AGENDA DOCUMENT NO. 98-51

FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 23, 1998

MEMORANDUM

AGENDA ITEM
For Meeting of: 7-30-98

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1998-14

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 30, 1998.

Attachment

ADVISORY OPINION 1998-14

DRAFT

Eugene F. Douglass
Eugene F. Douglass for US Senate
Campaign Committee
PO Box 6129
Hilo, HI 96720

Dear Mr. Douglass:

This responds to your letters of June 29 and 9, 1998, which request an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act") to your possible acceptance of contributions to your 1998 campaign for the United States Senate from individuals residing in certain Pacific island territories.

You state that you are a candidate for the Republican nomination for the U.S. Senate from the State of Hawaii. Your principal campaign committee is Eugene F. Douglass for US Senate ("the Committee"). You plan to place campaign advertising, including contribution solicitations, in the Guam newspaper, the *Pacific Daily News*, that reaches throughout a Pacific region which includes Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. The last three of these states form the recently created "Compact of Free Association with the United States,"(the "Compact").[1] As a result of this advertisement, you expect to receive contributions from individuals living in the Compact nations. You

[1] The Northern Mariana Islands, the Republic of Palau, the Republic of the Marshall Islands and the Federated States of Micronesia all formed part of the former United Nations Trust Territory of the Pacific Islands. These territories, formerly controlled by Japan, were placed under U.S. administration following the second World War. In 1986 the Northern Mariana Islands seceded from the Trust territories and became a self-governing commonwealth in political union with the United States. In a process beginning in 1976 and concluding in 1994, the remaining trust territories gained sovereignty and entered into the Compact of Free Association with the United States.

ask whether you may accept the contributions without regard to the prohibitions of 2 U.S.C. §441e which bars contributions by foreign nationals.

The Act prohibits contributions by "foreign nationals" in connection with any election to any political office, as well as the solicitation, acceptance, or receipt of any such contribution. 2 U.S.C. §441e; see 11 CFR 110.4(a). The term "foreign national" is defined at 2 U.S.C. §441e(b)(2) as "an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8 [United States Code]."[2] Under section 1101(a)(20), the term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Under the immigration code, this status is reserved for aliens (individuals who are neither U.S. citizens nor U.S. nationals) who satisfy various requirements as to health, morals, and economic status, and who obtain an immigrant visa. 8 U.S.C. §§1181, 1201, 1202.

A past Commission opinion, Advisory Opinion 1994-28, is relevant to your request. In that opinion, the Commission considered the status of political contributions made by residents of American Samoa, a territory of the United States, to the election campaign of a candidate for the Federal office of Delegate to the U.S. House of Representatives. The Commission stated that, while the residents of American Samoa

[2] The Commission notes that section 441e also includes in its definition of "foreign national" the term "foreign principal" with the proviso that a U.S. citizen would never be a foreign principal. The term "foreign principal" is defined in 22 U.S.C. §611(b) to include a "person outside of" the United States. The status of contributions made by permanent resident aliens while outside the territory of the United States is not addressed in this advisory opinion because you do not describe a specific factual situation that directly presents the issue. See 11 CFR 112.1(b).

were not U.S. citizens, their status as U.S. nationals was "materially indistinguishable for purposes of §441e from that of permanent resident aliens, who are specifically exempted from the definition of foreign national at §441e(b)(2)." The Commission based this on the fact that as U.S. nationals, the residents of America Samoa were permitted unrestricted entry into the United States. Their U.S. national status meant that they could be "lawfully admitted for permanent residence" in the United States at any time, without having to meet the entry requirements specified for alien immigrants. In concluding that contributions made by American Samoans would not be barred by section 441e, the Commission explained that "In essence, [U.S. nationals in American Samoa] qualify for permanent residence status without the legal obligation to apply for it, as is necessary for aliens."

