AGENDA DOCUMENT NO. 99-53

FEDERAL ELECTION COMMISSION

Washington, DC 20463

AGENDA ITEM

For Meeting of: 4-29-99

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan Levin
Senior Attorney

SUBJECT: Request for Reconsideration of Advisory Opinion 1999-1

I. Background

On February 25, 1999, the Commission issued Advisory Opinion 1999-1 which addressed the request of Mark Greene for a determination as to whether his proposal for salary payments to him by his principal campaign committee was lawful under the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations. The proposal was premised upon the loss of normal business income resulting from the amount of time Mr. Greene would spend on the campaign. Mr. Greene asserted that making up for such lost income was necessary to support his family and him during that time, and thus was vital to the plausibility of his campaign. Mr. Greene and the committee would enter into a written contract that would provide for a formula restated as follows: The amount of lost business income that the campaign would pay is the amount of the difference between Mr. Greene's average business income and the actual business income for that time period (e.g., a twice monthly period), times the percentage of a full-time work period (based on 40 hours per week) that Mr. Greene worked for the campaign. No salary would be paid if the business income exceeded the average income amount in a pay period until Mr. Greene's losses for the succeeding pay periods, under the formula, had eliminated the excess. In addition, to receive

any salary payment from the campaign, Mr. Greene would also need to show an aggregate loss over the past periods covered by the contract.

The Commission concluded that Mr. Greene could not receive a salary from the committee. The opinion cited to the Act's prohibition on the conversion of campaign funds to personal use, and to the Commission regulations' general definition of personal use, i.e., any use of funds in a candidate's campaign account to fulfill a commitment, obligation, or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder. 2 U.S.C. §439a and 11 CFR 113.1(g). The opinion also listed those uses that were considered to be *per se* personal use under the Commission regulations. 11 CFR 113.1(g)(1)(i). Noting that the basis of the request was the need for income to pay expenses that were personal use under the *per se* standard or the general definition, the draft stated that, under the proposal, the committee would be doing indirectly what it could not do directly, i.e., pay for expenses that are not related to the campaign, a type of activity the Commission has guarded against with respect to personal use. Moreover, in response to Mr. Greene's assertion that the full-time services of a candidate are an absolute necessity to any campaign and the utilization of campaign funds to offset his lost income was the only way to acquire such services, the opinion noted that the candidate traditionally plays a significant role in his own campaign regardless of remuneration, and payment of a salary would be based on the false premise that the committee is purchasing something that it would not otherwise possess.

In addressing Mr. Greene's advisory opinion request, the Commission considered two drafts from the Office of General Counsel, a "No" draft, which was adopted by the Commission and described above, and a "Yes" draft, which approved Mr. Greene's proposal on the grounds that the request was narrowly tailored to enable him to run for Congress and thus would not entail the payment of an expense that would exist regardless of his candidacy and would not enrich the candidate.

On March 8, 1999, Mr. Greene submitted a timely request for reconsideration of the opinion, pursuant to 11 CFR 112.6(a). Copies of that request were circulated to the Commission. This memorandum sets forth the bases of the request for reconsideration and recommends that the Commission deny the request.

II. Presentation of Requester's Arguments

The following is a brief restatement of Mr. Greene's arguments for reconsideration:

(1) Mr. Greene maintains that the opinion has an effect that was not intended by 2 U.S.C. §439a. He states that there was never "an intention of record to create, exacerbate or perpetuate an inequity between challengers and incumbents."

(2) Mr. Greene maintains that the Commission's conclusion was based on invalid terminology and invalid reasoning. He explains that, although he utilized the term "salary" in his initial request, the proposal did not entail a salary, but rather a "lost income

restitution agreement." Using a dictionary definition of salary, i.e., "[t]he recompense or consideration stipulated to be paid periodically to a person for regular work ...," Mr. Greene argues that the moneys would not be paid periodically unless he made claims for such money and would not be paid in fixed amounts, and that the payments would be restitution, not compensation for services provided. He maintains that this argument entails more than just a semantic difference because the loss of a candidate's income that is due directly to the time spent campaigning "constitutes a legitimate campaign expense that can legally be reimbursed from campaign funds." As a remedy, Mr. Greene recommends a "search" of the materials related to the advisory opinion and a substitution of the phrase "lost income restitution agreement" for "salary," so that a subsequent review by the Commission would lead to permitting his proposed activity.[1]

