UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

December 7, 2001

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:45 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, and Gordana Swanson were present.

Chairman Getman announced that the Commission would be discussing the date of the January meeting during closed session, noting that there was a filing deadline on January 10, 2001, the date scheduled for the meeting.

Item #1. Approval of the Minutes of the November 5, 2001 Commission Meeting.

The minutes of the November 5, 2001 Commission meeting were distributed to the Commission and made available to the public. There being no objection, the minutes were approved.

Item #2. Public Comment.

Jim Knox, representing California Common Cause (CCC), raised the issue of the enforcement of the PRA with regard to Indian tribes. He expressed concern that the FPPC Enforcement Division has had difficulty obtaining compliance by various tribes for a number of years.

Mr. Knox explained that CCC filed a complaint with the FPPC Enforcement Division 1 1/2 years ago, following a two-year study conducted by CCC investigating campaign financing by the tribes. He stated that CCC staff identified 300-plus possible violations, a vast majority of which were determined by FPPC staff to be violations. Nearly two-thirds of the discrepancies involved Indian tribes, and FPPC staff did not dispute the facts in most of those cases. However, no enforcement action had been taken. Mr. Knox expressed concern that the statute of limitations on these cases would run out in the coming months. He suggested that the Commission's lack of action may be an indication that the Commission has concluded that it may not have jurisdiction over Indian tribes.

Mr. Knox argued that the Commission must proceed with these cases and resolve any jurisdictional issues if it is uncertain of its authority. He noted that the tribes contribute more campaign funds than any of the traditional large campaign contributors. He asked that the Commission clarify its position and its plans regarding its authority over Indian tribes.

Chairman Getman replied that the Commission would not publicly comment on any pending enforcement cases, and that Mr. Knox's portrayal of the Commission's work on the resolved

cases was inaccurate. She requested that the Enforcement Division correct the record later in the meeting.

Items #3 and #4.

Item #3: Proposition 34 Regulations: Adoption of Regulations Regarding Section 85200 ("One-Bank-Account" Rule);

Item #4: Proposed Regulations 18520, 18521, 18523, and 18523.1. Proposition 34 Regulations: Adoption of Proposed Regulation 18537.1 Interpreting Section 85317 (Carry Over of Contributions).

In advance of his presentation, Assistant General Counsel John Wallace presented copies of the federal rules dealing with transfers between candidate's own federal campaign committees. He explained that § 85317 allows contributions to an elective state officer to be carried over without limit and without attribution of contributions to specific contributors. Proposed regulation 18537.1 implements the statute by providing that funds raised for a primary election may be carried over to the general election for the same office, and that the same rules would apply in special elections. He noted that Government Code section 82022 defines these as two separate elections, and noted that Proposition 34 treats them as separate elections for both contribution and expenditure limit purposes. All other cases allow transfer with attribution to specific contributors.

Mr. Wallace explained that the Commission received a letter from the legislative leadership opposing the draft regulation. Staff disagreed with the comment letter's assertion that there was no ambiguity in the statute, noting that the statute may be read to allow carryover from the primary to the general elections or it may be read to allow carryover from one election to another election years later to the same seat. Staff also disagreed with the letter's assertion that the regulation does not effectuate the intent of the voters. Mr. Wallace pointed out that the ballot arguments indicated that the limits of Proposition 34 should be strictly enforced. He believed that the proposed regulation was the most faithful to the intent of the voters when they adopted Proposition 34. He pointed out that § 85317 is not the same as the federal rule, and noted that Proposition 34 is not the federal election system and that the Commission is not bound by federal law. Staff disagreed with the letter's assertion that attribution to specific contributors is unconstitutionally burdensome on the rights of contributors. Staff recommended that the Commission adopt the regulation as proposed.

In response to a question, Mr. Wallace stated that the federal rule treats contributions received before an election differently than contributions received after an election. The federal rules recognize that each of those elections is a different federal office. If the Commission chose to pursue a federal approach, staff requested that they investigate it more thoroughly, possibly incorporating some of the limitations included in the federal statutes and regulations.

In response to a question, Mr. Wallace stated that the federal rules would allow carryover without attribution if the candidate is running for reelection to the same office, noting that there are other limits that should be considered.