The issue presented here is whether the citizens of the nations subject to the Compact hold rights similar to American Samoans and other U.S. nationals. At the outset, the Commission notes the difference in status between the Compact states and American Samoa. While under 8 U.S.C. §1101(a)(29) American Samoa is classified as an "outlying possession" or territory of the United States, the former territories comprising the Compact nations have been viewed by U.S. courts as foreign territories under U.S. administration, pursuant to the United Nations trust mandate. See *Aradnas v. Hogan*, 155 F.Supp. 546 (D. Haw. 1957), and *Pauling v. McElroy*, 164 F.Supp. 390 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C. Cir. 1960), *cert denied*, 364 U.S. 835(1960). This has led courts to characterize the inhabitants of the Pacific Trust territories as non-resident aliens for the purpose of U.S. immigration statutes. See *Pauling* at 393.

The Compact, however, has redefined the relations between the former Pacific Trust territories and the United States.[3] It established the Republic of Palau, the Republic of the Marshall Islands and the Federated States of Micronesia as sovereign nations with the right to enter into treaties (except in military and defense matters which remain under United States control) and establish diplomatic relations with other nations.[4] These provisions have led one court to reconfirm the judicial treatment of the Marshall Islands as a foreign nation. See *United States v. Covington*, 783 F.2d 1052 (9th Cir. 1985), *cert denied*, 479 U.S. 831 (1986).[5] Furthermore, the Compact does not grant U.S. citizenship or U.S. national status (as in the case of American Samoa) to the inhabitants of Micronesia, the Marshall Islands or Palau.[6] It remains, however, whether the immigration rights otherwise granted under the Compact treaty are, as in Advisory Opinion 1994-28,

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[3] Again, the Compact and the discussion below do not include the Northern Mariana Islands. Residents of this region were granted U.S. citizenship as part of its commonwealth status. See Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, codified, as amended, at 48 U.S.C. §1908.

[4] For a discussion of the terms of the Compact see Larry Wentworth, *International Status and Personality of Micronesian Political Entities*, 16 ILSA J. Int'l L. 1 (Spring 1993); Jon M. Van Dyke, *The Evolving Legal Relationship between the United States and its Affiliated U.S.-Flag Islands*, 14 U. Haw. L. Rev 445 (Fall 1992); and Peter Ruffatto, Note *U.S. Action in Micronesia as a Norm of Customary International Law: The Effectuation of the Right to Self-Determination for Guam and Other Non-Self Governing Territories*, 2 Pac. Rim L. & Pol'y J. 377 (Summer 1993). The concept of "free association," which underlies the Compact, is new in international relations with no precedent in international law or history. However, the Compact may be fairly characterized as a military and political alliance between the United States and its former Trust Territories with the U.S. also assuming certain defense and economic obligations and enjoying military prerogatives in the territories.

[5] The *Covington* court noted that "The Republic of the Marshall Islands has opted for free association status with the United States. *Id.* The result of free association status is that United States sovereignty does not apply to the Republic of the Marshall Islands, and the district is afforded full internal self-government. Consequently, we treat this confession [of appellants] as if it had been taken in what was undeniably a foreign country." *Id* at 1055.

[6] It should be noted that while citizens of the Marshall Islands, Micronesia and Palau do not have the right to use a U.S. passport (as U.S. citizens or nationals would), at the request of the governments of these nations, the U.S. is obligated under the Compact to "extend counselor assistance to a citizen of Marshall Islands, Micronesia and Palau on the same basis as it would extend to U.S. citizens or nationals." See Micronesia Compact Treaty Article II, section 126, codified as amended at 48 U.S.C. §1901. Still, this is more a treaty right granted to the governments of the Compact nations, rather than a privilege enjoyed directly by a citizen of those nations.

"materially indistinguishable" for purposes of §441e from that of permanent resident aliens.

