



FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1980-108

of

COMMISSIONER ROBERT O. TIERNAN

Caveat Banker!! Advisory Opinion 1980-108 is a poseur subject to fleeting perceptions and possible misunderstanding. Lending institutions, however, should be cautioned against reading this opinion as a license to suspend sound business and financial judgment when making political loans to candidates for federal office.

The National Unity Campaign for John Anderson asked the Commission to rule that federal election laws do not automatically prohibit a loan to a third party or independent presidential candidate where the source of repayment is future public funding contingent upon the receipt of five percent or more of the popular vote in the general election. This generalized request from the National Unity Campaign is unsupported by the details and conditions of any particular loan agreement put forth by any identified lending institution.

Under Federal Election Commission regulations governing requests for advisory opinions made pursuant to 2 U.S.C. 437f, "(r)equests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests." 11 C.F.R. 112.1(b). Without the details of a specific proposed transaction, this request is merely an abstract question of general interpretation about the possible actions of a third party bank. It is, therefore, procedurally deficient as an advisory opinion request, and I dissent.

Any advisory opinion rendered by the Commission may be relied upon by "any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered". 2 U.S.C. 437f(c)(1)(A). Furthermore, such reliance will not subject any such person involved to any sanctions of the federal election laws. 2 U.S.C. 437f(c)(2). Advisory Opinion 1980-108, however, can offer little guidance or legal protection to any of the unnamed bankers and lending institutions which may contemplate loans to the National Unity Campaign for John Anderson. This advisory opinion does not identify any bank or person other than the National Unity Campaign that may be involved in such a contemplated loan transaction. In addition, the request presented a narrow, abstract legal issue outside of the context of a "specific transaction or

activity". Finally, the majority has stated that "the Commission expressly does not decide that any particular loan made by any particular bank pursuant to this agreement would be deemed to be made in the ordinary course of business. It should be equally apparent that the opinion does not determine whether any particular loan made by any particular bank would be deemed to be made "on a basis which assures repayment."

As was pointed out by the Comptroller of the Currency in a banking circular issued on February 19, 1980 to Chief Executive Officers of all National Banks, the advisory opinion process of the Federal Election Commission is available to all banks and lending institutions which are contemplating specific loan transactions with federal political campaigns and which desire a definitive ruling on the application of the federal election laws to such a loan. When the terms and conditions of political loans involve unique facts and circumstances, such advisory opinion requests would be particularly appropriate. An advisory opinion issued to a bank on the circumstances of a specific transaction could be relied upon and offer definitive legal protection to the requesting lender.

In 1972, Congress amended the federal election laws to permit "a loan of money by a National or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business." Congress further amended the federal election laws with regard to political loans in 1979, and added the particular requirement that a bank loan to a political campaign be made "on a basis which assures repayment". Such an additional condition on political loans was certainly enacted with an awareness of the Supreme Court's concern in *Buckley v. Valeo* that a non-major party and its presidential candidate may be an acceptable loan risk under some circumstances including where the prospects of post-election public funding are good. There is nothing in either Congressional deliberations, or in the Court's rationale, however, which would indicate that the Court or Congress felt that normal banking practice and prudent financial judgments would be ignored in such situations.

This advisory opinion request has presented a draft loan agreement with repayment based upon a future contingency, presently evidenced by opinion polls. Of particular concern to me is whether the use of polling data and the averaging of poll results to project future popular votes and the eligibility for public financing are the types of evidence appropriate to make major banking judgments. It should be abundantly clear that the substitution of national polls for hard collateral would be a new and novel banking practice.

Important questions still remain unresolved about the legitimate use of polling data in making political decisions, much less financial decisions, and generate much controversy among professionals in the polling industry, as well as the general public. Writing in a September 7, 1980 New York Times column titled "The Polls Shouldn't Govern the Debate", Albert H. Cantril, a noted national opinion analyst and a respected spokesman for the polling industry, argued against further formalizing the role of polls in the political process, in that case making polls a standard for inclusion or exclusion in the

1980 presidential debates. In his article, Mr. Cantril stated: "Pollsters simply cannot be likened to public accountants who will certify an audited balance sheet."

Polls and politics have always been a volatile combination, particularly when political financing is involved. As the former Chairman of the Republican National Committee during the Eisenhower Administration described it in a 1968 *Newsday* article: "If no one else (does), politicians and spenders read polls. The big contributors like to know where their man stands, and, just like at the two-dollar window, no one likes to put his money on a loser."

I believe that political financing still requires public accountants who will certify an audited balance sheet. Before we turn bankers into political gamblers at the two-dollar window, we should carefully examine the exact terms and conditions of any specific bank loan, particularly in a national presidential campaign where repayment is based upon future possible public financing as evidenced by a present combination of national public opinion polls.