Chairman Getman stated that it would be best to make the carryover issue decisions at the same time as the redesignation decisions because the current wording of the proposed redesignation and carryover regulations incorporate several different terms to mean the same thing, undermining the notion that the language of § 85317 has a special meaning. She asked for clarification of the approach staff was recommending with regard to the term, "same elective state office."

Mr. Wallace responded that staff will be asking the Commission to remove some redundancy. He explained that under Proposition 73, the Commission treated both the election and reelection to a seat as separate distinct offices based on the year of the election, and Mr. Wallace believed that Proposition 34 rules have not changed that.

Commissioner Knox questioned why the statute did not specify "primary" and "general" elections if the statute intended to adopt a restrictive interpretation of § 85317.

Mr. Wallace responded that much of the language of the federal rules, which were the model of § 85317, was not included in Proposition 34. He noted that the language also did not state that it was intended to apply to a subsequent election to the same office, thus the statute was susceptible to both interpretations.

Chairman Getman noted that proposed Regulation 18520 considers the language in § 85200, referring to a "specific office." Other regulations use, "specific term of elective office," "specific term of elective state office," and "a specific office and a term of office." Since all of those terms apparently mean going from one term of office to another term of the same office, she questioned how the Commission could justify defining "same elective state office" in the same manner.

Mr. Wallace responded that different regulations are being applied in different contexts. He agreed that there were a lot of variations, but that the Commission is really trying to define "office." A Senate seat in 1992 would be considered one office, and reelection to the same Senate seat in 1996 would be considered a new office. He pointed out that staff considered the fact that term limits did not exist when the PRA was enacted. The limiting language on "office," meaning a "specific term of office," is appropriate and consistent with past Commission decisions.

Commissioner Swanson noted that an incumbent would see this as the same term of office, but that a challenger would see it as a new office. Therefore, each new term is a new office.

Mr. Wallace agreed. For most people, a primary and general election are two elections for that seat. He believed that the PRA supports that definition.

Chairman Getman pointed out that the statute allows carryover for a subsequent election for the same elective state office.

Commissioner Swanson stated that if an official is running for a second term in a two-term office, the second term is a new election.

Commissioner Knox agreed that it was a new election, but questioned whether that meant that it was the same elective office. The common sense construction of the language provided that a person who has run for office in 1998, and wants to run again in 2002, would be considered by most people to be engaged in a subsequent election for the same elective office. He agreed that there was ambiguity in the language, but that staff's interpretation was not the stronger of the two views.

Commissioner Swanson pointed out that the discussion was about whether carryover should be allowed and whether it would require attribution regardless of whether it is considered the same elective office or not. A new election, at the end of a term of office, is a new election. Primary and general elections are elections for the same term of office.

Chairman Getman stated that §§ 85200 and 85317 discuss "elective state office" and that it is clear that "elective state office" refers to a particular kind of office, such as senate, assembly, or governor. Section 85200 provides that every time someone runs for an "elective state office" a statement of intention must be filed to be a candidate for a "specific office." The Commission has used "specific office," to mean "specific term." A statement of intention must be filed at the beginning of the election cycle and is not required again for the general election. If the language, "a subsequent election for the same elective state office," is considered with regard to § 85317, it would support the argument that the candidate is running for another election cycle for that same elective state office for which the candidate will file a statement of intention under § 85200. If "subsequent election for the same elective state office," is defined to mean the primary and general elections, the regulations under § 85200 would define many terms in many ways and could cause unintended consequences.

Mr. Wallace responded that the issues illustrate that there is ambiguity in the statute, and that the Commission should decide which interpretation reflects the intent of the voters. Staff believed that there was nothing in the ballot materials supporting an approach other than that recommended by staff.

Commissioner Downey pointed out that staff's belief that there is ambiguity in the statute is important. He pointed out that Senator Burton's argument that, "By any reasonable reading of the statute this permits contributions that are unspent in one state election to be used in <u>any</u> future election to the same office without attribution to specific contributors…" can be rebutted. He argued that the statute concludes, "Campaign expenditures in connection with a subsequent election for the same elective state office." Since it does not state "any," only one subsequent election is referenced in the statute, thus demonstrating the ambiguity. Section 82022 defines "election" to be "any primary, general, special or recall election held in the state." Since there is no clear direction from the definitions, there is ambiguity. When there is ambiguity, the Commission must consider the voter pamphlet and not the actual intent of the drafters. The voter pamphlet required strict contribution limits, and therefore the Commission should adopt the stricter of the two interpretation, limiting the non-attribution scheme to the primary and general elections, and not the reelection campaigns.

