HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

ENI F. H. FALEOMAVAEGA
AMERICAN SAMOA

August 4, 1994

Mr. Lawrence M. Noble
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR 1994-28

Dear Mr. Noble:

An opinion of the Solicitor's office of the U.S. Department of the Interior interpreting 2 U.S.C. §441e has received considerable public attention in American Samoa. This opinion could have a substantial impact on the elections in American Samoa, and as the Federal Election Commission is the primary executive branch interpreter of federal election law, I request an advisory opinion on the following issue.

In an October, 1993, publication entitled "The Application of Federal Laws in ... American Samoa, Guam, The Northern Mariana Islands, The U.S. Virgin Islands", the Solicitor of the U.S. Department of the Interior concluded that the definition of "foreign national" included in 2 U.S.C. §441e would prohibit U.S. Nationals residing in American Samoa from contributing to the campaigns of candidates running for federal office, but that U.S. Nationals residing in the United States would not be so prohibited. A copy of this portion of above publication is enclosed.

Currently, the only election in American Samoa governed by federal election law is that of delegate from American Samoa to the U.S. House of Representatives. This position was created by public law 95-556 (48 U.S.C. §1731 *et seq.*) in 1978, and unlike the qualifications for other federal offices, a qualification of owing "allegiance to the United States" was used in lieu of U.S. citizenship.

It is my position that 2 U.S.C. §441e and 48 U.S.C. §1731 *et seq.* should be interpreted to provide for an orderly election of delegates in American Samoa that will not infringe upon the first amendment rights of residents of the territory or U.S. nationals who may choose to run for the position of delegate. It appears to me that the interpretation given the definition of "foreign national" by the Solicitor of the Department of the Interior is unconstitutional and arbitrary in that U.S. national candidates running for the office of delegate would be unable to contribute to their own campaigns. Additionally, an opinion that U.S. nationals cannot contribute to the campaigns of candidates for federal office would mean that the vast majority of the residents eligible to vote in American Samoa would be precluded from fully supporting and participating in the election of their delegate.

I request an advisory opinion be issued on the application of 2 U.S.C. §441e and 48 U.S.C. §1731 *et seq.* to U.S. nationals in American Samoa who wish to exercise their first amendment rights by contributing to candidates for federal office. As there is an election for the delegate position scheduled in American Samoa for November 8, 1994, a timely response would be of assistance to all candidates for the position.

With kindest regards,

Sincerely,

ENI F. H. FALEOMAVAEGA
Member of Congress

EFHF:mry
Enclosure

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Department of the Interior
Office of the Solicitor
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only (e.g., 2 U.S.C. 332). But because the Delegates from the Virgin Islands, Guam, and Samoa are generally entitled to the same benefits as "Members" (48 U.S.C. 1715, 1735), they suffer no deprivations under this Chapter.

(o) The Commission on Executive, Legislative, and Judicial Salaries (2 U.S.C. 351-361), popularly known as the "Quad"(rennial) Commission, is directed to review pay rates for highly-placed personnel of the Federal Government every four years and to report the results to the President. The Commission and its work have no particular relevance to the territories.

(p) The occasion for and the procedures to be followed in the case of Contested Elections (2 U.S.C 381-396) to the House of Representatives are as fully applicable to the territories as to the States (2 U.S.C. 381(h)).

(q) The Joint Committee on Congressional Operations (2 U.S.C. 411-417) is charged with studying and recommending improvements in the organization and operation of the Congress. Its law contains no provision of unusual interest to the territories.

(r) The statutes concerning Federal Election Campaigns (2 U.S.C. 431-455) contain the requirements for disclosure of campaign funds in Federal elections, provide for the creation of the Federal Election Commission, and impose limitations on the amount and source of campaign contributions and of outside income. These laws apply as fully to elections in the territories of Delegates, and to the Delegates, as they do to the States and their Members (2 U.S.C. 431(12)). The provision for judicial review of constitutional questions arising under these laws, which vests jurisdiction in "the appropriate district court of the United States" (2 U.S.C. 437(h)), could pose a question with respect to Samoa, but, assuming that some such questions remain for adjudication, it seems probable that a forum could be found for a Samoan's testing if the Samoan in question is a U.S. citizen entitled to vote in a national election. The U.S. District Court for the District of Columbia has entertained constitutional

questions arising in Samoa (King v. Morton, 520 F.2d 1140 (1975)).

