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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 6 3 59 PM '94

September 6, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rita Reimer
Staff Attorney

Subject: Draft AO 1994-28

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for September 14, 1994.

Attachment

AGENDA ITEM
For Meeting of: 9-14-94

DRAFT

ADVISORY OPINION 1994-28

The Honorable Eni F. H. Faleomavaega
U.S. House of Representatives
109 Cannon Office Building
Washington, D.C. 20515

Dear Congressman Faleomavaega:

This responds to your letter dated August 4, 1994, and supplementary documents received on August 12, which request an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), to campaign contributions by American Samoans.

Your letter states that you currently hold the office of Delegate to the House of Representatives from American Samoa. See 48 U.S.C. §1731 et seq. Documents filed with the Commission also indicate that you are currently a candidate for election to that office. Accordingly, your inquiry presents the issue of contributions to your Delegate campaign by American Samoans who are United States nationals, but not United States citizens. Your request also raises the question of whether you may contribute your personal funds to your own campaign, assuming you are a U.S. national but not a U.S. citizen.

You explain that there is no requirement in the U.S. Code that the Delegate be a United States citizen. Rather, 48 U.S.C. §1733(b) requires that the Delegate "owe allegiance to the United States" -- thus encompassing, under both Samoan and U.S. law, both U.S. citizens and U.S. nationals. See

3 discussion below. The Delegate is elected by the people
4 qualified to vote for the popularly elected officials of the
5 Territory of American Samoa. 48 U.S.C. §1732. Article II,
6 §7 of the Constitution of American Samoa requires electors to
7 be "United States nationals." The American Samoa Code
8 Annotated ("Am. Samoa Code Ann.") at §6.0214(a)(8) requires a
9 person who desires to register to vote in the Territory to
10 affirm "that the person is a U.S. citizen or a U.S.
11 national."

12 The term "national of the United States" is defined at
13 both 8 U.S.C. §1101(a)(22) and Am. Samoa Code Ann.
14 §41.0202(1)(i) as either "(A) a citizen of the United States,
15 or (B) a person who, though not a citizen of the United
16 States, owes permanent allegiance to the United States."^{1/}
17 Also, 8 U.S.C. § 1408(1) defines the term "nationals, but not
18 citizens, of the United States at birth" for purposes of U.S.
19 law to include, inter alia, "[a] person born in an outlying
20 possession of the United States on or after the date of
21 formal acquisition of such possession." Finally, 8 U.S.C.
22 §1101(a)(29) defines "outlying possessions of the United
23 States" to mean American Samoa and Swains Island.

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26 ^{1/} While the term "person who owes permanent allegiance to
27 the United States" is not defined in either the American
28 Samoa Constitution or Code, this presumably refers to
29 citizens of those islands over which the United States was
30 granted sovereignty under the Convention of 1899, the Cession
of Tutuila and Aunuu in 1900, and the Cession of the Manu'a
Islands in 1904.

3 The Act at 2 U.S.C. §441e prohibits contributions by
4 "foreign nationals" in connection with an election to any
5 political office, as well as the solicitation, acceptance, or
6 receipt of any such contribution. The term "foreign
7 national" is defined at §441e(b)(2) as:

8 an individual who is not a citizen of the United
9 States and who is not lawfully admitted for
10 permanent residence, as defined by section
11 1101(a)(20) of title 8 [of the United States
12 Code].^{2/}

13 Section 1101(a)(20) of Title 8, U.S.Code, defines the
14 term "lawfully admitted for permanent residence" as:

15 the status of having been lawfully accorded the
16 privilege of residing permanently in the United
17 States as an immigrant in accordance with the
18 immigration laws, such status not having changed.

19 Under the immigration code, this status is reserved for
20 aliens (individuals who are neither U.S. citizens nor U.S.
21 nationals) who satisfy various requirements as to health,
22 morals, and economic status, and who obtain an immigrant
23 visa. 8 U.S.C. §§1181, 1201, 1202.

24 In contrast, U.S. nationals qualify for unrestricted
25 entry into the United States.^{3/} Their U.S. national status
26 means that they can be "lawfully admitted for permanent
27

28 ^{2/} The definition at §441e(b)(1) also includes non-citizen
29 foreign principals under the Foreign Agents Registration Act,
30 as that term is defined at 22 U.S.C. §611(b).

^{3/} In addition, U.S. nationals qualify for U.S. passports on
the same basis as U.S. citizens. 22 U.S.C. §212 provides,
"No passport shall be granted or issued to or verified for
any other persons than those owing allegiance, whether
citizens or not, to the United States."

3 residence" in the United States at any time, without having
4 to meet the entry requirements specified for alien
5 immigrants. In essence, they qualify for permanent residence
6 status without the legal obligation to apply for it, as is
7 necessary for aliens.

8 The position of U.S. nationals is thus materially
9 indistinguishable for purposes of §441e from that of
10 permanent resident aliens, who are specifically exempted from
11 the definition of "foreign national" at §441e(b)(2). Given
12 this situation, the Commission concludes that American Samoan
13 U.S. nationals who are not U.S. citizens may make otherwise
14 lawful campaign contributions to candidates for the office of
15 U.S. Delegate from Samoa.

16 To conclude that §441e bars their election campaign
17 contributions would have the dubious effect of prohibiting
18 American Samoan U.S. nationals from contributing to
19 candidates for whom they are legally entitled to vote.
20 Furthermore, the conclusion that §441e mandates "foreign
21 national" status for American Samoans who qualify as U.S.
22 nationals would contravene their favored status under United
23 States immigration laws for well over 50 years. Congress
24 should not be presumed to have intended such a result when it
25 fashioned the definition of "foreign national" in the 1974
26 Amendments to the FECA and then some four years later
27 established the Federal office of American Samoa Delegate to
28 the United States House of Representatives.
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3 Your request also raises the question of whether this
4 prohibition bars you, a U.S. national who is not a U.S.
5 citizen, from contributing your personal funds to your own
6 campaign. For the reasons discussed above, your use of your
7 personal funds for your Delegate campaign is not barred by
8 2 U.S.C. §441e.

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

13 For the Commission,

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15 Trevor Potter
16 Chairman
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