(3) In a variation of the two previous arguments, Mr. Greene argues that the Commission failed to exercise its duties under the equal protection provisions of the Fourteenth Amendment to the United States Constitution because it upheld a rule which, he maintains, creates an inequity between candidates and incumbents. He states that, although Commissioners made statements acknowledging that inequities could result, some of them did not "distinguish these inequities from the Commission rulemaking that creates and perpetuates them."[2]

In the final part of his submission, Mr. Greene proposes and describes a detailed sample contract for the reimbursement of earnings lost as a result of time spent on candidacy. He submits this in response to points made by the Commissioners in their discussion of the opinion and offers them as "amendments" to the "Yes Draft." The contract reflects the arrangement in his advisory opinion request with a few specific amendments reflecting the principles in his original proposal. These include requiring the filing of the contract with the Commission within 30 days of the designation of the PCC; Commission approval as to an amended contract before it can be in effect; a one-month limitation as to the duration set by the contract for an individual claim period; timeliness of claims for recovery; and establishment of the claim as inferior in priority to all other legitimate claims of vendors, paid staff, and other claimants.

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[1] In addition to recommending the adoption of the "Yes Draft" (with appropriate amendments) as a remedy, the requester also recommends the modification of 11 CFR 113.1 to recognize that reimbursement for a candidate's loss of earned income as a direct result of time spent campaigning is a legitimate campaign expense.

[2] Mr. Greene also argues that the Commission did not follow the comment procedures for advisory opinion requests set out in the Commission regulations. The Act and regulations provide for a comment period of ten days after the request is made public. 2 U.S.C. §437f(d) and 11 CFR 112.3. He complains that he was not given sufficient time, under the regulations, to comment on the agenda drafts. This office has already explained to him, via electronic mail, that the Act only refers to comments on the request itself, and not to the five to seven day comment opportunity after the agenda draft is made public. This latter opportunity, which had been given to the requester, is not required by the Act or regulations, but was instituted in November 1993 and announced in the Federal Register. In response to our explanation, Mr. Greene acknowledged his error in interpretation.

III. Analysis

Mr. Greene's concern that the Commission did not assess his proposal correctly, due to the characterization of his proposal as entailing a "salary," is refuted by this office's proposed drafts. The analysis in the draft adopted by the Commission addresses the core issues, regardless of whether the proposed arrangement is labeled as a "salary" or as a "lost income restitution agreement." Under either terminology, the proposal would still be inconsistent with the Act's prohibition on the personal use of campaign funds and the regulation's definition of personal use. The provision of funds by a campaign to the candidate for the sole purpose of ensuring that the candidate has funds to pay for expenses that would exist regardless of the campaign is contrary to the regulations. It makes no difference whether the funds are paid pursuant to a regularly scheduled fixed salary payment (based on a "reasonable" estimation), or are dependent on the need for the candidate to make a claim that is contingent on the amount of normal income that was not earned.[3]

Moreover, the Commission considered a "Yes Draft" that analyzed Mr. Greene's proposal as a plan for recovery of loss of income that would occur because of the time that he spent on the campaign. Although that draft also used the term "salary," it analyzed the arrangement as being tied directly to the hours spent on the campaign and the income that such hours would normally provide to him, assessed the plan as being specifically tailored to enable him to take time off from his full-time job and not enrich him, and discussed the limitations on recovery. Thus, the Commission has already examined Mr. Greene's plan which was presented in a coherent manner and included virtually the same terms that Mr. Greene now prefers to present and advocate. After considering such a proposal, the Commission declined to approve it.

Mr. Greene also attacks the Commission regulations and the conclusion in the advisory opinion as inequitable and unconstitutional. The opinion was adopted because it adhered to the regulations, which were based on the statute. It was a faithful application of regulations, designed specifically to ensure against the personal use of campaign funds which is prohibited by the Act, to Mr. Greene's proposal. Generally, Federal administrative agencies are without the power or expertise to pass upon the constitutionality of legislative action. Advisory Opinions 1998-22, 1998-20, and 1992-35 (citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Spiegel, Inc. v. Federal Trade Commission*, 287, 294 (7th Cir. 1976)).[4] The regulations promulgated by an administrative agency pursuant to its statutory authority also have the force and effect of law. *Batterton v. Francis*, 432 U.S. 416, 425, n. 9 (1977); *see also Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1980). Consistent with these principles

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[3] As emphasized in the opinion, payments by a PCC to a candidate as a way of obtaining the services of a candidate would be based on the false premise that the committee is purchasing something that it would not otherwise possess. Indeed, Mr. Greene, in his request for reconsideration, rejects the idea that such payments would be compensation for work done by him, as opposed to "restitution" of lost income.