Commissioner Downey agreed that a challenger who lost an election would view the next election as an election for a different office. He believed that there was an ambiguity to the statute and that the Commission should limit the circumstances for non-attribution.

Commissioner Knox disagreed, noting that Commissioner Downey put undue weight on the term "a subsequent election" as compared to "any subsequent election." In this context, "a" and "any" mean precisely the same thing. If the draftsmen or the voters had intended that this should refer only to a general election following a primary election, then they would have written, "the next subsequent election" or, "the immediate subsequent election." He believed that use of the word "a" indicates that it refers to any and all subsequent elections for the same elective state office.

Chairman Getman stated that there is no way to read, "same elective state office" except to read it as, "the same office." She believed that the Commission was reading it that way in § 85200, and that "elective state office" means a particular type of office. If a candidate is running for the "same elective state office," then the candidate is running for that same particular type of office. The term "specific office," in § 85200 is the term that means, "a specific term" of that elective state office. There was still a question regarding what, "a subsequent election" means. She believed that there was ambiguity in the term "subsequent election." She stated that the statute would have been clear if it had been written, "Contributions raised in connection with one election for elective state office to pay campaign expenditures incurred in connection with reelection."

Commissioner Downey disagreed, noting that a candidate who lost an election and is also running for the same office several years later would not be running for reelection.

Chairman Getman agreed, noting that using the term, "reelection" would not have allowed carryover from primary to general elections. If the intent was to allow carryover for reelection campaigns and from primary to general elections, expansive language such as, "subsequent election" would have to be used. If the Commission accepts that reading, it might make regulation 18520 and the redesignation regulations easier to write. "Specific office" would mean a specific term, "specific term of elective state office" and "elective state office" would mean a particular type of office.

Ms. Menchaca stated that Chairman Getman's approach was generally correct, but would not resolve viewing the term, "same elective state office" differently because it would not necessarily have to mean the same thing in other contexts. She believed that it would require that staff present that analysis.

Chairman Getman disagreed, noting that, if the candidate lost, the campaign would have to be closed out.

Ms. Menchaca agreed, but noted that another campaign could be opened right away.

In response to a question, Technical Assistance Division Chief Carla Wardlow stated that there is nothing in the statute that would preclude a candidate from opening a committee years before the election.

Ms. Menchaca pointed out that the statement of intention must be filed before raising campaign funds.

Commissioner Downey noted that a losing candidate with a surplus of funds at the end of an election could file a statement of intention for the same office some years hence and transfer the funds to the new committee.

Chairman Getman questioned why a contributor should not be allowed to contribute to both elections as long as both contributions were within the limits.

Ms. Menchaca suggested that staff research the term "subsequent election" separately from "a same elective office," because "subsequent election" could mean "reelection," possibly excluding the primary from the general election as well.

Chairman Getman suggested that the Commission was trying very hard to define everything to try to get around the language of the statute.

Commissioner Downey stated that, using Senator Burton's example, attribution must be done when switching offices, and has the same impact on the contributors.

Commissioner Knox responded that the statute does not restrict attribution when it is for a different office.

Commissioner Downey stated that the contributors, through no fault of their own, are hamstrung in the amount that they can give to the next campaign simply because it is for a different office.

Mr. Wallace stated that if the Commission wanted to take the broader approach staff would like to try to put some of the federal limits in the regulation. He anticipated that the federal law had some restrictions with respect to designation of contributions and when the contributions are received.

Chairman Getman stated that she was not comfortable with a regulation that seems inconsistent with the language of the statute. The regulations should be clarifying ambiguities in the statute, but the proposed regulation makes the statute less clear. She suggested that the Commission compare regulations with different interpretations to find a correct reading.

Mr. Wallace agreed.

Ms. Menchaca explained that, if the Commission chose to consider the broader approach, staff would need to do further research to determine what effect the broader approach would have on other provisions of Proposition 34.

