



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 9 4 03 PM '94

SUBMITTED LATE

SEPTEMBER 9, 1994

AGENDA ITEM

For Meeting of: 9/14/94

MEMORANDUM TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Draft AO 1994-29

Attached is a proposed draft of the subject advisory opinion.

This request is subject to consideration under the expedited 20-day advisory opinion procedure. 2 U.S.C. §437f(a)(2); 11 CFR 112.4(b). The 20th day is September 19, 1994.

Accordingly, the draft opinion should be presented for Commission decision at the meeting of September 14, 1994, and we request suspension of Commission rules on timely submission in order to consider this document.

Attachment

1
2 ADVISORY OPINION 1994-29

3 Robert Barra, Treasurer
4 Levy for Congress Committee
5 P.O. Box 323
6 Lynbrook, NY 11563

DRAFT

7 Dear Mr. Barra:

8 This responds to your letter dated August 26, 1994,
9 requesting an advisory opinion on behalf of the Levy for
10 Congress Committee ("the Committee") concerning the
11 application of the Federal Election Campaign Act of 1971, as
12 amended ("the Act"), and Commission regulations to a
13 candidate seeking nomination from more than one party.

14 The Committee is the principal campaign committee of
15 Congressman David Levy for re-election to the House from the
16 Fourth District of New York. You state that, pursuant to New
17 York's election law, Mr. Levy and another candidate were
18 "designated" for the Republican nomination, i.e., their names
19 appeared on the ballot for the Republican primary held on
20 September 13, 1994. The winner of the primary will be the
21 party nominee for the general election. Under New York law,
22 only enrolled members of the Republican party may vote in
23 that primary.

24 Mr. Levy has also been designated for nomination by the
25 Conservative Party. Although no other candidates have been
26 designated for nomination on the Conservative line, the
27 Conservative Party also held a primary election on September
28 13 in which its enrolled members could either vote for Mr.
Levy or write in the name of another candidate. You state

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2 that Mr. Levy's opponent in the Republican primary campaigned
3 actively for write-in votes for the Conservative nomination
4 as well.

5 You explain that an individual contributor and a
6 multicandidate committee which have already contributed the
7 legal maximum per election to Mr. Levy's primary and general
8 election efforts have expressed interest in making additional
9 contributions. You ask the Commission for an advisory
10 opinion as to whether Mr. Levy may be considered a candidate
11 in three elections for purposes of the Act's limitations,
12 i.e., the September 13 Republican primary, the September 13
13 Conservative primary, and the general election, and whether
14 the Committee may receive the maximum legal contribution for
15 each election. See 2 U.S.C. §441a(a)(1)(A) and (2)(A).

16 The Commission has previously considered the same
17 question which was posed by a New York candidate for the U.S.
18 Senate. Advisory Opinion 1982-47. In that situation, the
19 candidate was seeking nomination in a contested Republican
20 primary and was evidently unopposed in the Conservative and
21 Right-to-Life primaries, all to be held on September 23,
22 1982. The opinion noted that, under Commission regulations,
23 if no primary election is held because the candidate is
24 unopposed, the date on which the primary would have been held
25 is the date of the primary for purposes of the Act's
26 contribution limitations. See 11 CFR 110.1(j)(3). The
27 opinion also stated that the candidate should be viewed as a
28 a candidate for nomination by the Republican, Conservative,

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2 and Right-to-Life parties in the 1982 New York primaries,
3 even though no balloting may take place for the latter two
4 parties.

5 In responding to the specific question presented, the
6 Commission stated that the nominations made by the three
7 parties on September 23 will constitute the same primary
8 election, and that, since the candidate was a candidate for
9 nomination by all three parties for the same office, she
10 could not be regarded as seeking more than one Federal
11 office. See 11 CFR 100.2(c)(1) and 110.1(f). The Commission
12 concluded, therefore, that only one limit would apply to
13 contributions made for the September 23 primary election.

14 Your request attempts to distinguish the 1982 situation
15 from the facts presented by you. You state that, in the 1982
16 opinion, the candidate's opposition in the Conservative and
17 Right-to-Life primaries was "either anticipatory or
18 hypothetical" and, in contrast, Mr. Levy faces active
19 opposition in the 1994 Conservative primary. In a
20 subsequent opinion discussing a former House candidate, the
21 Commission stated that "[t]he fact that a candidate is
22 unopposed in a primary election is immaterial to the
23 application of a separate contribution limit for that primary
24 election," and cited the 1982 opinion for support of the
25 proposition. Advisory Opinion 1986-12. See 11 CFR
26 110.1(j)(2). Therefore, the degree of opposition or activity
27 in any one party's primary does not make a difference in
28 determining the number of contribution limits applied.

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2 In its Explanation and Justification of Commission
3 regulations defining the term "election," the Commission
4 averred that the definitions are designed to be neutral as
5 between party-affiliated and independent candidates. House
6 Document No. 95-44, at 40 (1977). The Explanation stated
7 that "[g]enerally, each [nominated] candidate will
8 participate in two elections: the primary (for independents,
9 a comparable period during which he or she may secure a
10 position on the general election ballot) and the general
11 election." Id., at 40-41. Noting that non-major parties
12 usually do not have actual primary elections and spend a
13 great deal of effort to secure a ballot position, the
14 Commission gave independent candidates and non-major party
15 candidates the same three options (not available to major
16 party candidates) for determining when the primary election
17 "is considered to occur." Id. at 41. The point of these
18 regulations, therefore, is to equalize treatment, as much as
19 possible, among major party candidates, minor party
20 candidates, and independents with respect to the availability
21 of contribution limits. The purpose is not to expand
22 contribution limit opportunities for major party candidates
23 seeking more than one party's nomination.

24 Based on the foregoing analysis, the Commission
25 concludes that the Committee is permitted only one limit for
26 the primary elections on September 13, and one limit for the
27 general election if Mr. Levy secures the nomination of any
28 political party.

