the restrictive definition of 11 C.F.R. § 100.2(b) the General Counsel advocated in its draft.

Joan D. Aikens
Commissioner

Lee Ann Elliott
Commissioner

November 20, 1992