AGENDA DOCUMENT NO. 00-91

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commissioner Karl Sandstrom

DATE: September 12, 2000

SUBJECT: 2000 General Election Entitlement

Please add the attached to the agenda for the 2 pm Open Meeting today.

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SUBJECT: 2000 General Election Entitlement - Reform Party

I. Introduction

For the first time in the history of the Federal Election Commission, this Commission has received letters of candidate agreements and certifications, required under 26 USC § 9003(c) and 11 CFR 9003.1 ("9003 certification"), from two individuals who both claim to be the Presidential candidate of the same minor party, and who both request that the Commission certify to the Treasury that they and their respective running mates are eligible for payment in the full amount to which candidates for President and Vice President of the Reform Party are entitled. Given the novelty and the importance of the issues raised by these individuals' competing claims, I have objected to granting Mr. Buchanan funding and denying Mr. Hagelin funding on a tally vote basis so that we might discuss as a Commission the basis for whatever course of action we choose to take.

In connection with these tally votes, on Thursday, September 7, 2000, this Commission received two reports from the Audit Division, with memoranda from the Office of General

Counsel attached. In OGC's memorandum, dated September 7, 2000, to the Audit Division regarding Buchanan/Foster's eligibility, it concludes that Buchanan/Foster have established their eligibility based on (1) their 9003 certification and (2) the documentation indicating that they have qualified to appear on the general election ballots as the nominees of the Reform Party in at least ten states, in accordance with the definition of "candidate" in 26 USC § 9002(2) and 11 CFR 9002.2. In OGC's memorandum, dated September 7, 2000, to the Audit Division regarding Hagelin/Goldhaber's eligibility, it concludes that the documentation Hagelin/Goldhaber have submitted to date does not indicate that they are on the ballot as Reform Party candidates in ten or more states, and thus advises that the Commission make an initial determination that Hagelin/Goldhaber are not entitled to pre-election funding. If we vote as recommended, we will be voting (1) to deem one candidate ineligible without an opportunity to respond; (2) to resolve competing claims for a minor party's general election federal funding based on which individual has provided evidence of state ballot access in 10 states to the Commission first; and (3) to certify payment without addressing which candidate, if any, is the valid nominee of the Reform Party. Thus, before the Commission votes, I would like the Commission to give proper consideration to these issues and to consider whether a different course of action might be advisable.

II. Only One Individual May Be Entitled to the General Election Federal Funding of a Minor Party.

As a preliminary matter, I note that the statute does not allow us to split the $12.6 million, for this federal funding entitlement results from the Reform Party's status as a "minor party,"[1] and there can only be one individual nominated to be a minor party's candidate for President. I

[1] See 26 USC § 9004; 11 CFR 9004.2.

base this conclusion on the definition of "minor party," which in turn rests on the definition of "political party."[2] "Political party" is an entity "which nominates or selects **an individual** for election to any Federal office . . . ." 11 CFR 9002.15. (Emphasis added) See also 2 USC § 431(16).[3] I see no basis for interpreting "an individual" in the plural.

Even if there were ambiguity in the statute and regulations regarding the number of candidates of a particular minor party entitled to general election federal funding, and it were thus necessary to examine the legislative history, the legislative history regarding minor party federal funding strongly suggests that Congress did not intend for the general election federal funds of a minor party to be divided among various individuals. The Senate Report for the FECA Amendments of 1974 states, "Minor parties with significant support are eligible to receive a fair share of public assistance commensurate with their proven political strength."[4] By "proven political strength," the report presumably means the minor party's return of 5% or higher in the previous election. How could the Commission divide a minor party's general election federal funding and still have it be the "fair share . . . commensurate with their proven political strength"? Based on the statutory language and legislative history relating to minor parties, I do not believe that "splitting the baby" is an option here.

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[2] "*Minor party* means a political party whose candidate for the office of President in the preceding Presidential election received, as a candidate of such party, 5 percent or more, but less than 25 percent, of the total number of popular votes received by all candidates for such office." 11 CFR 9002.7.

