FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1982-44

of

COMMISSIONER FRANK P. REICHE

Stated simply, I disagree with my colleagues on this issue. The opinion approved by the Commission represents a good faith, but ill-conceived effort to justify that which is not permitted by the Federal Election Campaign Act. Despite the desirability of encouraging free political discussion, we should not, in view of the longstanding Congressional prohibition of corporate or labor union political activity, countenance the participation of this corporation in the political process as proposed herein.

The opinion quite properly limits its consideration to the one TV broadcast on which there is some detailed information, i.e., the program prepared by the Democratic National Committee. If this program had been limited to an exposition of Democratic Party views on issues of the day, then the question would indeed be a close one. I would still be bothered by a situation in which a corporation made air time available on a selective basis to political parties, but I would be the first to admit under such circumstances the existence of a countervailing view that public policy suggests we should foster the use of the air waves for such purposes. Such, however, is not the case. Not only is there an exposition of Democratic Party views, but there is also a contribution solicitation by the DNC, all of which, in light of the Commission approval, will effectively permit broadcasting corporations, and possibly others, to facilitate and indirectly participate in the fundraising activities of political parties.

The opinion suggests that we should be guided by the standard laid down in the case of the Reader's Digest Association, Inc., vs. the Federal Election Commission wherein the Court stated that one of the questions on which the availability of an exemption from the statutory prohibition against expenditures by corporations would hinge was "whether the press entity was acting as a press entity in making the distribution complained of". As applied to this case, the opinion implicitly suggests that the offering of free air time by a corporation to a political party, coupled with the party's intention to solicit contributions, represents a logical extension of the broadcasting activities and responsibilities of that corporation.

In analyzing this situation, reference should be made to the basic statutory and regulatory provisions which govern. These include Section 441b of the Act which states that "it is unlawful . . . for any corporation whatever. . . to make a contribution or expenditure in connection with (emphasis added) any election" which is a Federal election. Please note the words "any corporation whatever". Please note also the words "in connection with". These words contrast with the phrase which modifies the definitions of the terms "contribution" and "expenditure" as contained in the statute, i.e., "influencing any election for Federal office". The wording "in connection with" is broader in scope and (encompasses a wider range of activities than the wording which modifies the terms "contribution" and "expenditure". The definitions contained in Section 431 of the statute wherein it is stated explicitly that the term "expenditure" does not include " . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication unless such facilities are owned or controlled by any political party, political committee, or candidate" are also applicable. In view of the blanket prohibition against direct corporate activity which appears in Section 441b, the activity proposed is not permitted unless it comes within one of these exemptions. In this connection Congress was very specific in establishing these three exemptions and has had numerous opportunities to review not only these provisions, but also the conferral of jurisdiction upon the Federal Election Commission to enforce Section 441b.

The opinion then proceeds to suggest that this activity does indeed fall within one of such exemptions, i.e., the one that refers to commentary. The draft further suggests that commentary includes and is perhaps designed primarily to cover commentary not by the broadcasting station or network, but rather commentary by a third party. It is quite possible and logical to draw a different conclusion from Commission regulations which state at 11 CFR 100.7(b)(2) that . . . any cost incurred in covering or carrying a news story, commentary, or editorial by (emphasis added) any broadcasting station, newspaper, magazine or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate. . ." A careful reading of this provision could well lead one to conclude that the reference is to commentary by the broadcasting station itself, but I would not argue in favor of such a limited interpretation for purposes of this opinion. What does matter is the definition of the word "commentary". Dictionary definitions are of limited utility, but they rather uniformly refer to commentary as being a series of explanations or interpretations or perhaps an expository treatise or series of annotations. Commentary is also described as anything that explains or illustrates. Regardless of how one views the activity of this corporation in making free air time available to political parties for the expression of party views on current issues, how can one rationally state that the accompanying fundraising activity represents commentary by anyone--either the party or the broadcasting station? One of the significant deficiencies of this opinion is the absence of anything except a veiled reference to the solicitation portion of the proposed political activity. Furthermore, this is not an editorial. Neither is this the covering or carrying of a news story as mentioned in Commission regulations. I therefore conclude that this activity does not fall within any of the exemptions set forth in the Act.

The opinion raises and leaves unanswered many questions. For example, what about other political parties which would obviously desire comparable opportunities for the dissemination of their political views and the solicitation of contributions? Also, with respect to the participation of third parties in the process of "commentary" since the Commission is, by this opinion, permitting commentary by corporations, how far would this permission extend? Furthermore, how does the Commission square its proposed opinion in this case with the conclusion reached in Advisory Opinion 1980-90 where the Commission held that a corporation may not distribute the taped interviews of Presidential candidates since to do so would constitute a prohibited corporate contribution?

Instead of postulating general principles of law which, despite their efforts to limit the application of this opinion to the facts of this particular case, will nevertheless result in a broader application than was intended, I believe the Commission would have been better served if it had merely approved a very short opinion indicating the conclusion that this was not a prohibited corporation contribution. By so doing it would have limited the otherwise inevitable extension of this political doctrine and would have preserved for future action, either by statute or regulation, the legal clarification of this confused question.