FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**CONCURRING OPINION OF
COMMISSIONER JOAN D. AIKENS
AND
COMMISSIONER LEE ANN ELLIOTT
TO ADVISORY OPINION 1993-2**

I. Introduction.

In Advisory Opinion Request 1993-2, the Commission was asked whether 2 U.S.C. §441a(d) "confers a single spending limitation on parties supporting candidates in a [Texas] special election together with any run-off." Advisory Opinion Request at page 1 (emphasis supplied).[1]

Although a majority agreed only one spending limit was available, different rationales were put forward to reach that result. After a lengthy deliberation in which it was acknowledged no Commissioner had the exclusive rationale for deciding this case, the Commission decided to refer this matter back to OGC for re-drafting. The General Counsel then prepared two alternative drafts, one that included each Commissioner's rationale and another that gave a "bare bones" answer that accommodates either interpretation.

The majority agreed to adopt the "bare bones" approach and let individual Commissioners supplement their views with written concurrences. We agree with this action and accordingly set forth our reasons for supporting the Advisory Opinion issued in this case.

II. Problems with the General Counsel's Original Draft.

While we agree with our colleagues that there is only one §441a(d) limit available in Texas, we do not agree

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1. The Act and Commission regulations allow political party committees to make coordinated expenditures in connection with the general election campaign of Senatorial candidates who are affiliated with such party according to a formula based on the voting age population of each state. 2 U.S.C. §441a(d)(1),(3).

with their rationale. Their rationale, as stated in the General Counsel's original draft of this opinion, is premised on the rationale of Advisory Opinion 1983-16. That opinion concluded a California special "general" election received a limit under §441a(d), but a possible run-off election following it was a "continuation of the general election campaign" and therefore not entitled to an additional expenditure limit under 2 U.S.C. §441a(d). Advisory Opinion 1983-16 at page 3.

We do not think the above-quoted rationale of Advisory Opinion 1983-16 wisely answered the question presented there or in today's case. As we said last year during our deliberation of the Georgia Advisory Opinion Request, "[n]owhere in the FECA is there a definition of, or provision for, a 'continuation of an election'." In fact, we consider that phrase's use in 1983-16 to have been "erroneous." Statement of Commissioners Aikens and Elliott to Advisory Opinion Request 1992-39 at page 2.

We also criticized using the word "campaign" as a legal term (as opposed to relying on the word "election" which is clearly defined in the FECA) in a North Carolina Advisory Opinion. In that opinion, we joined Commissioner Josefiak's concurrence which said "the Act and Commission regulations do not define 'campaign,' and that word does not appear to have independent meaning in §441a(d)(3) within the phrase 'general election campaign'." Commissioner Josefiak also stated a "one-campaign concept ... is flatly inconsistent with the Act's provisions which do not use the word 'campaign' (and) [i]mplementation of the one-campaign concept would call for a nightmare of subjective line-drawing." Concurring Opinion of Commissioner Josefiak to Advisory Opinion 1986-31 at page 3. See also Concurrence of Commissioners Aikens & Elliott to Advisory Opinion 1986-31.

While the facts of today's request differ from Advisory Opinions 1992-39 (Georgia) and 1986-31 (North Carolina), the criticisms we stated in those opinions of the rationale in Advisory Opinion 1983-16 (California) are consistent and directly applicable to how we decide today's case. We believe Advisory Opinion 1983-16's use of a "continuing general election campaign" as a basis for legally analyzing §441a(d) is inappropriate, subjective and unsupported by the statute. In our opinion, the better way to analyze these special election cases is to stay consistent with the result in Advisory Opinion 1983-16, but rely on the legally-defined term "election" and the rationale of other Commission precedent.

III. Advisory Opinion 1983-16.

In Advisory Opinion 1983-16, the Commission applied §441a(d) to California's law governing special elections. That law provided that all candidates for a vacancy, regardless of party affiliation, were required to enter an initial special primary election. If no candidate emerged with more than 50% of the vote from the primary, a special general election would be held.