[4] *See also Communications Workers v. Beck*, 487 U.S. 735, 744, n. 1 (1988); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 838, n. 211 (1997).

is the proposition that an agency must adhere to its own rules and regulations and "[*a*]*d hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned." *Reuters LTD v. F.C.C.*, 781 F.2d 946, 950-951 (D.C. Cir. 1986); *see also Panhandle Eastern Pipe Line Co., v. F.E.R.C.*, 613 F.2d 1120, 1135 (D.C. Cir. 1979); *U.S. v. Nixon*, 418 U.S. 683, 695-696 (1974). Moreover, the Commission's statutory duty in responding to advisory opinion requests is confined to answering a written request "concerning the application of [the] Act ... or a rule or regulation prescribed by the Commission," to a specific transaction or activity, and does not add the ability to determine the constitutional validity of a section of the Act or regulations within this process. See 2 U.S.C. §437(f)(a); 11 CFR 112.1(a).

Additionally, Mr. Greene's constitutional claim itself is problematic. The Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), in addressing a claim that the limitations on contributions were constitutionally flawed on equal protection grounds, noted that the Act applied the same contribution limitations to all candidates regardless of occupations, views, or political affiliation, and that "[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." 424 U.S., at 31. Similarly, the statute and regulations pertaining to personal use are facially neutral. Members of Congress and non-incumbents alike could complain of perceived impairments because of the personal use prohibition. Although the Congressional salary of a Member is not reduced as a result of campaigning, while someone in Mr. Greene's position may risk a loss of income, there may be other challengers who would have the opportunity to earn income that exceeds that of a Member during a campaign. Moreover, Members of Congress are also subject to limitations on outside income to which a challenger is not subject.[5]

[5] Mr. Greene's constitutional claim is also problematic if viewed as a claim of wealth discrimination. Section 439a and the regulations fulfill the purpose of ensuring against the personal, non-election-related use of funds that were donated by contributors for the purpose of influencing a Federal election. Even if the purported distinction is viewed as merely rationally related to a legitimate government interest, poverty standing alone is not a suspect classification requiring a compelling state interest. *See Harris v. McRae*, 448 U.S. 297, 322-323. Moreover, the difficulties that Mr. Greene may experience as a result of his financial condition relative to incumbents or other candidates does not appear to be the kind of disadvantage that has been deemed to directly impair the rights of the voters, which might sometimes trigger a higher constitutional standard for the government to meet (e.g., high ballot access fees or requirements). See *Anderson v. Celebrezze*, 460 U.S. 780, 786-788 (1983); *Buckley*, at 94; *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *see also* cases cited in *Gottlieb v. Federal Election Commission*, 143 F.3d 618, 622 (D.C. Cir. 1998).

General Counsel's Recommendation

The Office of General Counsel recommends that the Commission deny the request to reconsider Advisory Opinion 1999-1 and notify the requester by letter (including a copy of this memorandum) of the Commission's decision.

Attachments

1. **Request for reconsideration from Mr. Greene**
2. **Proposed letter to Mr. Greene**

RECONSIDERATION REQUEST AO 1999-01

Mark Greene
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Benbrook, Texas 76126-3024
817-249-3190 FAX 817-249-8072

March 5, 1999

Federal Election Commission
999 E. St. N.W.
Washington, D.C.

Attn: Office of General Counsel

Re: AO 1999-01

Sirs:

This correspondence is to serve as a formal request for reconsideration under Section 112.6 (2 U.S.C. 437f) of the Commission's February 25, 1999 ruling on AOR 1999-01. I apologize in advance for taking up so much of your time, and in failing to initially undertake sufficient scrutiny of the drafts and procedures being followed to have raised protest earlier. My only defense is that I do indeed have a business to run, that I cannot afford nor should I need a battery of lawyers to make such a case effectively, and that as alluded to in count 4, the time to scrutinize and respond was short. I would like to thank the staff of the Office of General Counsel in advance for your cooperation and professionalism in this matter to date, and hope that such diligence is displayed throughout the remainder of this ordeal. While I am sending this directly to your office without further distribution per Mr Litchfield's suggestion, I want to make it clear that the arguments and comments contained herein are written to and intended for the direct consumption of the Commissioners.

While your office has indicated that there will be no expedited treatment of this request, please note for the record that each unnecessary day's delay adds exponentially to the fund-raising challenge facing my campaign. Were this decision rendered favorably today, I would need to raise an average of $1,630 every day between now and the 2000 general election. One month's delay would raise this amount by almost $100 daily, and the slope of increase is exponential with each passing day. Please bear this factor in mind in scheduling your response activities.

