



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

MWD

FROM: OFFICE OF THE COMMISSION SECRETARY

DATE: February 21, 2007

SUBJECT: COMMENT: DRAFT AO 2007-03
(Senator Barack Obama and the
Obama Exploratory Committee)

Transmitted herewith is a timely submitted comment regarding the above-captioned matter from Mr. Donald Simon on behalf of Democracy 21 and the Campaign Legal Center.

The proposed draft advisory opinion is being considered under an expedited process.

Attachment

By Electronic Mail

February 20, 2007

Thomasenia Duncan, Esq.
Acting General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comment on AOR 2007-03 (Obama Committee)

Dear Ms Duncan:

Democracy 21 and the Campaign Legal Center file the following comments with regard to AOR 2007-03, a request by Senator Barack Obama and his presidential campaign committee.

The AOR requests a ruling to allow Senator Obama, in the event he becomes the Democratic Party presidential nominee, to "retain the option" to choose public financing for the general election race notwithstanding the intent of his campaign to "provisionally" raise, and deposit into an escrow account, private contributions for the general election between now and the end of the presidential nominating period. AOR at 1.

The request is occasioned by a provision of the Presidential Election Campaign Fund Act which states that, as a "condition for eligibility" to receive general election public funding, a candidate must certify that "no contributions" for general election expenses "*have been* or will be accepted" by the candidate. 26 U.S.C. § 9003(b)(2) (emphasis added). Commission regulations repeat this requirement. 11 C.F.R. § 9003.2(a)(2).

AOR 2007-03 states that upon becoming a candidate for the nomination, Senator Obama will "instruct his campaign to proceed with active fundraising for the general election." The AOR further states that Senator Obama "would not, if the law allows, rule out the possibility of a publicly financed campaign if *both* major party nominees eventually decide, or even agree" to use public financing for the general election. AOR at 2. The request notes that "a number of potential candidates" have determined that they will not accept public financing for the 2008 general election. *Id.* at 1.

The AOR states: "Should both major party nominees elect to receive public funding, this would preserve the public financing system, now in danger of collapse, and facilitate the conduct of campaigns freed from any dependence on private fundraising." *Id.* at 2.

Democracy 21 and the Campaign Legal Center strongly support the presidential public financing system and the efforts currently underway to fix and modernize the system. In this regard, both of our organizations are supporting legislation, introduced last month in the House and Senate, to repair the system for future elections. See S. 436 (introduced by Senator Feingold on Jan. 30, 2007); H.R. 776 (introduced by Representatives Meehan, Shays and Price on January 31, 2007). We are aware that Senator Obama is a supporter of the presidential public financing system and that he is also the first Senator to co-sponsor the legislation to fix the system for future presidential elections.

The presidential public financing system served the nation well for most its existence, but is now broken and needs to be repaired. The Senate and House bills are intended to restore the viability of the system and the ability of presidential candidates to opt into and run financially competitive races for president without becoming dependent on large funders.

We recognize that the pending AOR reflects a good faith effort by Senator Obama and his campaign to preserve, and to have the opportunity to use, this extremely important and valuable system for our democracy and the American people.

As a *Washington Post* editorial (February 20, 2007) in support of the AOR stated, "Interpreting the law in a way that would allow the nominees the chance to call off the fundraising arms race would further the purpose of the campaign finance law and avoid the first fully privately financed presidential campaign since Watergate."

We agree with these policy goals.

However, the issue before the Commission is not what would be the best policy here, but rather what is the legal interpretation of the word "accepted" in the context of the language and meaning of the presidential public financing law.

It is our view that the law does not permit the interpretation of "accepted" set forth in the advisory opinion request.

1. **The statute does not permit a candidate who seeks to obtain general election public financing to have raised private contributions for the general election.**

We believe that, given the language of the public financing statute, a presidential candidate cannot raise contributions for the presidential general election and then choose not to spend these funds and instead opt into the general election public financing system. We further believe that the goals of the statute, as interpreted by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), affirm this position, as we discuss in Part 2 below

The presidential public financing law states:

In order to be eligible to receive any payments under section 9006, the candidate of a major party in a presidential election shall certify to the Commission, under penalty of perjury, that –

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(c)....

26 U.S.C. § 9003(b)(2) (emphasis added).

The language explicitly states that in order to be “eligible” to receive public funds for the general election, a major party candidate must certify that “no contributions ... have been or will be accepted” by that candidate. This statutory requirement applies to the acceptance of private general election contributions both before (“have been”) and after (“will be”) the general election has begun. The statutory provision does set forth a narrow exception to the rule: in the case of a deficiency in the Fund so that the full entitlement to general election funding cannot be paid, the law permits a candidate to raise private contributions to make up the difference. However, that is not the situation here. The AOR does not claim to fall under this exception.¹

The issue in this matter involves the meaning of the word “accepted” in the context of this statutory requirement.

