AOR 1996-36
BACKGROUND

* AFFIDAVIT OF ROBERT F. BAUER

WASHINGTON, DISTRICT OF COLUMBIA

I, Robert F. Bauer, being duly sworn, do depose and say:

1. I am a partner at the law firm of Perkins Coie in Washington, D.C. I currently serve as the managing partner for the Washington, D.C. office of Perkins Coie and as the Chairman of its Political Law Group.

2. For the last 18 years I have specialized in federal and state campaign finance law, including matters involving the Federal Election Campaign Act ("FECA") and the Federal Election Commission (the "Commission"). During this time I have represented numerous parties in proceedings before the Commission and advised many others about compliance with the FECA. Also, throughout this period, I have written extensively about the FECA and spoken before a variety of audiences on this subject.

3. Among my past and current clients for which I have provided FECA advice and counseling are Members of the United States Senate and House of Representatives, House and Senate candidates, federal and state party organizations, corporations, trade associations, individuals, and tax-exempt organizations. In addition to providing advice and counseling, I have also litigated a number of FECA cases before federal courts at every level.

* See Vera v. Bush Slip at pg 25.

4. I am the author of several publications in the area of federal campaign finance including two books: "Paying the Political Price: A Practical Guide to Changes in the Federal Lobbying, Ethics and Campaign Laws" (1996) and "United States Federal Election Law" (1982 and 1984).

5. I am not aware of any instance since the enactment of the FECA in which candidates have competed in an election that was subsequently declared void by court order and have been required to run in still another election scheduled in its stead, in the same year, for the same office. The FECA does not address a series of significant questions about how the application of the federal contribution and spending limitations, and the related disclosure requirements, would be affected by any such occurrence.

6. For example, it appears that the voided election, having not produced a nominee, might not be treated as an "election" under the FECA. The applicable definition of a "primary election" under regulations of the FEC is as follows:

> An election which is held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to federal office in a subsequent election.

11 C.F.R. 102(c)(1). Because a voided election does not result in the "nomination" of a candidate, it would not appear to qualify as a "primary election" for purposes of the FECA's contribution limitations.

7. If the voided election was not an election, then monies received by those candidates for the voided election would presumably not constitute "contributions," defined by statute as donations "for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.7(a)(i). The contributions limit would not apply, permitting those candidates to receive

still additional contributions for a newly scheduled primary and the subsequent general or runoff election.

8. The acceptance of still additional contributions from the same individuals or political committees for the newly scheduled primary and subsequent runoff would allow those individuals and political committees to contribute more to the particular candidate in an election cycle than permitted or intended by law. An individual will have been permitted to contribute up to $3,000 to that candidate -- one for the voided election, and then an additional $1,000 a piece for the newly scheduled primary and general elections -- and a multicandidate political committee would be able to contribute fully $15,000 on this basis ($5,000 each for the voided election, subsequent "primary" and following general election.)

9. This interpretation of the statute would raise serious questions for the FEC under its mandate to enforce the contribution limitations in furtherance of the statutory purpose of averting the fact or appearance of the corruption of elected officials. Buckley v. Valeo, 424 U.S. 1 (1976). See Advisory Opinion 1981-29, Fed. Election Camp. Fin. Guide (CCH) ¶ 5616 (Aug. 13, 1981) (disallowing separate contribution limit for pre-primary nominating convention); Advisory Opinion 1984-38, Fed. Election Camp. Fin. Guide (CCH) ¶ 5780 (Aug. 22, 1984) (enforcement of limits against candidate changing candidacy from House to Senate, and back again); Advisory Opinion 1978-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 5315 (May 12, 1978) (enforcing limit where there is runoff for one party's candidates and not the other's).

10. The Commission has only addressed one case even similar to this one, where, in the wake of redrawn boundaries under court order, a candidate withdrew from one candidacy in one Congressional District, and initiated a new one in another Congressional district. The Commission held that the candidate was not entitled to accept contributions under a separate

set of limits for the campaign in the new District. Advisory Opinion 1982-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5653 (April 9, 1982). In that case, however, the election had not yet been held. The Commission has never addressed the situation where the primary was held and then voided.