SECTION I - GROUNDS

The following are the grounds under which I request this reconsideration:

1. The Commission's adoption of the "Nc" draft has an effect entirely unintended by the authorizing legislation.
2. The entire draft process, the bulk of the discussion, and an untold percentage of the vote taken was based on a mischaracterization of the monetary arrangement in question as "salary."
3. The Commission relied upon invalid reasoning in application of Section 113.1 statute and precedent in reaching its decision.
4. I received my copy of the drafts from the Office of the General Counsel via fax on February 18, 1999, in violation of the 10 days notice/comment period required under Section 112.3, allowing insufficient time to analyze the drafts, the applicable procedures and regulations, and to muster public support.
5. The Commission, while recognizing the inequities in the political system created wholly from the structure and implementation of certain Commission-generated rules during the course of discussing this case, in adopting a ruling which clearly exacerbates such inequity failed to faithfully and constitutionally exercise its powers under Sec. 437d.(a)(8).

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1. Unintended Effect (2 U.S.C. 437d.(a)(8))

It is common knowledge among all Commissioners and other interested parties that the overriding rationale of U.S.C. 439a. and implicitly all rules propagated thereunder was the elimination of blatantly corrupt campaign fund aggregations carried home by incumbent and retiree elected officials as private retirement and investment accounts. A not unwelcome byproduct was the discouragement of any financial gain accruing to a candidate solely as a function of candidacy. Never was there an intention of record to create, exacerbate or perpetuate an inequity between challengers and incumbents. Therefore the ruling was not reached in a manner either intended to or having the effect of carrying out the provisions of the Act. It is incumbent upon the Commissioners to examine both Congress' intent and their own when making such rulings, and to act in a manner that will carry forth the intent of record and not create or aggravate a situation which, as several members noted, was likely or potentially unconstitutional.

Proposed Remedy – Immediate: Vacate AO 1999-01 as decided February 25, 1999 and adopt in its place "Yes" draft with appropriate amendments.

2. Salary vs. Lost Income Replacement Agreement

All references to my proposed contract, unfortunately and erroneously including my own in the initial request, utilize the term "salary," when in fact any reasonable person's interpretation of the agreement prove it to be anything but. According to my old dictionary, New Webster's Dictionary of the English Language, © 1975, "salary, n. – The recompense or consideration stipulated to be paid periodically to a person for regular work, especially other than manual labor." I'm doubtful that there exists a dictionary or other source of any type that has a definition differing materially from this, so I will use this as a starting point for deconstruction.

- The monies referred to would not be paid *periodically*, meaning by reasonable inference at a regular interval, unless claims for such were made. While the maximum amount of lost income recoverable would be based on an average *periodic* pre-campaign income, and while a candidate could not receive such recovery unless such a *periodic* loss had been incurred and claimed, under no reading of the proposed arrangement could it be validly argued that the intent or effect would be to generate regular fixed-amount *periodic* payments.
- Under no valid interpretation of the proposed agreement could it be inferred that the monies in question would be compensation for regular work. Indeed, the complex formula which your office asked me to generate makes it abundantly clear that the result generated answers two simple questions: (a) total amount of lost income, and (b) amount of lost income reasonably attributable to campaign activities. Under no auspices might it be inferred that this amount, which will have a high likelihood of varying periodically over the course of a campaign, is regular or even irregular compensation for services rendered to the campaign. It is clearly and unambiguously the restitution of lost income occasioned specifically and directly by campaign activities.

Proposed Remedy – Immediate. Search all materials related to the presentation of this case and substitute "Lost Income Restitution Agreement" for "Salary". I believe that this will most accurately state the true nature of the proposal at the heart of this request, and that a subsequent review of all pertinent documents so modified will lend a much more than semantic adjustment to the entire question. Long Term: Modify 11CFR113.1(2 U.S.C. 439a) as necessary to recognize that a candidate's loss of earned income which is lost directly and inarguably as a result of time spent campaigning constitutes a legitimate campaign expense that can be legally reimbursed from campaign funds. Such remedy would be executed under 2 U.S.C. 437d.(a)(8), and such other rules and regulations as may be applicable.

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3. Invalid Reasoning

The Commissioners voting to adopt the "No" draft rely wholly on 11CFR113.1(g) as their statutory basis for so voting. As all voting members are or were at the time of their appointment "citizens of experience, integrity, impartiality and good judgment," according to their appointment/employment criteria as defined in Sec.437c.(a)(3), it seems that nothing other than an honest inability to recognize the valid principles underlying the requested agreement could have generated such a final tally. If, however, having clarified the nature of the proposed agreement under point 1 above, the error in reasoning is still not clear, I will attempt to illuminate the prevailing lack of logic and thus provide a basis for its rectification.