Commissioner Swanson requested that staff provide more information comparing the federal regulations with the proposed regulation, specifically exploring whether the Commission's intent conflicts with the federal regulations and whether the Commission's regulations were required to comply with the federal regulations.

Scott Hallabrin, representing the Assembly Ethics Committee, appearing on behalf of the authors of Proposition 34: Senator John Burton, Assembly Speaker Robert Hertzberg, and Senator Ross Johnson. He reiterated their opposition to the regulation, seeing no need for a regulation because § 85317 was clear on its own merits. They were baffled by the staff's interpretation that the language applied to the transfer of funds from the primary to the general elections. He agreed that the Commission should consider the plain meaning of the language. Even if the Commission concedes that it is ambiguous, the body of Proposition 34 and the ballot arguments must be considered for guidance and Proposition 34 has been set up as a "per election" contribution limit.

In response to a question, Mr. Hallabrin explained that there is a requirement for attribution and transfers between other committees of the same candidate because the "per election" contribution limits can be violated. If a person were running for Lieutenant Governor, then decides to run for Senate, attribution would be necessary to ensure that the transferred monies do not exceed contribution limits because the contribution limits for Lieutenant Governor are higher.

Mr. Hallabrin stated that if carryover were not allowed, it would raise the constitutional issue of a contributor not being able to give the maximum contribution from one race to the next. He did not agree that the scenario existed anytime attribution is required. He believed that the candidates should be able to carry leftover monies into the next election without attribution.

Commissioner Swanson pointed out that all incumbents would want to do that, but that the Commission should be trying to make an even playing field. An incumbent always has an advantage.

Mr. Hallabrin responded that it is an inherent advantage and that the courts have upheld that advantage.

Chairman Getman asked Mr. Hallabrin what harm would be brought if the carryover were limited.

Mr. Hallabrin responded that he did not know whether there was harm from a policy perspective, but that there was a constitutional problem. He noted that their concerns were with the carryover issue, not with redesignation.

Lance Olson, with Olson, Hagel, Waters and Fishburn, commented that the federal rules permit a candidate to carry monies over from the general to the primary for a subsequent election for the same elective office. He did not agree that the federal rules were very complicated, and he believed that the federal rules would be consistent with § 85317. He suggested that the Commission develop a rule providing that funds received after an election should be designated for the next election.

Chairman Getman stated that she did not feel comfortable approving the regulations as drafted because they created some internal inconsistencies and greater ambiguities with respect to the language of the PRA. She believed that § 85317 contained ambiguities in the definition of "subsequent election." The term, "same elective state office" is fairly clear and means the same type of office. The question was whether "a subsequent election" means just the primary to general elections, or any other election in connection with that same office.

Commissioner Downey agreed that the regulation should be further explored, and was not ready to make a motion.

Commissioner Swanson agreed. She stated that the ambiguities should be clarified. She stated that even if every word appears to be clarified, there might still be questions about the intent of the Commission. She believed that "subsequent" means the next election to the same elective office.

Chairman Getman noted that Commissioner Swanson's reading would be the opposite of what the Commission had previously voted for.

Commissioner Downey stated that if the Commission gives a broad interpretation to § 85317, it would result in a terrific undermining of the attribution rule of § 85306(a) and that there a certain offense taken to that by some members of the Commission. Most subsequent campaigns are reelection campaigns.

Chairman Getman agreed, noting that the Commission is trying very hard not to undermine the attribution rule and not to create an easier set of circumstances for incumbents.

In response to a question, Chairman Getman agreed that the Commission will also address the redesignation issue when the staff brings back the next draft addressing the carryover issue again.

Commissioner Knox stated that the draft of regulation 18520(a) defines "specific office" to mean "specific term of elective office." Draft regulation 18520(b) uses the term, "the specific term of office." He suggested that if the Commission is defining that, the reference to "specific term of office, " should be changed to "specific office."

Mr. Wallace agreed.

Commissioner Knox noted that draft regulation 18520(b) uses the term, "new original statement," and suggested that it could be deleted.

Chairman Getman suggested that subparagraph (c) could be deleted altogether.

Mr. Wallace responded that staff would revisit both of those issues.

The Commission adjourned for a break at 11:00 a.m.