[3] I note that 26 USC § 9004(a)(2)(A) states that "The eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed . . . for a major party as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election." While the phrases "eligible candidates" and "in the aggregate amount" might create ambiguity, I believe the definition of "eligible candidates" resolves this ambiguity: "The term 'eligible candidates' means the candidates of a political party for President and Vice President of United States . . . ." 26 USC § 9002(4).

[4] S. Rep. No. 689, 93rd Cong., 2nd Sess. 1974, 1974 USCCAN 5587.

III. Due Process Considerations

Our statute and regulations provide no procedure for resolving a dispute between individuals competing for the same minor party federal funding. Given that $12.6 million is at stake and only one individual can be properly entitled to it, we must consider what constitutes due process for the competing claimants here. Due process is flexible and calls for such procedural protections as the particular situation demands.[5] The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[6] Resolving the question of which individual is the valid Presidential candidate of the Reform Party after the $12.6 million has been spent would hardly afford the individual who was denied the funds an opportunity to be heard "at a meaningful time and in a meaningful manner." Here, where we face a dispute over a statutory entitlement and we have no procedure in place to resolve such a dispute, can we make a determination that one individual is eligible and the other is not, without giving not only notice but also an opportunity to be heard? I do not believe we can. If we make an initial determination that Mr. Hagelin is ineligible, on the basis that his submissions regarding ballot access in 10 states are insufficient, without even addressing the dispute over whether he or Mr. Buchanan is the valid nominee of the Reform Party, Mr. Hagelin is at least entitled to an opportunity to respond before a final determination is made that the funds will go to someone else.

IV. State Ballot Access Test

The requirement that an individual qualify to appear on the general election ballot "as the candidate of a political party" in 10 or more state is based on the definition of "candidate" in 26 USC § 9002 and 11 CFR 9002.2. If Mr. Hagelin is allowed the opportunity to complete his state

ballot certification in a timely manner[7], or if we conclude that Mr. Hagelin has satisfied the plain language of the definition of "candidate" based on the Natural Law Party's status as a political party,[8] then it is possible that, under the analysis provided in OGC's memorandum, we would have to deem both Mr. Buchanan and Mr. Hagelin eligible for the Reform Party's general election federal funding. As discussed above, I do not believe the Commission has the statutory authority to deny the nominee of a minor party the full amount by forcing that nominee to split the minor party's entitlement with someone else. Thus, I think the Commission should be leary of proceeding down this path.

Even if Mr. Hagelin does not ultimately meet the 10-state requirement, the fact that both Mr. Hagelin and Mr. Buchanan have already qualified to appear on the general election ballot in some states as the Reform Party candidate only underscores the uncertainty that results from relying on state ballot access laws to determine which individual is the proper nominee of the minor party for purposes of general election federal funding. When some states conclude that Mr. Buchanan is the nominee and others conclude Mr. Hagelin is the nominee, and all states have presumably acted in accordance with their state ballot access laws, how does the Commission reconcile the different conclusions? If state laws can yield two different results, as some have here, and the Commission can only have one nominee for purposes of the Reform Party's federal funding entitlement, how does the Commission take comfort in relying on state ballot access laws for its determination of who the correct nominee of the Reform Party is?

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[5] Mathews v. Eldridge, 424 U.S. 319, 335 (1975).
[6] Eldridge, 424 U.S. at 333.
[7] According to OGC, September 15, 2000 appears to be the last date by which a state requires candidates to be certified by their parties or by petition for placement on the general election ballot.
[8] See Advisory Opinion 1992-30 regarding the Natural Law Party's status as a "political party."

V. An Individual's Entitlement to a Minor Party's General Election Federal Funding Must be Based, in Part, on that Individual's Status as the Reform Party's Nominee.

