FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DISSENTING OPINION
OF
COMMISSIONER THOMAS E. HARRIS
RE
ADVISORY OPINION 1984-52

While I applaud the imagination and effort that went into crafting the draft put forward by the legal staff, I find no support for the proposition that the statute or regulations require the return of the funds at issue. That is not to say that I do not believe the money should be returned or that I do not hope the Commission will craft a regulation on this point.

The question of whether a recipient of funds that were contributed illegally must return them has been dealt with in many different ways, depending on the context and circumstances. In several Matters Under Review, the Commission has not required candidates who received contributions made in the names of others to return the funds. In my view, the rationale has been that there was no evidence that the recipients knew or had any reason to know that the contributions received were in any way improper, and it would be an unjust enrichment to return the funds to the malefactor. See, e.g., MUR 1445 ($75,000 in corporate contributions made in the names of others to 16 candidates and one other committee not required to be returned); MUR 1237 ($32,100 in contributions by an individual in the names of others to one candidate not required to be returned); MUR 1525 ($5,000 in contributions by a union in the names of others to one candidate not required to be returned); MUR 1436 ($2,900 in contributions by one individual and $1,800 in contributions by another made in the names of others to one candidate not required to be returned); compare MUR 970 (Commission authorized sending letter to candidate who had received $12,000 in corporate contributions in the names of others recommending that refund be made, though letter was not sent because it was learned refund had been made already).

The advisory opinions relied on in the legal staff's draft are inconsistent on the question and not supported

by any legal authority that I can discern. In Advisory Opinion 1980-37, where the Commission "directed" the recipient committee to refund what we ruled was a government contractor contribution, no legal authority was cited. Similarly, in Advisory Opinion 1977-40 the Commission asserted that if certain contributing committees were later found to be affiliated such that their contributions, when aggregated, would be excessive, the recipient candidate "will have to" return the excessive funds, but no legal basis was given. Yet in Advisory Opinion 1978-53, which involved contributions made to various condidates from funds illegally obtained through a reverse check-off, the Commission did not require any refunds. The distinction offered by the legal staff regarding Advisory Opinion 1978-53-- that an erroneous legal interpretation had been made by the contributor-- has no logical bearing on whether the recipient candidate should be required to return the funds.*/

The regulation cited by the legal staff, 11 C.F.R. § 103.3(b), comes close to stating the proposition that Congressman Russo would have to refund the contributions in question but, in my view, it was written to cover a different set of circumstances. When a campaign committee receives a contribution that appears to be illegal on its face, such as a check from a named entity that may be a corporation, union, or foreign national, the regulation permits the committee the option of either (1) returning it before deposit or (2) depositing it, reporting it with a statement regarding its questionable legality, making a written record noting the basis for the appearance of illegality, and returning it within a reasonable time if best efforts do not determine it to be legal. The purpose of the regulation was to allow committees to deposit what might later turn out to be illegal contributions as long as extra precautions were taken to make a record of such receipts. See Communication Transmitting Proposed Regulations, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. at 45 (1977). In the case of Congressman Russo, it is not suggested that the contributions in question appeared to be illegal before deposit, so the regulation does not apply.

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*/ In Advisory Opinion 1977-44, not cited in the draft prepared by the legal staff, the Commission added yet another puzzling twist. Regarding contributions received by a trade association committee from non-members who were solicited, the Commission's opinion stated that such funds "are required to be returned to the donors or otherwise utilized in a lawful manner that would not constitute a 'contribution' or 'expenditure' as defined in 2 U.S.C. §§ 431, 441b /emphasis added/."

In view of these conflicting and ever chaotic rulings that we have issued in the past, it is my view that if the Commission is disposed to consider a general rule that illegal contributions must be returned, it should proceed by regulation.

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Date

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