FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1996-39

of

COMMISSIONER SCOTT E. THOMAS

In Advisory Opinion 1996-39, the Commission concluded that a congressional campaign committee could accept corporate funds to pay for litigation defending the legal sufficiency of nominating petitions submitted by the candidate to qualify for the primary election ballot. Because I don't believe that donations for such legal expenses should be exempted from the limitations, prohibitions and reporting requirements contained in the statute, I dissent.

In my opinion, the Commission gave the right answer when it first addressed this issue in Advisory Opinion 1980-57, 1 Fed. Elec. Camp. Fin. Guide (CCH), 5510. There the Commission considered whether funds solicited to defray the legal expenses incurred on behalf of a candidate to challenge his opponent's nominating petitions were "contributions" under the statute. The Commission concluded that the funds raised on behalf of the candidate were contributions and subject to the limitations, prohibitions and reporting requirements of the statute. In reaching its result, the Commission recognized that litigation over ballot access was plainly election related: "A candidate's attempt to force an election opponent off the ballot so that the electorate does not have an opportunity to vote for that opponent is as much as an effort to influence an election as is a campaign advertisement derogating that opponent." Id. at 10,595.

In Advisory Opinion 1982-35, 1 Fed. Elec. Cam12. Fin. Guide (CCH), 5679, however, the Commission made a U-turn. In that opinion, the Commission ruled that funds received by a candidate to challenge a party rule which would keep the candidate off the ballot were not contributions under the Act. Similarly, in Advisory Opinion 1983- 37, 1 Fed. Elec. Camp. Fin. Guide (CCH), 5737, the Commission ruled that funds raised by the State party to defend against the same lawsuit were also outside the purview of the Act. In those opinions, the Commission provided no rational distinction between the result reached in Advisory Opinion 1980-57 and the result reached in Advisory Opinions 1982-35 and 1983-37. Rather, the Commission simply restated the opinions' conclusions: Expenses for ballot access litigation arising out of an attempt to keep a candidate on the ballot are outside the reach of the statute; but expenses for ballot access litigation arising out of an attempt to get a candidate off the ballot are within the reach of the statute.

I believe that the Commission had it right the first time in Advisory Opinion 1980-57. The costs of circulating nominating petitions are part and parcel of the effort to get elected. The contribution limits, prohibitions, and reporting requirements of the Act clearly apply to such ordinary election expenses. If there is litigation over the admissibility of those nominating petitions or some other aspect of ballot access for a particular candidate, the raising of money for that effort should also be subject to the Act. It should make no difference whether the purpose of the litigation was to get a candidate on the ballot or off the ballot.

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