



April 15, 2009

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2009 APR 15 P 5:45

Federal Election Commission
Office of General Counsel
999 E. Street, N.W.
Washington, D.C. 20463

AOR 2009-09

Re: Request for Advisory Opinion: Bill White for Texas
(U.S. Senate Campaign Committee)

Dear Counsel:

I am the Treasurer of Bill White for Texas (the "Committee"), the authorized campaign committee of Bill White, a candidate for the U.S. Senate from the State of Texas. The Committee is requesting an Advisory Opinion addressing the following fact situation:

Fact Situation

Bill White is currently the Mayor of Houston, Texas. On December 12, 2008, he submitted documentation to the Federal Election Commission (the "Commission") creating the Committee as his authorized campaign committee in an election for the U.S. Senate from the State of Texas.

Senator Kay Bailey Hutchison currently holds a U.S. Senate seat from Texas that will be on the ballot in the Texas primary and general elections in 2012. However, Senator Hutchison has publicly stated that she will not be a candidate for re-election to the U.S. Senate in 2012, and she has formed a committee under the Texas Election Code to raise funds for a possible race for Governor of Texas in 2010, when that position will be on the March primary election ballot and the November general election ballot. Senator Hutchison publicly denied a report that she was not planning to resign from the Senate while running for Governor, and has stated that she may resign as early as late 2009. See "Senate Run May Spur Dewhurst to Pick Up the Pace," p. B-8, *Austin American Statesman*, March 26, 2009.

Texas Law on Filling a Vacancy in Office

If Senator Hutchison resigns her seat in the U.S. Senate before the term expires, the scheduling of any election to fill the seat will be governed by the Texas Election Code

("the Code") and primarily by Chapters 203 and 204 of the Code. A copy of these Chapters is attached.

Under Section 201.023 of the Code, a vacancy in office, including the U.S. Senate, occurs on the date the incumbent's resignation is accepted by the Governor, or eight days after receipt of the resignation, whichever is later. Under Section 201.051, a special election to fill a vacancy must be ordered "as soon as practicable" after the vacancy occurs. Ordering a special election to fill a vacant U.S. Senate seat is the responsibility of the Governor. Section 3.003.

Under different timing scenarios, Texas law could require that a special election to fill a vacant U.S. Senate seat be held in 2009 or 2010 on one of the two uniform election dates set under the Texas Election Code. Alternatively, the seat could be filled at a special "emergency election" called by the Governor. These scenarios are discussed below:

Scenario 1. Resignation in Odd-Numbered Years. If a vacancy in a U.S. Senate seat occurs in an odd-numbered year, it must be filled by a special election. Section 204.005 and Section 203.004 of the Code require that a special election be held on the first uniform election date occurring at least 36 days "after an election is ordered." Under Section 41.001 of the Code, the two uniform election dates in 2009 are May 9 and November 3. If a special election were to be ordered on or before April 3, 2009, it would occur on May 9, 2009. If a special election were to be ordered after April 3, 2009, but before September 28, 2009, it would be held on November 3. If the special election were ordered after September 28 but before January 31, it would be held on the spring uniform election date in 2010, which is on May 8, 2010.

Scenario 2. Resignation in Even Numbered Years. If a vacancy occurs in an even numbered year on or before the 62nd day before the spring primary date which (which under Section 41.007 will be March 2, 2010), §204.003 requires that the unexpired term be filled at the next general election for state and county officers. Since there are not 62 days in 2010 before the March 2 spring primary, this means that this scenario cannot occur in 2010, and an election cannot be scheduled under 204.003.

If a vacancy occurs in an even year after the 62nd day before the spring primary date, (which means any date in 2010), then Section 204.005 and 203.004 require that a special election be held on the first uniform election date occurring at least 36 days "after the election is ordered." The 2010 uniform election dates are May 8 and November 2. So, a special election on May 8 could be ordered up to and through April 2, 2010, and a special election on November 2 could be ordered up and through September 26, 2010.

Scenario 3. Emergency Election. Under Section 41.0011 of the Code, the Governor also has authority to call an "emergency election" to fill a U.S. Senate

seat. An emergency election does not have to occur on a uniform election date. For example, if a vacancy were to occur after September 28, 2009, rather than wait for the spring uniform election date in May 2010, the Governor could call an emergency election for an earlier date, such as the March 2, 2010 spring primary. To do so, the Governor must determine that an emergency exists that warrants the earlier voting date, and the proclamation or order for the emergency election must include a statement identifying the nature of the emergency. Section 41.0011. The Governor has considerable discretion in deciding whether to call an emergency election, and it is not possible at this time to predict whether he will do so. In the last four years he has ordered at least two emergency elections: the emergency election of February 25, 2006 to fill a vacancy in House District 106, and the emergency election of January 17, 2006 to fill a vacancy in House District 48.

Potential Number of Elections Through 2012

In Texas, a special election or emergency election to fill a U.S. Senate seat under any of the foregoing scenarios is not conducted as a party primary, but as an election in which candidates from all parties appear on the same ballot, with party affiliation indicated. Section 203.011. In any special election or emergency election of this type, the winner must receive a majority of the votes cast. Section 203.003. This means that any special election or emergency election to fill a U.S. Senate seat may be followed by a run-off election between the two candidates receiving the most votes in the first election. Historically, this has usually been the case. The timing of a runoff election after a special election is set by Section 2.025, and it generally must be set within 20 to 45 days after the final canvass from the special election.