- In every previous Advisory Opinions referenced in both drafts, the Commission has consistently and quite admirably held to a logical application to this subsection. The test seems to be, now as then, whether a campaign expenditure results from legitimate campaign activity, which might be paid from campaign funds, or whether such expenditure would exist "irrespective of the candidate's campaign or duties as an officeholder."
- The specific language of the proposed formula for lost income recovery in question clearly stipulates that the lost monies to be recovered are reasonably construed to have been lost as a result of campaign activites. If there had been no campaign and no time spent on campaign activities, no income loss should have occurred, and if it did there could certainly be no valid claim that such loss was attributable to an activity that did not exist.
- I believe that in reviewing the tapes it will be noted that Mr. Levin attempted unsuccessfully to make clarifications for Commissioners very much along these lines, and accurately portrayed the final disposition of said monies to be secondary and implicitly beyond the purview of the Commission.

Proposed Remedy – Immediate: Vacate AO 1999-01 as decided February 25, 1999 and adopt in its place "Yes" draft with appropriate amendments. Long Term: Modify 11CFR113.1(2 U.S.C. 439a) as necessary to recognize that a candidate's loss of earned income which is lost directly and inarguably as a result of time spent campaigning constitutes a legitimate campaign expense that can be legally reimbursed from campaign funds. Such remedy would be executed under 2 U.S.C. 437d (a)(8), and such other rules and regulations as may be applicable.

4. Inadequate Notice/Public Comment 11CFR 112.3 (2 U.S.C. 437.f)

I received my copies of the drafts and agenda notice via fax on February 18, 1999. The Sunshine Act notice, while dated February 16, 1999 in the Federal Register, was not published until February 18, 1999. Neither of these dates could reasonably be interpreted as meeting the statutory deadlines for notification and to allow for public comment. Given the short shrift given the views of the five commentators in support of the "Yes" draft versus the tumultuous acclamation given the invisible but no doubt persuasive proponents of the "No" draft, what the effect of the full statutory compliance might have been is impossible to ascertain. Nonetheless, as the Commissioners have so eloquently and steadfastly professed a fidelity to the statutes under which they operate, this point seems to offer statutory cover for reconsideration for those not readily persuaded by arguments to language, logic or equity.

Proposed Remedy – Immediate: Vacate AO 1999-01 as decided February 25, 1999 and adopt in its place "Yes" draft with appropriate amendments. Long Term: Modify 11CFR 112.3 (2 U.S.C. 437.f) to clearly stipulate what Commission and or Counsel actions trigger commencement of period sensitive intervals such as the 10-day public comment period and related matters.

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5. Failure to Faithfully Exercise Duties re: 14th Amendment U.S. Constitution. [2 U.S.C. 437d.(a)(8).]

At the risk of sounding condescending, but in light of the discussion recorded among Commissioners regarding this request, it seems appropriate to visit the source of the Commission's powers and the implicit responsibilities attached thereto. Specifically, the power conferred by the people to the Congress under the Constitution empowered the Congress to enact regulatory legislation regarding elections pursuant to Article I, Sec. 4 of the Constitution. This legislation resulted in the formation of and charges to the Commission (2 U.S.C. 437) and later added to the Commission's charge the regulation of the use of campaign funds (2 U.S.C. 439a.). Nowhere in this diagram of conferred, shared and delegated regulatory power is there any provision for enactment or enforcement of unconstitutional provisions.

It is most disconcerting that throughout the discussion of this case virtually every member conceded the existence of glaring inequities in the system, and made no effort to distinguish these inequities from the Commission rulemaking that creates and perpetuates them. These were brushed over as minor inconveniences or irregularities, rather than the glaring flaw in the very foundation of the Republic they actually constitute. While it is true that there are short people and tall, heavy and slim, dark, light, rich, poor, and that none of these conditions can or should be the purview of the government in any of its manifestations, the inequities in question are of a wholly different character. These are inequities created by the government; specifically by the rulemaking and opinion rendering of the Commission. As one member suggested, these internal governmental inequities have been rightly rooted out throughout our history and destroyed, beginning with the 14th amendment to which we now appeal, continuing through universal suffrage and the Voting Rights Act of 1965 and beyond. Government has no responsibility to cure nature's inequities, but it has an overriding constitutional duty to identify and eliminate its own.

- "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid."