Since I do not believe we can base our decision to certify eligibility on the state ballot access test alone, by what basis do I propose that we should determine that an individual has met "all applicable conditions" under 26 USC § 9005? I would argue that we must consider the basis of an individual's entitlement. Unless an individual was a candidate in the previous election cycle and received at least 5% of the total popular vote as the candidate of a minor party in the preceding election, an individual's entitlement to the general election federal funding of a minor party is derived solely from the individual's status as the nominee of the minor party. Without that relationship between the individual and the minor party, such individual's entitlement is zero.[9]

Given that in this case, entitlement to the general election federal funding of a minor party can only be derived from the individual's status as the nominee of the Reform Party, the Commission must have some basis for concluding on the record that an individual is the nominee of the Reform Party before the Commission certifies that the individual is eligible for that minor party's general election federal funding. Ordinarily, the Commission could be justified in relying on the representations of a party officer as to whom the minor party has nominated. No one would argue that the Commission is obligated to investigate further. However, if for some reason the Commission cannot conclude with reasonable certainty that an individual is the nominee of a minor party, then the Commission cannot certify that the individual is entitled to the minor party's general election federal funds until the question of whether such individual is the

[9] See 26 USC 9004 and 11 CFR 9004.2.

nominee of a minor party has been resolved. In this case, there are competing factions of the Reform Party claiming to be its party officers, and the Commission has received affidavits and transcripts as evidence of a dispute over who was validly nominated at the Reform Party's nominating convention in August 2000. Given the nature of the allegations, I do not believe the Commission can disregard them as irrelevant or frivolous. The allegations cut to the heart of an individual's entitlement to general election federal funding. If an individual is not the nominee of the Reform Party, then his entitlement to the Reform Party's general election federal funding is zero.

VI. The Determination of Which Individual Was Validly Nominated by the Reform Depends Should be Based on the Reform Party's Constitution.

What determines who the valid nominee of the Reform Party is? The party does. And by "party", I do not mean the inquiry stops with what party officers say, for they are on both sides of this dispute. The answer depends on the rules that were created to govern the Reform Party. The answer depends on who was nominated in accordance with the Reform Party's constitution.

VII. A Court is Better Suited to Resolve the Dispute Over Which Individual is the Valid Nominee of the Reform Party.

Is this a question for this Commission to answer? The Commission has broad investigatory powers; should it exercise those powers here? While this Commission has the authority to investigate this matter further, there are several important reasons why it is not the best suited to resolve the issue. First, where federal funding is at stake, less than two months before an election, this Commission has a heightened duty to resolve the matter as expeditiously as possible. How can this Commission act expeditiously when we do not even have the procedures in place for conducting an investigation or hearing in this context? Second, the

discrete question here is who is the valid nominee of the Reform Party. While this question arises out of the Federal Election Campaign Act, it is not a question upon which the Commission's expertise have any bearing.

The adjudicatory body best suited for this inquiry is a federal court. Procedurally, a court is equipped to adjudicate this matter in a far more fair and expeditious manner than any procedure this Commission could hastily put together in this case. Substantively, there is no reason why the Commission, and not a court, is better suited to perform a finding of fact and make a legal analysis about the nominating procedures of the Reform Party. Analyzing the constitution of the Reform Party does not fall within the Commission's exclusive jurisdiction.

Indeed, a district court judge engaged in this very type of fact-finding and legal analysis in Reform Party vs. Gargan.[10] In that case, the question before the court was whether the procedure by which the Chair and the Treasurer of the Reform Party were removed was valid. While acknowledging that courts do not generally concern themselves with whether parliamentary rules are followed, the court nonetheless conducted a hearing at which a parliamentarian gave expert testimony on whether the meeting at issue was conducted according to the Party's constitution and the parliamentary procedures designated by the constitution.

Why did the court decide it had jurisdiction over the matter in the first place? One of the reasons was that the issue at stake was which faction of the Reform Party was entitled to $2.5 million of federal funds for the party's nominating convention, and thus the court found federal question jurisdiction in that the matter arose under the Federal Election Campaign Act. In contrast to our current situation, the Commission had already disbursed the money before the dispute arose, but it was months before the convention was to be held, so it had not yet been

spent. The court ordered the faction that had control over the money to place it in the court's registry while the court made its determination.

