FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DISSENT OF VICE CHAIRMAN POTTER
TO ADVISORY OPINION 1993-2

This Advisory Opinion Request concerns the provisions of federal election law allowing the national and state committees of a political party to "make expenditures in connection with the general election campaign of candidates for Federal office," subject to certain limits. See 2 U.S.C. § 441a(d).

We start with the fact that the term "general election" is nowhere defined in the Act. How, then, should we interpret this term? I believe State law, established political practice, and public policy arguments all lead to the conclusion that "general elections" should be defined as those elections which may directly result in the election of persons to Congress.[1]

In Advisory Opinion 1983-16 the Commission dealt with a California law which called for an election, open to all candidates, with the power to elect a Member of Congress. If no one candidate obtained a majority of the votes cast, however, then state law provided for a subsequent election between the two top vote getters. In that Advisory Opinion the Commission, without being asked, or having the issue briefed by the parties, stated that the first election was the only "general election," and that if a second election were held it would be a "run-off election" not entitled to its own general election Section 441a(d) political party coordinated expenditure limit. Had I been a Commissioner in 1983, I would not have voted for that result. Rather, I would have applied California law as found in Kellam v. Eu, 83 Cal. App. 3d 463, (1978), which was cited (but not followed) in Advisory Opinion 1983-16. Kellam v. Eu held that under California law there could be two "general elections": a preliminary general election, followed if needed by a run-off general election.

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1. See Statement of Commissioner Potter in Advisory Opinion Request 1992-39, involving the November 24, 1992 Georgia run-off election for the United States Senate.

I would have taken this position not only because of California's interpretation of its own election laws, but because I believe that under our Act any election which can have the legal effect of qualifying a person to sit in Congress is a general election. Indeed, the Commission's own regulations define "general election" as "[a]n election which is held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake . . . (emphasis added)." 11 C.F.R. 100.2(b)(2). Thus, I believe the Commission should over-rule its mistaken conclusion in AO 1983-16, and in accord with the language of the statute and our Regulations hold that there may be two general elections, and thus two 441(a)(d) limits, in the 1993 Texas Senate race.

There are practical reasons supporting the interpretation of the situation at hand as constituting two general elections. As an example of these considerations, I note the Comment to this Advisory Opinion Request of the Chairman of the Texas Democratic Party that "under the one election rule, the amount of money provided for by Federal formula was grossly inadequate for the Party to fully and fairly participate in the run-offs." Of necessity, the Commission majority's position here would require candidates and party committees to engage in a calibration of the chances of particular candidates winning the first election, versus the likelihood that they will continue to a run-off. This gamesmanship serves no public purpose in our system of elections, which as a practical matter is currently dependent on substantial sums of money to enable a candidate to campaign. Second, interpreting the present situation as two general elections with separate Section 441a(d) limits allows candidates to spend more of their time between the first and second elections with voters, rather than with fundraisers. Why not let the political parties take some of that fundraising burden off the candidate's backs? This would seem to be the point of political party Section 441a(d) expenditures. I again note the comments of the Chairman of the Texas Democratic Party in this regard.

Finally, it may be useful to correct the suggestion by the requester in this AOR that it is my view that the Commission must initiate a rulemaking before establishing a two-limit policy. A footnote in the request makes the statement that "Commissioner Potter . . . states that a rulemaking would be required to reverse the Commission's position taken in AO 1983-16". For the record, I note that my statement in AOR 1992-39 says only that "ultimately these ideas need to be debated and commented upon in a rulemaking." I believe as a general principle that we have a duty to the public and those we regulate to state our policies clearly and explicitly in our Regulations. As I outlined in my statement in AOR 1992-39, I believe our current regulations on this issue are unclear and subject to misinterpretation, and that they do not adequately express the meaning of the statutory provision they are intended

to explicate. Further, I believe the Commission benefits from full public comment and discussion when it deals with issues which may be contentious or controversial. For these reasons, I would support a Rulemaking for the purpose of clarifying our Regulations in this area, if that were my colleagues' desire.

However, as a legal matter the Commission may over-rule a previous Advisory Opinion if four Commissioners agree that the previous AO wrongly interpreted the statute. Thus, a rulemaking is not, as a matter of law, necessary to over-rule Advisory Opinion 1983-16.

While I respect my colleagues' differing views, and understand them, I do not subscribe to the result in this Advisory Opinion. For all of the above reasons, I believe the preferable reading of the statute to be that there may be two general elections with separate Section 441a(d) limits in the 1993 Texas Senate race.

Trevor Potter
Vice Chairman

Dated: March 4, 1993