  -Alexander Hamilton, *The Federalist #78*

- The Commission is specifically charged "...to make, amend and repeal such rules...as are necessary to carry out the provisions of this Act." (2 U.S.C. 437d.(a)(8).) In light of the fact that one or more Commissioners alluded to the likelihood that all or part of the provision in question was unconstitutional, it would have been more appropriate to exercise the Commission's constitutional and statutory power under this subsection to amend the offending statute than to rely on it to render an unenforceable and unconstitutional opinion.
- Additionally, and again in direct contravention of the stated rulemaking responsibilities of the Commission, it appears from all accounts that those members voting in support of the "No" draft did so specifically to avoid engaging in this rule making aspect of their duties. (2 U.S.C. 437d (a)(8)). A careful inspection of the meeting's recording leaves room for no other interpretation

Proposed Remedy – Immediate Vacate AO 1999-01 as decided February 25, 1999 and adopt in its place "Yes" draft with appropriate amendments Long Term: Adopt a posture that welcomes the power to make rules that render the political system open, fair, and responsive to the will of the people.

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This concludes this section of this request. I feel certain that any citizen of passing familiarity with the Constitution and the various principles of justice and equity contained therein will have little difficulty in recognizing a sufficient degree of validity to the above stated grounds to readily vacate the ruling issued as AO 1999-01 at the meeting of February 25, 1999. The only question remaining is what remedy should be imposed to fill the resulting vacancy. Certainly continued abdication is not an appropriate response.

II. "Yes" Draft- Amendments and Rationale

While the Chairman accurately mentioned that there have been successful candidates of limited means, and while Ms. Elliot accurately noted that these are few and far between, the controlling regulations are decidedly inadequate and unfair to deal with their financial plight. Again, the inequity of their having to "find a way around" these hurdles while incumbents and the wealthy don't face such a challenge is unequal and thus unconstitutional on its face. Certainly I could do as many have in the past and hire myself as a campaign manager, burying the actual campaign manager in an assistant role as everyone winks and nods along. Or perhaps, or in addition, my wife and children could be aides-de-camp, assisting at some reasonable rate in compensated design, strategy, speechwriting or some such nonsense. Of course, by following such a strategy we would be putting ourselves at legal risk and exacerbating an already growing disregard for the government itself and the processes by which it is staffed.

"But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government any more than an individual will long be respected, without being truly respectable, nor be truly respectable without possessing a certain portion of order and stability."

James Madison (probably), *The Federalist #62*

At this point we have now accurately characterized the nature of the proposed Agreement, and in so doing have recognized rightly and accurately that despite the demagoguery of certain Commissioners during the meeting in question, there is clearly no potential for financial improvement contained therein. Nonetheless it remains to address those valid concerns brought up by certain Commissioners during the course of the February 25, 1999 discussion. Specifically, points were made regarding disclosure, limitations of recovery, and prioritization of recovery vs. claims of other campaign debtors, all of which should be considered valid topics of discussion and potentially of amendment. I will attempt to address each of these areas, and leave it to the Office of General Counsel to determine in what form they might be implemented. I will transmit with this request a draft of the agreement I have in mind, which will contractually encompass as many of these concepts as seems practicable.

<u>Disclosure</u>

First, it is important to note that throughout this request process, I have insisted that the agreement be contractual, and that such contract be part of the campaign records. While I agree that from a pragmatic and/or strategic standpoint "up-front" disclosure is advisable, I'm not certain that such could be statutorily compelled. Once we begin to operate under the guise of constitutional equity, it would seem to be impossible to compel "up-front" disclosure of certain legitimate authorized campaign expenditures without similarly compelling the disclosure of all anticipated authorized campaign expenditures from all candidates. Once that threshold is crossed it becomes virtually impossible for candidates on either side to privately plan, develop or implement strategies, which would likely be viewed as an infringement of their 1st Amendment free speech protections. On a parallel line of reasoning, it would be blatantly inconsistent to compel some sort of advance disclosure of a specific legitimate direct campaign expenditure, while requiring no such disclosure

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for the transfer of funds from one campaign fund to another local, state or national fund, which transfer is, while statutorily allowable, under no rational guise a direct campaign expenditure.