The AOR legal position rests on a purported distinction between the terms “accepted” and “received.” The AOR takes the position that while the statute prohibits a candidate from “accepting” private contributions for the general election, the Obama campaign would “receive” such contributions, deposit them into an escrow account and refrain from spending the money. Under these circumstances, the AOR maintains, the contributions will have not been “accepted” within the meaning of the law, and Senator Obama therefore should continue to be eligible to receive public funding for the general election under section 9003(b). According to the AOR, if Senator Obama ultimately decides to take public funding, he would return all of the private contributions to the donors, never having “accepted” them. AOR at 2.

The gravamen of the argument, thus, is the purported distinction between “accepting” contributions, which “denotes conclusive use of the money – deriving some benefit from the

¹ The Commission, by rule, has created a second exception that allows a publicly financed general election candidate to raise private contributions for a general election legal and compliance fund (GELAC). See 11 C.F.R. §§ 9003.2(a)(2); 9003.3(a). The AOR does not claim to fall under this exception either. We note that our organizations have long been of the view that the Commission’s creation of a GELAC exception to the ban on private fundraising for publicly financed general election candidates is unauthorized by statute, and contrary to law.

funds" and "receiving" contributions, which means "merely taking custody of them for possible use at a future date." AOR at 3.

We do not believe that this is a correct interpretation of the term "accepted" as used in the law.

The language of the statute should be read according to its plain meaning, based on common usage of the terms. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (relying on dictionary definition to discern "natural reading" of statute and "normal meaning" of operative term). Dictionary definitions of the terms "accept" and "receive" do not distinguish between them in the manner proposed by the AOR; indeed, one term is used to define the other. *E.g., Black's Law Dictionary* 12 (6th ed. 1990) ("accept" defined as "to receive with approval or satisfaction"); *Webster's Ninth New Collegiate Dictionary* 48 (9th ed. 1991) ("accept" defined as "to receive willingly"); *The American Heritage Dictionary* 71 (2nd College ed. 1982) ("accept" defined as "to receive (something offered) esp. gladly"). There is no reason to conclude that Congress' use of the term "accept" in section 9003 means anything other than the general understanding of the term in its context, which was to prohibit a candidate from raising and receiving private contributions.

In addition, the distinction drawn by the AOR – that the words "accept" and "receive" have different meanings – is not supported by the statute, which in multiple places uses the term "receive" interchangeably with the term "accept."

For instance, in the section at issue here, section 9003(b), the statute states that "[i]n order to be eligible to receive any payments under section 9006, the candidates ... shall certify ... no contributions ... have been or will be accepted" The use of the term "receive" here with reference to the payment of public funds does not have the meaning ascribed to it by the AOR, *i.e.*, that the public financing payments will "merely" be taken into "custody" by the candidate "for possible use." AOR at 3. Instead, when an eligible candidate "receive[s]" payments under section 9006, as that term is used in section 9003(b), the candidate is free to spend those funds for his campaign. To the same effect, *see* section 9003(d)(1) (candidate who has withdrawn shall be eligible to continue "to receive" payments to defray qualified campaign expenses); section 9003(e) (stating that no candidate "may receive amounts" from the Presidential Election Campaign Fund unless they comply with certain requirements).

This point is also illustrated by the language in section 9004(c)(2), which permits the use of public funds only to defray qualified campaign expenses, or to repay loans or "restore funds" used for the same purpose, "other than contributions to defray qualified campaign expenses received and expended" by such candidates. The juxtaposition of the terms "received and expended" shows that the limitation suggested by the AOR – that funds are to be treated as spent (or used) by a candidate only if "accepted" but not if simply "received" – does not comport with the statute's own terminology. *See also* 26 U.S.C. § 9007(b)(4)(B) (referring to contributions "received and expended" by a candidate to defray qualified campaign expenses); 9008(b)(3) (referring to payment to a party committee "which elects to receive its entitlement" and provides that "[s]uch payment shall be available for use by the committee...."). Similarly, section 9003(e) provides that party committees "may receive" their public financing grant for convention

expenses beginning on July 1 of the calendar year prior to the convention. There is no suggestion that the funds cannot be spent by the party upon receipt, notwithstanding use of the statutory term "receive" instead of "accept."

Furthermore, the Commission itself has never made the distinction between terms that is proposed by the AOR. The AOR cites two regulations and an advisory opinion where the Commission has used one term or the other. See 11 C.F.R. 102.9(e)(1) ("receives"); 11 C.F.R. § 103.3 ("accepted"); Ad. Op. 1980-46 ("acceptance"). These precedents, however, do not make the distinction between terms that is proposed in the AOR -- putting particular meaning on the choice of one term over the other.