VIII. Interpleader is a Permissible Means to Bring this Dispute Before a Court.

Does the Commission have a procedure to bring this issue before a federal judge so that the question of who the valid nominee of the Reform Party is can be resolved in the most fair and expeditious manner? Yes, it does. Rule 22 of the Federal Rules of Civil Procedure provides that "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability."[11] This means that rather than waiting for a suit to be filed, a party can bring the competing complainants into court as defendants who must establish their right to the funds at stake. This allows the stakeholder - who is indifferent as to which claimant wins and merely wishes to avoid a protracted legal dispute - to withdraw from the matter after filing its interpleader suit and await the court's findings. Typically it is an insurance company faced with parties competing for the proceeds of a policy that uses interpleader.

What does Rule 22 require? First, there must be an identifiable property or a limited fund or pecuniary obligation. "An inchoate, uncertain claim . . . against the general assets of a party, rather than specific, identifiable 'property' is not a proper subject for interpleader relief."[12] Here, the property at stake is specific and identifiable: $12.6 million in general election federal funding for the Reform Party's nominee.

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[10] 89 F Supp 2d 751 (WD Va 2000)
[11] Note that interpleader under Rule 22 is separate and distinct from statutory interpleader under 28 USC 1335.
[12] Murphy v. Travelers Ins. Co. 534 F2d 1155, 1159 (5th Cir 1976).

Second, there must be more than one party claiming entitlement to the funds. Here, Mr. Buchanan and Mr. Hagelin have both submitted materials to the FEC claiming that they are entitled to the Reform Party's general election federal funding.

Third, Rule 22 requires that the claims must be "adverse to and independent of one another." I don't think there is any question here that Mr. Buchanan and Mr. Hagelin are adverse to one another.

Finally, it is important to note that unlike statutory interpleader, interpleader under Rule 22 does not require that the funds be deposited with the court's registry, thus the fact that the funds are currently sitting with Treasury until the FEC directs otherwise is not an issue here.

Having satisfied the requirements of Rule 22, is there some reason why a government entity would be precluded from using interpleader under Rule 22? I find no basis for concluding that a government entity cannot use Rule 22, which is not suprising, since a government entity has just as much interest in avoiding the time and expense of unnecessary litigation as a private entity does. Indeed, the IRS provides us with a fine example of a government entity using interpleader in the case of the United States vs. Major Oil Corporation.[13] In that case, the IRS filed an interpleader action involving the surplus proceeds of the sale of property seized by the IRS for delinquent taxes. Also at stake was a tax refund, the application for which the IRS had not finished processing at the time that the IRS filed the interpleader action. When one of the parties argued that the refund could not be part of the interpleader fund because it was not yet in existence at the time the interpleader action was filed, the court rejected the argument, noting that

[13] Gargan, 583 F2d 1152 (10th Cir 1978).

"[s]ignificant here, Rule 22 does not require that the fund be deposited with the registry of the court."[14]

Seeing no bar to the FEC using Rule 22, the inquiry does not stop there, for we would need to meet the normal jurisdictional requirements in federal court. I do not see why those jurisdictional requirements could not be met. Subject matter jurisdiction would be based on federal question jurisdiction, for the matter arises under the Federal Election Campaign Act, just as it did in Gargan. Personal jurisdiction and venue do not appear to pose any problems.

Therefore, it is my recommendation that we direct the Office of General Counsel to file a complaint in interpleader, with Mr. Buchanan and Mr. Hagelin as defendants. Based on the court's finding as to which, if any, individual was nominated pursuant to the Reform Party's Constitution, this Commission could then certify that one or neither individual has met all applicable conditions for eligibility to receive payments under 26 USC § 9003 and certify to Treasury for payment consistent with the court's finding. Otherwise, we shall find this Commission in court regardless of whom we decide to certify eligibility to, and I would hate to see this Commission expend the time and resources on a lawsuit which might otherwise be avoided.

[14] 583 F2d at 1158.