The Compact does grant certain privileges to the citizens of the Compact nations. However, these privileges are materially less significant than those discussed in Advisory Opinion 1994-28. Article IV, section 141(a) of the Compact which concerns immigration rights, permits a citizen of the Compact nations to "lawfully engage in occupations, and establish residence as a non-immigrant in the United States and its territories and possessions without regard to paragraphs (14), (20), and (26) of section 212(a) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), (20), and (26)." This exemption permits citizens of the Compact nations to enter the United States for work purposes without prior certification from the Secretary of Labor, and without requiring a visa or other travel documents.[7] However, Compact Treaty Article IV, section 141(c), specifically denies the automatic granting of permanent resident status which is the basis for qualifying as a naturalized U.S. citizen. Rather, the Compact requires that a Pacific nation citizen follow the usual administrative course available to other aliens:

> "(c) Section 141(a) does not confer on a citizen of the Marshall Islands or the Federated States of Micronesia [or the Republic of Palau] the right to establish the residence necessary for naturalization under the Immigration and Nationality Act, or to petition for benefits for alien relatives under that Act. Section 141(a), however, shall not prevent a citizen of the Marshall Islands or the Federated States of Micronesia [or the Republic of Palau] from otherwise acquiring such rights or lawful permanent resident alien status in the United States."

[7] Subsequent to the initial signing of the Compact treaties in 1989, the subsections of 8 U.S.C. §1182 were reorganized and renumbered. Section 1182(a)(14) is now section 1182(a)(5)(A) and sections 1182(a)(20) and (26) are now found at section 1882(a)(7)(A) and (B). See 1990 Amendments to Immigration and Nationality Act; subsec. (a), Pub.L. 101-649, §601(a).

Accordingly, because the rights granted under the Compact of Free Association do not equate to a grant of U.S. citizenship, or confer the status of U.S. national, or give permanent resident alien status, the Commission concludes that citizens of the Marshall Islands, the Federated States of Micronesia and the Republic of Palau would be considered foreign nationals for purposes of 2 U.S.C. §441e. Consequently, you and Committee may not solicit or accept contributions from residents of these nations, unless they otherwise qualify as citizens or nationals of the United States or as permanent resident aliens. See footnote 2.

Your request also raises the issue as to what circumstances should alert the Committee regarding the possible foreign national status of a contributor, and when it should take further action to ascertain the contributor's status. Given the multi-ethnic national identity of the United States population in general, and its Pacific territories and the associated states in particular, the Commission agrees with your observation that "surnames would not be indicative of [foreign national status]." Therefore, the use of any surname on a contribution check (or similar instrument) would not, by itself, give any reason to inquire as to the person's nationality. Nonetheless, the Commission notes that the Committee and its treasurer should take several minimally intrusive steps to ensure that the contributions it receives comply with section 441e. See 11 CFR 103.3(b)(1).[8]

Any Committee advertisement in the public news media reaching the Compact nations which solicits contributions, or any contribution solicitation mailing which is directed to addresses in the Compact nations, should contain, in clear and conspicuous

[8] This regulation requires a committee treasurer to examine all contributions for evidence of illegality and to make "best efforts" to determine the legality of contributions that present "genuine questions" whether they were made by foreign nationals or other unlawful sources.

print, a summary of the prohibitions of section 441e. If the Committee receives any contribution postmarked from within the Compact nations (i.e. the Federated States of Micronesia, the Republic of Palau or the Republic of Marshall Islands) or any other non-U.S. territory, the Committee should make further inquiry as to the nationality of the contributor. Similarly, if the bank identification or the account owner information imprinted on a contribution check indicates a foreign nation address, the Committee should make further inquiries as to the nationality of the contributor. Of course in the above circumstances, if the contribution is submitted along with some credible evidence that the contributor is a U.S. citizen, a U.S. national or a permanent resident alien, no further inquiry need be made.[9]

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

Sincerely,

Joan D. Aikens
Chairman

Enclosures (AO 1994-28)

[9] Credible evidence would include a signed contributor card with a clear notation (e.g., a marked box/circle) that the contributor is a U.S. citizen, a U.S. national or lawfully admitted for permanent residence (a "green card" holder). But see footnote 2.