While I would certainly be willing to include such advance disclosure in any agreement I enter, I think that to statutorily compel such disclosure in some but not all cases would be to invite the same sort of challenge we are currently working our way through. It is obvious that this agreement and any recovery payments received hereunder will be as meticulously disclosed and recorded as any other campaign record, and it seems this is the best we can hope for under the circumstances. However, I can see no reason that the Commission should not require certain rigorous criteria of the agreement itself, including certain provisions to answer legitimate timing and disclosure concerns brought up by various Commissioners in discussion. Following are the operating principles contained in the attached Sample Contract:

1. Formal Contract - Any candidate wishing to recover lost income at any point during his/her candidacy under these provisions must contractually enter into such a Lost Income Replacement Agreement as hereunder proposed and file documents with the Federal Election Commission attesting to same no later than 30 days following initial filings and Committee designation. No such Agreement may be filed after this date unless specifically approved by the Commission.
2. Earliest Claim - No claims will be permitted prior to the formal filing of a Lost Income Replacement Agreement with the Federal Election Commission.
3. Earliest Recoverable Loss - No claims will be considered valid which are incurred prior to the formal filing of a Lost Income Replacement Agreement with the Federal Election Commission.
4. Recovery Claim Period – The contractually established time period against which average pre-campaign periodic income is established The maximum allowable lost income recovery claim period would be one calendar month
5. Claiming Interval - The regulatory provisions controlling funds transfers under the Agreement will be triggered from the date of first claim and continue through the dissolution of the Agreement. No claims will be recoverable during this "claiming interval" unless the aggregate income losses during the entire interval exceed the aggregate amount of funds recovered under the Agreement prior to date of claim. (Agreement can be in effect and on file for unlimited duration prior to the first claim for recovery. Provisions regarding aggregate recoverable losses will trigger from the date of first claim and last until dissolution of Agreement.)
6. Reporting - From the trigger date of the Claiming Interval until the final dissolution of the Agreement (90 days following the general election), claim forms will be filed each recovery period, regardless of whether recovery sums are sought in the respective period.
7. Claim Limitation - No earned income losses will be recoverable which were incurred prior to initial date of contract.
8. Timeliness of Claim - No earned income losses will be recoverable which are not claimed and submitted within 15 days following the terminal date of a specified recovery claim period.
9. Prioritization of Recovery - The recovery of lost income provided for through the Lost Income Replacement Agreement shall be: an inferior claim against campaign assets to all other legitimate claims by vendors, paid staff and any other legitimate claimants.

Please recognize that I am fully aware of my limitations and offer the attached as a general example only I would expect that either the Commission would create an acceptable agreement form under this ruling which would serve as an acceptable "boilerplate" form for this provision, or that such an agreement would require pre and/or post signing approval by the Commission through the General Counsel's office I would hope that the former would be the solution of choice for the sake of clarity and efficiency

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Limitations of Recovery

There was some significant discussion among the Commissioners regarding recoverable amounts under the proposed Agreement. While many hypotheticals posed by various Commissioners were flippant and certainly off point in relevance to the specific discussion at hand, the issue itself is worthy of discussion. While it was accurately noted that wealthy candidates might recover significant monies vastly in excess of those discussed in this particular case, the actual issue to be considered is whether the Commission can and should set a limitation on recoverable amounts. While I'm little inclined to assist the Commission in avoiding its rulemaking responsibilities, in this particular case it would seem the Constitution plays in favor of limited action. Again, if we look at the issue strictly from a Constitutional standpoint, the 14th Amendment dictates that the government, in this instance the Commission, take no action that would create an inequity that would not have existed absent the ruling. To create a statutory class based on the wealth or income of an individual, whether for or against some class or individual, is the exact action and type of action that we must strive to avoid. For this reason, I can see no constitutional possibility of setting some upper limit of recovery, other than the individual candidate's periodic earned income prior to campaigning.

Suffice to say that a candidate of means who attempts to take advantage of this provision will receive limited support in the bank or the booth. Further, be assured that so long as the Agreement under which such a candidate would attempt recovery is not materially different from that proposed herein, the most he or she might accomplish is an avoidance of loss. Again, the very nature and structure of the agreement assures the virtual impossibility of actual enrichment.

III. CONCLUSION

As this will undoubtedly be my last direct inquiry to the Commission on this matter, I trust you will recognize and allow for the lack of lawyerly input in this and previous pleadings. As a matter of principle I believe such filters should be allowable but not required for "the governed" to petition the "government." Should any deficiencies contained herein be of such a nature that legal clarification of a technical nature is necessary to facilitate an enforceable constitutional ruling, I trust that such would be rectified internally or brought to my attention so that I could obtain such assistance as required from this end