The Commission decided it had to rename the California special primary a "general" election in order to grant §441a(d) limits for that initial special election. The Commission also renamed the special general election a "run-off" election, and said a separate §441a(d) limit would not be available there since it would be the "continuation of the general election campaign." Advisory Opinion 1983-16 at page 3.[2]

In our opinion, it was unnecessary to rename the elections in California, and we could not support repeating that fiction in answering today's request. In our opinion, the initial special election in Texas (and the special primary election in California for that matter) can maintain their status as essentially "primary" elections that narrow the field, but political parties may still make §441a(d) expenditures in them, because of the Commission's decision in Advisory Opinion 1984-15.

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2. Advisory Opinion 1983-16 cites Kellam v. Eu, 83 Cal. App. 3d 463, 466 (1978) in support of renaming the special primary as a general, and the special general as a run-off. But that is not persuasive to us, and is not all the opinion actually said. In Kellam, the court stated:

> 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. (emphasis added)

If you literally follow the court's opinion, it is suggesting there are two general elections. This could mean there are two §441a(d) limits available there and in other special elections or run-offs. See, for example, Statement of Commissioners Aikens & Elliott to Advisory Opinion Request 1992-39, Dissent of Vice Chairman Potter to 1993-2. But the Commission did not follow that course in 1983-16, so we think the court's opinion is of limited precedential value.

IV. Advisory Opinion 1984-15.

In Advisory Opinion 1984-15, the Commission was asked, inter alia, whether the "timing" of certain expenditures would effect their characterization as coordinated party expenditures under §441a(d). Advisory Opinion 1984-15 at page 3. The Commission answered that "nothing in the Act, its legislative history, Commission regulations, or court decisions, indicates that coordinated party expenditures must be restricted to the time period between nomination and general election." The Commission continued:

> Where a candidate appears assured of his party's presidential nomination, the general election campaign, at least from the political party's perspective, may begin prior to formal nomination ... [W]hether a specific nominee has been chosen, or a candidate assured of nomination at the time the expenditure is made, is immaterial.

Advisory Opinion 1984-15 at page 4. See also Advisory Opinion 1985-14 at pages 6-7 (expenditures pursuant to §441a(d) may be made before the party's general election candidates are nominated in Congressional elections). Further, the Commission has stated §441a(d) "does not by its terms refer to candidates for Federal office as the party's nominees; it refers to such candidates only as those who are 'affiliated with' the political party." Advisory Opinion 1984-15 at page 4, n.4.

Accordingly, parties may make coordinated expenditures during the primaries, before the general election has begun. Therefore, candidates do not have to be participating in an election named or renamed a "general" election for political parties to make coordinated expenditures on their behalf. In fact, this type of spending has become a fairly common practice. See, e.g., 1992 Monthly Reports of the National Republican and Democratic Congressional Committees.

V. Applying 1984-15 to Initial Special Elections.

Since political parties can make coordinated expenditures during regular primary elections, it follows that they may also make these expenditures during an initial multi-party special election, like the one in Texas on May 1, 1993. In fact, initial special elections essentially operate as (and are often called) primary

elections. See Comment of Bob Slagle, Chairman, Texas Democratic Party, to Advisory Opinion Request 1993-2 (March 3, 1993). No nominations precede the first Texas special election and candidates of the same political party will compete against each other. This initial election, therefore, has the practical effect of a primary by narrowing all the primary contenders to the top two finishers, who will face each other in a special general.[3]

The second special election meets the literal definition of a "general election" since it is "intended to result in the final selection of a single individual to the office at stake." 11 C.F.R. §100.2(b)(2) (emphasis added). Although the first election may result in one candidate taking office if he or she receives over 50% of the vote, it can't be said that is the intent (or usual outcome) of that election. See Slagle Comment. If the first election did, however, produce an absolute winner, then it essentially operated as a general election. As a general election, §441a(d) expenditures could obviously have been made in it, and there is no subsequent election or "continuing general election campaign."