A "foreign national" is barred by 2 U.S.C. 441e from contributing money to the campaign of one running for Federal office, and a "foreign national" means a person who is not a citizen of the United States or who is not lawfully admitted to the U.S. for permanent residence (2 U.S.C. 441e(b)). Without more, that provision would have barred contributions by citizens of the Northern Marianas, until they achieved U.S. citizenship following Trusteeship termination in 1986. But the President, by Proclamation No. 5207 of June 7, 1984, in effect waived that bar as to citizens of the Northern Marianas prior to Trusteeship termination (see section 5(b)), so they became in effect "citizens of the United States" for purposes of 2 U.S.C. 441e(b) during that interval. They were, thus, enabled to contribute to campaigns for Federal office.

But, oddly, U.S. nationals living in Samoa cannot do so. The effect of 2 U.S.C. 441e is to permit those Samoans who are U.S. nationals but not U.S. citizens--and most are nationals only--and who reside in the States, to contribute to the campaign for a candidate for the Federal office of Delegate from American Samoa. But those national but noncitizen Samoans residing in Samoa cannot. This peculiar result follows from the language of 2 U.S.C. 441e(b), which defines a "foreign national" for purposes of the Federal Election Campaign Act as one who is neither a U.S. citizen nor an individual lawfully admitted for permanent residence. American Samoans, who are for the most part nationals only, and who, as such, may under the Federal immigration laws travel freely to and reside in the States, are unquestionably "lawfully admitted." So such U.S. resident Samoans are not barred from making political contributions. But American Samoans living in American Samoa--excepting only those relatively few who have become naturalized as U.S. citizens--are barred from contributing to the campaigns of candidates for the office of Delegate from American Samoa, because they are neither U.S. citizens nor U.S. residents (8 U.S.C. 1101(a)(20), (38)).

This anomaly should be eliminated. As usually defined, the term "foreign national" would not include a noncitizen national of the United States in American Samoa, because U.S. nationals, like U.S. citizens, owe permanent allegiance to the United States (8 U.S.C. 1101(a)(22)). But the definition at 2 U.S.C. 441e provides differently. The anomaly doubtless represents an historic accident, for the Federal Election Campaign Act, originally enacted in 1971, preceded by some years the enactment of the law providing for a Delegate from American Samoa (Public Law 95-556, 1978, 48 U.S.C. 1731-1735). The oversight should be corrected.

When it is corrected, changes would also be required in the section pertaining to enforcement. While enforcement by means of administrative action by the Federal Elections Commission, including civil penalties, is available now with respect to transgressions in Samoa--there being no limitations in the key provisions that would preclude it (2 U.S.C. 437g(1)-(5))--judicial enforcement is available only through action instituted "in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business" (2 U.S.C. 437g(6)(A)). There is no such court in American Samoa, and there is no district court of the United States with jurisdiction in Samoa. In those circumstances, the High Court of American Samoa might be given jurisdiction.

(s) The Office of Technology Assessment (2 U.S.C. 471-481), created in 1972 as an agency of the Congress, is responsible for developing information concerning "the potential impact of technological applications" (2 U.S.C. 471(c)(1)). No provision of its statute is of particular interest to the territories, but the statute does recognize their existence--as, for example, in the authorization for the Office to enter contracts in the conduct of it work with public agencies of the territories and possessions, as well as of the State and Federal Governments (2 U.S.C. 475(a)(2)).

(t) The laws pertaining to Congressional Mailing Standards (2 U.S.C. 501-502) create agencies of both the House and the Senate to provide advice to Members (including, expressly, Delegates) as to the use of the franking privilege,