The reference to section 102.9(e)(1) is particularly instructive. The AOR states that it is "significant that where the rules generally authorize pre-primary fundraising for the general election, the funds so raised and reserved for later use are deemed to have been 'received', not 'accepted.'" AOR at 2.

But the same regulation also deems the funds raised for the *primary* election and *available for immediate use* to be "received," not "accepted." In other words, the use of the word "received" in the regulation regarding contributions for the general election does not signify the meaning ascribed to it by the AOR.

The regulation requires a candidate who, prior to the date of the primary election, "receives" contributions designated for the general election, to use an acceptable accounting method in order "to distinguish between contributions *received* for the primary election and contributions *received* for the general election." (emphasis added). This language refers identically to both the contributions "received" for the primary (which are available for the candidate's immediate use), and those "received" for the general election (which must be segregated and reserved for general election expenses). Under the logic of the AOR, this regulation would have drawn a distinction between contributions "accepted" for the primary election and those "received" for the general election. But the regulation does not.²

In sum, the statutory interpretation sought by the AOR does not comply with the language of the statute and is not supported by any past Commission interpretations of similar language.

² The same is true of the other citations in the AOR. Section 103.3 does not support the view that candidates who retain funds pending a determination of their legality have "received" but not "accepted" the funds. No such distinction is drawn by the regulation, which instead provides for methods to cure illegality or to refund the money within a set time frame. The regulation does not provide, as the reasoning of the AOR implies it should, that a candidate may "receive" and hold illegal funds indefinitely, so long as he never "accepts" them for his benefit. Finally, there is nothing in Ad.Op. 1980-46 which indicates that the "receipt" of checks which resulted from in-kind contributions, as opposed to the opinion's language referring to the "acceptance" of such checks, would have mattered to the Commission's analysis or conclusions there.

2. The proposed AOR interpretation of "accepted" is not consistent with the overall policy goals that led to the enactment of the law.

Under the approach set forth in the AOR, Senator Obama and his campaign would raise private contributions for the presidential general election and deposit such proceeds into a separate escrow account.

The policy goals that led to the Presidential Election Campaign Fund Act were set forth by the Supreme in *Buckley v. Valeo*, 424 U.S. 1, 91 (1976):

Congress was legislating for the "general welfare" – to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.

According to the Court, Congress "properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions." *Id.* at 96.

Under the approach proposed in the AOR, Senator Obama, and any other presidential candidate who took the same position, would not be free of the "rigors of soliciting private contributions" for the general election, a principal goal of the statute. Similarly, the goal of the statute to reduce "the deleterious influence of large contributions" would not be met, since the circumstances and concerns that relate to the raising of private contributions would still occur, even if the contributions were subsequently returned.

Thus, the approach set forth in the AOR does not comport with the goals of the statute to provide presidential candidates an alternative approach to spending large amounts of time raising large amounts of private contributions for the general election.

The AOR cites examples where the Commission in the past has "considered and addressed as it could disincentives to participation" in the public financing system. AOR at 3. In the cases cited, however, the Commission (or individual Commissioners) made recommendations to Congress to correct problems in the system, as is entirely appropriate. The Commission did not, however, take it upon itself to override statutory language.

We recognize that the Commission has shown some flexibility in certain past circumstances to allow candidates who had agreed to take, or had been certified to receive, primary matching funds to subsequently rescind their agreement, prior to receiving any matching funds. *See* Ad. Op. 2003-35 (involving a rescission of the matching fund certification for the Gephardt campaign); *see also* the subsequent case where the Commission allowed Gov. Howard Dean to withdraw from the primary match fund system. A. Kort, *Dean Requests Withdrawal of Certification for Matching Funds*, *The Record*, Vol. 30, No. 2 (Feb. 2004) at 13.)

The position taken by the Commission in those cases – where the Commission found that the statute "does not address" the question, Ad. Op. 2003-35, nor did the Commission

regulations – is different from the situation here, where there is a clear and applicable requirement set forth in the statute and that is repeated in the regulations.

Further, these past cases involved different circumstances. In the past cases, candidates were allowed to withdraw from the system prior to receiving any public funds, and in so doing were choosing to forego receiving the benefits of public financing after they had fully complied with the system's requirements.

In the proposed AOR, however, a candidate is seeking to retain the option of receiving the benefits of public financing, after having foregone compliance with the system's requirements for eligibility. While a flexible approach may be in line with the statutory provisions involved in the past cases, such an approach is not warranted here, given the statutory language involved and the goals of the law.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

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