VI. Comparison with Advisory Opinion Request 1992-39.

Because we view Texas special election law as effectively creating a primary and general election, our support for two §441a(d) limits during the Georgia general and run-off elections is inapplicable to this case. See Statement of Commissioners Aikens & Elliott to Advisory Opinion Request 1992-39. But even if the Texas special elections can only be considered a general and a run-off, today's case is quite distinguishable from the request in Advisory Opinion 1992-39.

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3. The fact that these multi-party primaries have all the candidates competing within them, and have absolute- majority winner provisions, does not mean they do not operate as primaries. These provisions are really step-savers, and are designed to save the states' money, ease their administration of the special election and above all, fill the vacancy as quickly as possible. Further, the fact that Texas law has the possibility of candidates of the same party competing in the second special election doesn't mean the first election still doesn't effectively operate as a primary, or change our analysis for purposes of 2 U.S.C. §441a(d).

In Georgia, we approved two separate limits because there were essentially two separate general elections that followed an initial primary election. Obviously, the regularly-scheduled November 3rd election was a general election, see 11 C.F.R. §100.2(b)(1), and the November 24th run-off (in addition to meeting the definition of 11 C.F.R. 100.2(d)(2)) was "intended to result in the final selection of a single individual to the office at stake," also meeting the definition of "general election." 11 C.F.R. §100.2(b)(2) (emphasis added). As we said in 1992-39, we believe one election can be considered to be both a general and a run-off, and there is no support in the FECA for the restrictive definition of §100.2(b) the General Counsel's office advocated in its draft. See Statement of Commissioners Aikens and Elliott in Advisory Opinion Request 1992-39 at page 3 n.2. Accord, Statement of Commissioner Potter in Advisory Opinion Request 1992-39 at pages 1-2.

Also, Georgia was a very unique situation and does not lend itself to broad application. No other state has an absolute majority law in the general election as Georgia does, and we believe the 1992 Senatorial race is the only election to which the law had been applied. It is also reported the Georgia legislature is prepared to repeal this law in the near future.

VII. Conclusion.

Although the Commission did not have the benefit of Advisory Opinions 1984-15 and 1985-14 at the time it decided 1983-16, those two opinions (plus our criticisms of 1983-16 in 1986-31 and 1992-39) have guided our decision in this matter. Accordingly, there is no need to name or rename a special election a "general election" just to create the ability to make coordinated expenditures, nor is it necessary for parties to wait until the second special general election to begin spending.

In sum, we do not support the subjective notion of a "continuing general election campaign" as a rationale for deciding these cases. We instead choose to rely on the legally defined term "election" at 2 U.S.C. §431(1), and gauge what that election actually does or is "intended" to accomplish. 11 C.F.R. §100.2(a),(b)&(f).

Fortunately, the Commission has agreed to a result in this case that does not use the rationale of Advisory Opinion 1983-16 as the sole basis for deciding today's request, and acknowledges that different interpretations are acceptable.[4]

Joan D. Aikens
Commissioner

Lee Ann Elliott
Commissioner

March 16, 1993

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4. Importantly, counsel's original draft included the following language which was deleted from the final draft opinion:

> The election process always has a single general election and the process may entail other elections either before or after the general election; e.g., nominating convention, popular primary, post-primary or post general run-offs. All of these are focused on the general election, either as a means to narrow the field before the general election, or afterwards, if the general election is inconclusive.

Agenda Document #93-20 at page 6. We are glad this statement was deleted since we obviously don't agree with it, and, of course, it isn't even true! See Statement of Commissioners Aikens and Elliott to Advisory Opinion Request 1992-39; La. Rev. Stat. Ann. 401, et. seq.; Advisory Opinions 1978-79, 1984-54 (regarding the state of Louisiana's unique October open-primary system).