Whether or not the U.S. Senate seat is filled by a special election or emergency election in 2009 or 2010, the seat will be on the ballot in 2012, when there will be both March party primary elections and a November general election. Under Texas law, the winner of a primary election must also receive a majority of the votes cast, which means that a primary election may also be followed by a runoff.

Bill White has stated that he will be a candidate in any special election or emergency election that may be called before 2012 to fill the U.S. Senate seat currently held by Senator Hutchison. If there is no special election or emergency election, Bill White will be a candidate for the same U.S. Senate seat in the 2012 Democratic Party Primary election in Texas, and in the 2012 general election if he receives the Democratic Party nomination for the U.S. Senate seat.

Given this scenario, it is possible that Bill White could be a candidate in up to five different elections for the same U.S. Senate seat between now and November 2012: a special election or emergency election in 2009 or 2010, a run-off election following the special or emergency election, a 2012 Democratic Party Primary election, a Democratic Party run-off election, and the November 2012 general election.

We note that, as of January 2009, there were already five other candidates in both major parties who had formed campaign committees or exploratory committees in connection with this U.S. Senate seat. In deciding whether they may accept contributions, these candidates will potentially face the same multiple election scenario outlined above. We also note that the number of already declared candidates increases the likelihood that any special or general election will be followed by a run-off election.

Questions Presented

The Committee requests an advisory opinion addressing the circumstances under which the Committee may accept and use contributions for a special or emergency election (and any related run-off election) that occurs before the 2012 party primary election but that has yet to be called at the time the contributions are made. Specifically:

1. What is the maximum contribution that the Committee may accept, prior to the time that any special or emergency election is scheduled, if the contributor designates the contribution to be used for either 1) a special or emergency election and a run-off election following the special or emergency election, if a special or emergency election is called prior to the 2012 party primary election; or 2) the 2012 party primary election, and the November 2012 general election, if a special or emergency election is not called prior to the 2012 party primary election?

2. Alternatively, if a contributor makes a contribution to the Committee prior to the time that any special or emergency election is scheduled, and designates a portion of the contribution for the "first election" for the U.S. Senate in which Bill White participates, and the remainder for the "second election" for the U.S. Senate in which Bill White participates, may the Committee (i) use the portion of the contribution designated for the "first election" for a special or emergency election that is called after the contribution is made and prior to the March 2012 primary election, and (ii) use the portion of the contribution designated for the "second election" for a run-off election following the special or emergency election?

3. If a contributor makes a contribution to the Committee of \$2400 or less but does not designate the contribution for any particular election, we would normally assume that the contribution would be for the next regularly scheduled election, which in the absence of any special or emergency election would be the March 2012 primary election. In the event a special or emergency election is scheduled after such a contribution is made and prior to the March 2012 primary election, would that undesignated contribution then be available to the Committee for the "next" election, whether that was a special or emergency election?

4. If the Committee raises money for a special or emergency election, or for a runoff following a special or emergency election, and the special or emergency election does not occur, what may the Committee do with the money?

5. The Committee also requests an advisory opinion on the proper reporting, on FEC Form 3, of accepted contributions designated by the contributors for potential use in elections other than the 2012 party primary election and the 2012 general election, in the event that the Commission responds that a candidate is not currently limited to accepting contributions designated solely for the 2012 elections.

In making this request, the Committee states its opinion that it should currently be permitted to accept up to \$4,800 per contributor without those funds being available solely for the 2012 elections, provided that the contributor properly designates, as set out in Questions 1 or 2 above that the \$4800 consists of two contributions of \$2400 specifically for either 1) a special or emergency election and a run-off election following the special or emergency election; or 2) the 2012 party primary election, and the November 2012 general election, depending on whether there is a special or emergency election preceding the 2012 party primary election.

The Committee presents this opinion request in part because it may need to use contributions it is currently raising for any one of these possible elections, but it cannot yet be certain which elections those will be. If the Committee currently must accept designated contributions only for the 2012 Democratic Party Primary election and the 2012 general election, it will likely face uncertainties and complications in raising additional contributions when a special or emergency election is called.

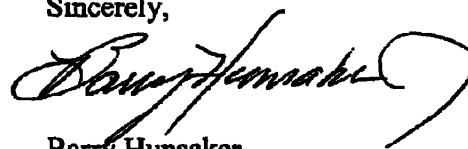
If, on the other hand, the Committee is permitted to maintain separate designated subaccounts (for our purposes, referred to as Election 1 funds and Election 2 funds) and to expend those funds in either 1) a special or emergency election and a run-off election following the special or emergency election; or 2) the 2012 Democratic Party Primary election, and the November 2012 general election, if there is no special or emergency election before the 2012 primary, the purposes of the Federal Election Campaign Act and the Commission's rules will be fully served.

Under this scenario, the maximum amount that a contributor may contribute in connection with any election will still be the current contribution limit. Also, the contributor will have provided a written designation, ensuring that the contributor's intent is fully conveyed to the Committee, promoting consistency in the way contributions are reported by the Committee, and complying with the Commission requirement that a contributor must make a written designation if a contribution is for an election other than the next upcoming election.

In requesting these advisory opinions, the Committee is not assuming that there will necessarily be a special or emergency election prior to 2012, although all objective indications are that such an election will take place. If no special or emergency election occurs, we presume that the Committee will remain under the Commission's existing rules and prior advisory opinions governing designation of contributions.

Given the uncertainty of the timing of the special or emergency election to fill Senator Hutchison's seat, the Committee respectfully requests that the Commission address this question at the earliest opportunity.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Hunsaker", with a large, sweeping flourish at the end.

**Barry Hunsaker
Treasurer, Bill White for Texas**