11. If an election were voided and thus no longer an election under the FECA, the FEC would confront the question of whether the participating candidates would no longer be treated as "candidates" for FECA purposes, because the funds that they had raised and spent, no longer properly characterized as for the purpose of influencing an "election," would not be "contributions" and "expenditures" on which candidacy is based under the federal law. 2 U.S.C. § 431(2), 2 U.S.C. § 431(8), (9). Moreover, the FEC would be required to address the question of whether the organizations they had formed to receive contributions and make expenditures would constitute "political committees" subject to the law's registration and reporting requirements. 2 U.S.C. § 431(4).

12. If "candidacy" ended, along with the related committees, when the election is voided,, the statutory requirements for candidate registration with the FEC for the prior "election" would lapse and the operation and reporting of the candidates' former committees would be discontinued. The candidates could terminate their committees without further reporting requirements, and they could also collect funding from any source without limitation to retire their debts. For example, those candidates would be permitted to accept contributions from foreign nationals, otherwise prohibited from contributing in federal elections, to retire the debts of the campaign organizations that were formerly "political committees." 2 U.S.C. § 441e.

13. Also affected would be the annual aggregate $25,000 contribution limits that applies under law to an individual's contributions to all candidates and all political committees in a given year. 2 U.S.C. § 441a(a)(3). Should the voided election have become a non-election, then individuals may be able to disregard contributions previously made to candidates participating in those now voided elections. The $25,000 annual limit will have been significantly enlarged. An individual who contributed to two or three candidates in voided elections may have contributed up to the maximum of $3,000 but those $3,000 will effectively have been erased from the tally of contributions counting toward the annual limit. These individual contributors will have been able to significantly exceed the $25,000 annual limit binding upon all other individual contributors in the county this year.

14. Even if the FEC sought a means to find that the voided election were still an "election" for FECA purposes, similar issues would be raised. If a prior voided election were still an "election," for FECA purposes, then the committees of candidates competing in both that election and the newly scheduled election would be treated by the law as "affiliated." See 11 C.F.R. § 110.3(a)(1)(i) ("authorized committees of the same candidate for the same election to federal office" are affiliated). As affiliated committees, they would share contribution limits: which means that any contributor who had made a contribution to the candidate in the voided election in the maximum amount could not provide any additional contribution to that same candidate in the rescheduled primary election in the same year.

15. The law also does not clearly address the question of how candidates in the voided election might treat surplus funds accumulated for that election in the new, court-ordered election. 11 C.F.R. §110.3(c)(3). Generally, a candidate may transfer surplus from a primary to a general election campaign. The law makes no provision for the transfer of surplus

funds from a voided primary to another primary conducted in the same election year for the same office.

16. Similar questions of how the limits would be applied would affect spending by the political parties. The FEC and the courts have already encountered with difficulty the issues presented by party spending in "runoff" general elections following an election in which a candidate did not have more than 50 percent of the vote. See, e.g., Advisory Opinion 1983-16, Fed. Election Camp. Fin. Guide (CCH) ¶ 5717 (June 10, 1983) and 1993-2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6082 (Mar. 5, 1993); See also Democratic Senatorial Campaign Comm. v. FEC, Civil No. 93-1321 (D.D.C. Nov. 14, 1994).

17. The prospect of a voided election and another one scheduled to its take place presents significant challenges to the Commission's authority. The Commission could address in certain of these issues by Advisory Opinion that only if the Opinion were requested by an affected party. The Commission would then have 60 days within which to render an Opinion or 20 days if the Opinion Request were submitted within 60 days of the election. 2 U.S.C. § 437(f). The Commission can only issue an Opinion, however, if there is bipartisan consensus and at least, one member of a political party represented on the Commission joins members of the other party in favor of a particular outcome.

18. A party aggrieved by the failure of the Commission to issue guidance in the form of an Advisory Opinion or rulemaking would be required in this compressed timetable to seek relief in a federal court. It is not clear, however, that relief would be available and parties would then confronted with the possibility of no legal guidance and significant legal uncertainty

in attempting in these circumstances to chart compliance with the Act.

FURTHER AFFIANT SAYETH NOT.

Robert F. Bauer

STATE OF DISTRICT OF)
County of COLUMBIA)

SUBSCRIBED AND SWORN to before me this 18th day of July, 1996.

Notary Public

CLAUDETTE B. HENRY
Notary Public, Washington, D.C.
My Commission Expires June 30, 1998

My Commission Expires: