FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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DISSENTING OPINION

OF

COMMISSIONER THOMAS E. HARRIS

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ADVISORY OPINION 1986-17

The majority opinion permits a candidate to spend, prior to the primary election, for some but not all purposes, contributions received for the general election. This result contravenes the general scheme of the statute of separate contribution ceilings for each election. Moreover, uncertainty as to the opinion's reach will give rise to numerous problems of interpretation and to much Commission hair splitting.

Inevitably candidates will during the primary solicit contributions designated for the general so that such funds may be used during the primary for disbursements that otherwise would have to be met with funds raised subject to the contribution limits applicable to the primary. Contributors who have given the maximum toward the primary will be solicited to contribute in advance for the general so that the campaign may front certain costs during the primary phase. In reality, such persons will be making contributions "with respect to" the primary election in excess of the applicable limit. 2 U.S.C. 441a(a)(1)(A),(2)(A).

I thought the Commission had learned the inadvisability of making contributions provisionally acceptable, but contingently retroactively illegal, in its handling of the "testing the waters" situation. Allowing the receipt and use of otherwise impermissible contributions for "testing the waters", subject to the condition that such funds must be returned later if the recipient became a candidate, clearly allowed circumvention of the Act's limits and prohibitions regarding contributions, and the Commission ultimately revised its regulations specifically to avoid this abuse. See 50 Fed. Reg. 9992 (Mar. 13, 1985). The majority's ruling in the matter

at hand raises similar concerns and permits campaigns to treat certain contributions as initially legal that become retroactively illegal at some later time. For, under the opinion, general election contributions may be spent before the primary, but must be refunded if the candidate does not make it to the general.

Moreover, the position adopted by the majority will prove very confusing in application. The line drawn would permit use of general election funds "where it is necessary to make advance payments or deposits to vendors for services that will be rendered, or goods that will be provided, after [a successful primary]." It would not permit the use of such funds for "activities that influence the primary or nominating process or expenditure allocations for goods or services to be used in both the primary and general elections." Under this rubric will a committee have to pay for the production of a billboard with primary contributions (because it is a good that will be used in the primary and general), but be able to pay for rental of future billboard space in part with general election contributions (because the use of space in the general will be distinct from the use of space in the primary)? If the same vendor provides the production and rental of space, will a separate payment have to be made by the campaign to represent the general election portion? If not, will the campaign have to use a memo entry on its Schedule B reporting form to clarify what portion of an itemizable disbursement pertains to the general election? What if the campaign is able to realize a discount for rental of primary election billboard space through its combined purchase of primary and general election usage? The simple rule heretofere followed, that contributions designated for the general may not be spent until after the primary, would avoid these complexities. That rule does present difficulties because it bars, for example, forward purchases of TV or radio time, but it applies equally to all candidates.

Candidates faced with the opportunity to take in and spend general election contributions during the primary will be anxious to do so, even if they risk having to return such funds. Yet defeated candidates, experience teaches, have difficulty raising funds. By encouraging such creation of potential debt, the Commission's action will generate more compliance actions for the failure to refund contributions. Candidates unable to raise funds no doubt will attempt to obtain Commission approval of "debt settlements" regarding these debts. See 11 C.F.R. 104.3(d), 104.11. Assuming that the Commission will reject such attempts, it nonetheless will have to monitor the continued reporting of campaign committees that have not made the necessary refunds. Id. The Commission's already scarce resources will have to meet these additions to our workload.

In sum, from a legal, practical, and budgetary perspective, I see nothing to recommend the conclusion reached by the majority. As with our "testing the waters" experience, I suepect that ene day the Commission will question the wisdom of its efforts to be accommodating.

6-30-86
Date

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