



FAIR GOVERNMENT FOUNDATION

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Brent Thompson
Executive Director

April 8, 1996

COMMENTS
APR 1996-12

General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

To the Office of General Counsel:

On behalf of the Fair Government Foundation, I am submitting the following comments on the advisory opinion request of Lenora B. Fulani (No.1986-12). Our comments focus solely on the legal standards in issue and we therefore express no opinion on the ongoing repayment determination proceedings arising out of Dr. Fulani's 1992 presidential candidacy.

Dr. Fulani has asked for guidance on how the Commission will in the future determine whether expenditures are "qualified campaign expenditures" under 26 U.S.C. 9002 (11) and 26 U.S.C. 9032 (9). More particularly, Dr. Fulani has sought a fuller explication of the "arms length" standard evidently raised but not adequately articulated by the Commission staff in repayment proceedings.

The issue appears novel to us. As you know, "arms length" is neither referenced nor defined in the Act or in the Commission's rules. Our concern is that the Commission not adopt a standard that would limit the flexibility of candidates to conduct campaign business through vendors of their choosing, regardless of existing or prior relationships. In judging whether a campaign expenditure is "qualified," we believe there are only two principal considerations (in addition to the explicit requirements of the statute): 1) Is the transaction real, in other words, were services rendered and payment made; and 2) Was the agreed upon payment reasonable in light of prevailing commercial standards. If both questions can be answered in the affirmative, the expenditure should be deemed to be qualified.

There would thus appear to be little, if any, room for "arms length" analysis, unless "arms length" is a proxy for judging whether the amount of the payment was commercially reasonable.

The Commission clearly has a duty to ensure that taxpayer dollars are properly allocated and are used only for campaign purposes. The statute was written to balance candidate flexibility, precluding FEC micromanagement of campaigns, with the need to provide sufficient tools to the Commission to protect the taxpayer. That balance has generally been achieved.

General Counsel
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Page Two

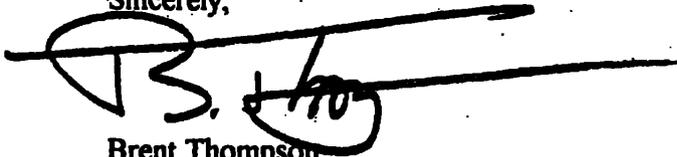
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We therefore urge that a new "arms length" standard not be allowed to serve as the basis for greater Commission entanglement in presidential campaigns.

Without the benefit of the Commission's interpretation of "arms length" and its intended application, our ability to comment fully is limited. We would welcome an opportunity to comment further upon completion of a draft advisory opinion.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Thompson", is written over a horizontal line. The signature is stylized and somewhat cursive.

Brent Thompson
Executive Director