This serves to conclude this request for reconsideration I know that everyone's life at the Commission would be simpler if I'd have dropped this inquiry and desisted, but for reasons apparent to us all I cannot It is my fervent hope that the Commission will faithfully and constitutionally deal with this matter in a manner reflective of the gravity of your duties. It would cause me great pain to have the Commission force me into the company of those who question the Commission's right to exist and the government's interest in regulating the political system. It is a fundamental prerogative under our system of government that such regulation be vigorously exercised to weed out even the appearance of corruption. At the same time, as in all other regulatory exercises, it is incumbent upon the regulatory agencies to adhere to stringent constitutional principles in such regulation We all recognize that this is the heart and sole of this effort and inquiry on my part I can only trust that your love of the country and the Constitutional foundation upon which it rests is equal to my own If so you will render a judgment that is unassailable and worthy of acclaim by all

Respectfully,

Mark Greene

Attachment

1 - p. 7 of 8

Lost Income Replacement Agreement/Sample

Whereas (Name of Campaign Committee), hereafter referred to as "The Committee" requires the services of (Name of Candidate,) hereafter referred to as "Candidate," to facilitate and perform various campaign activities, and

Whereas "The Committee" recognizes that "Candidate" is uniquely able to provide such required services to the campaign, which services would include but not be limited to the following: fundraising, planning, policy and issue formulation, research, constituent meetings, speech-making, debating, etc., and

Whereas "The Committee" recognizes that "Candidate" is likely to suffer lost business income as a result of time spent on such campaign activities, which loss has been recognized as a legitimate reimbursable campaign expense under (Statutory Reference),

It is hereby agreed that "The Committee" shall reimburse "Candidate" an amount not to exceed $(established pre-campaign periodic earned income), which amount has been determined through examination and averaging of periodic earned income through tax filings for the years (xxxx and yyyy), and which amount can be claimed no more often than [recovery period (weekly/semi-monthly/monthly)] in compliance with the following conditions:

SPECIFIC CONDITIONS

1. Formal Contract - Any candidate wishing to recover lost income at any point during his/her candidacy must contractually enter into this or some other Lost Income Replacement Agreement, which Agreement shall be filed with the Federal Election Commission no later than 30 days following Committee designation. No such Agreement may be filed after this date unless specifically approved by the Commission. This Agreement shall be and remain a permanent record of this Campaign.
2. Earliest Claim - No claims will be permitted prior to the formal filing of this Agreement with the Federal Election Commission.
3. Earliest Recoverable Loss - No claims will be considered valid which are incurred prior to the formal filing of this Agreement with the Federal Election Commission.
4. Recovery Claim Period – The recovery claim period specified above shall not be changed during the term of this Agreement with out specific approval of the Federal Election Commission.
5. Claiming Interval - The regulatory provisions controlling funds transfers under this Agreement will be triggered from the date of first claim and continue through the dissolution of the Agreement. (Agreement can be in effect and on file for unlimited duration prior to the first claim for recovery. Provisions regarding aggregate recoverable losses will trigger from the date of first claim and last until dissolution of Agreement.) (Statutory Reference)
6. Reporting - From the trigger date of the Claiming Interval until the final dissolution of the Agreement (90 days following the general election), claim forms will be filed each recovery period, regardless of whether recovery sums are sought in the respective period.
7. Claim Limitation - No earned income losses will be recoverable which were incurred prior to initial date of Agreement. No earned income losses will be recoverable during the "claiming interval" unless the aggregate income losses during the entire interval exceed the aggregate amount of funds previously recovered under the Agreement prior to date of claim.
8. Timeliness of Claim - No earned income losses will be recoverable which are not claimed and submitted within 15 days following the terminal date of a specified recovery claim period.
9. Prioritization of Recovery - The recovery of lost income provided for through this Agreement shall be an inferior claim against campaign assets to all other legitimate claims by vendors, paid staff and any other legitimate claimants.

for "The Committee" / Date

"Candidate" / Date

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FEDERAL ELECTION COMMISSION

Washington, DC 20463

Mark Greene
10149 Stoneleigh Drive
Benbrook, Texas 76126-3024

Dear Mr. Greene:

On March 8, 1999, the Office of General Counsel received your request for reconsideration of Advisory Opinion 1999-1, pursuant to 11 CFR 112.6(a). The request was circulated that day to the Commission. On April 29, 1999, the Commission voted to accept the recommendation made by this office that your request be denied. Enclosed are a copy of the memorandum to the Commission prepared by this office, recommending the denial, and a copy of the official certification of the Commission vote on reconsideration.

Sincerely,

Lawrence M. Noble
General Counsel

BY: _____
N. Bradley Litchfield
Associate General Counsel

Enclosures
1. Memorandum to the Commission
2. Certification of the April 29, 1999, Commission vote

Attachment 2