FEDERAL ELECTION COMMISSION
WASHINGTON,D.C. 20463



# DISSENTING OPINION

# OF

# COMMISSIONER THOMAS E. HARRIS

# RE

# ADVISORY OPINION 1985-40

The majority opinion concludes that several kinds of activities proposed to be undertaken by the multicandidate political committee of former Senator Baker (RMF) or by his "testing the waters" fund (the Fund) would all fall within the "testing the waters" exemption created by the Commission and set forth at 11 C.F.R. 100.7(b)(1)(i) and 100.8(b)(1)(i). A significant limitation on the impact of this decision is that RMF may provide only $5,000 worth of support for such "testing" activities as an in-kind contribution toward Mr. Baker's potential primary campaign. More significant however, is the Commission's conclusion that, although contributions to Mr. Baker's "testing" effort are subject to the limits and restrictions of federal law, none of the proposed activities set forth in the request amount to actual campaigning so that they would count toward Mr. Baker's $5,000 threshold for "candidate" status. See 2 U.S.C. 431(2).

I dissent because I believe that certain of the activities proposed would go beyond "testing the waters" and, accordingly, would constitute contributions or expenditures. The receipt or disbursement of more than $5,000 worth of contributions or expenditures would trigger "candidate" status for Senator Baker and the attendant obligation to publicly disclose contributions received and expenditures made.

The Commission's handling of its "testing the waters" exemption cannot be characterized as a model of clarity or consistency. The first regulation made effective in this area simply excluded "(p)ayments made for the purpose of determining whether an individual should become a candidate, such as those incurred in conducting a poll, if the individual does not otherwise subsequently become a candidate." Former 11 C.F.R. 100.4(b)(1) and 100.7(b)(2) (see 41 Fed. Reg. 35932, Aug. 25, 1976), effective April 13, 1977 (see 42 Fed. Reg. 19324). Subsequently, pursuant to the Federal Election Campaign Act Amendments of 1979, the Commission clarified the "testing" exemption to read:

> Funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not (contributions or expenditures). Activities permissible under this exemption include, but are not limited to expenses incurred for:

> conducting a poll, telephone calls and travel, to determine whether an individual should become a candidate.... This exemption does not include funds received or payments made for general public political advertising; nor does this exemption include funds received or payments made for activities designed to amass campaign funds that would be spent after the individual becomes a candidate.

Former 11 C.F.R. 100.7(b)(1) and 100.8(b)(1)(see 45 Fed. Reg. 15080, Mar. 7, 1980), effective April 1, 1980 (see 45 Fed. Reg. 21209). I perceived this revision as an effort to narrow the scope of the exemption because the examples of "telephone calls and travel" suggest a small-scale effort by the individual involved to make personal contact with potential supporters. The limitations regarding political advertising and amassing funds further support this interpretation.

Nevertheless, the Commission's subsequent advisory opinions often went beyond a narrow reading of the "testing the waters" regulation. For example, in Advisory Opinion 1982-3 (Cranston), 1 Fed. Election Camp. Fin. Guide (CCH), para. 5647 (Mar. 15, 1982), the exemption was ruled to encompass travel expenses of persons other than the prospective candidate and hiring political consultants and communications specialists. See also Advisory Opinion 1981-32 (Askew), 1 Fed. Election Camp. Fin. Guide (CCH), para. 5620 (employing public relations consultant to coordinate speaking engagements and disseminate speech copies, rental of office space, and rental or purchase of office equipment). The activities deemed to be "testing" in these opinions went further down the path toward campaigning than travel by the prospective candidate, telephoning potential supporters, and polling to determine name recognition or relative preference among the electorate--the rather restrictive examples of "testing" specified in the regulation.

In 1985, when the Commission again addressed its regulations in this area, one would be led to believe it was attempting once more to restrict the "testing" exemption. The Commission revised the regulations to state:

> This exemption does not apply to funds received for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign. Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:
>
> (A) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.
> (B) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.
> (C) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.
> (D) The individual conducts activities in close proximity to the election or over a protracted period of time.
> (E) The individual has taken action to qualify for the ballot under State law.

Current 11 C.F.R. 100.7(b)(1)(ii); see also 11 C.F.R. 100.8(b)(1)(ii).

The addition of subparagraphs (C), (D), and (E) demonstrates a desire to restrict what can be categorized as "testing the waters." The Commission's explanation of these revisions makes this intention quite apparent:

> Despite its attempts to limit the scope of the "testing the waters" exceptions, the Commission has concluded the present rules could be interpreted to include activities beyond those they were originally intended to encompass. The Commission has, therefore, amended the rules to ensure that the "testing the waters" exemptions will not be extended beyond their original purpose.

50 Fed. Reg. 9992 (Mar. 7, 1980).

Even though the current regulations may not spell out the answer in each and every case as to whether a particular activity is or is not "testing," it is apparent that the Commission's stated goal is to define the concept narrowly. Where ambiguity exists, I would argue that the interests behind full and prompt public disclosure--a central tenet of the Federal Election Campaign Act of 1971, as amended--favor a determination that the activity in question is outside the exemption.

Turning to the specific concerns I have with the opinion issued by the majority, I believe that the solicitations proposed by the Fund could very well exceed the Commission's concept of "testing the waters." Almost certainly the solicitations will include laudatory references to Mr. Baker. Therefore, if such solicitations are disseminated so widely that they would constitute "general public political advertising to publicize his...intention to campaign for Federal office" (see 11 C.F.R. 100.8(b)(1)(ii)(A)), they would not qualify as "testing the waters." 1/

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1/ When the regulations were revised in 1980 to clarify that "testing" does not include "general public political advertising" (see p.1, supra), discussion at the Commission table plainly indicates that certain solicitations for "testing" funds would be disallowable. At one point, Commissioner Aikens inquired: "Political advertising to raise funds. If they used it for that, the individual used it for that purpose, the $5,000 would apply (meaning the $5,000 that would count as "expenditures" triggering candidate status)?" The Assistant General Counsel responded: "Would apply." See transcript of Meeting on New Election Law Regulations, Feb. 6, 1980, at 19 (FEC Library).

Later in the discussion, Commissioner Tiernan raised the issue again:

> Let me ask a hypothetical question. A candidate trying to test the waters for a Senate race, for example, puts an ad in the newspaper saying he's having a cocktail reception and puts it in a general circulation newspaper; can he do that, say, have a $100, $500 cocktail party?

(footnote continues on next page)

The Commission has expressed its interpretation as to what type of mailing by an individual rises to the level of general public political advertising in a different, though relevant, context--the so-called "coattail exemption" pertaining to campaign materials of a candidate seeking any public office that contain reference to someone else who is a candidate for federal office. There, "direct mail" is equated with "general public communication or political advertising," and "direct mail" is defined as "any mailing(s) by commercial vendors or mailing(s) made from lists which are not developed by the candidate (conducting the mailing)." 11 C.F.R. 100.7(b)(16) and 100.8(b)(17). This interpretation comes directly from the legislative history of the Federal Election Campaign Act Amendments of 1979:

> The term "direct mail" as used in this provision (now codified at 2 U.S.C. 431(8)(B)(xi)) refers to mailings by commercial vendors or to mailings made from lists which were not developed by the candidate. For example, a mailing by a candidate from a list of contributors to his or her campaign, or other type of list developed by the candidate would not be considered direct mail.

H.R. Rep. No. 96-422, 96th Cong., 1st Sess. at 10 (1979).

The majority opinion, without explanation, concludes that the solicitations at issue would not be "general public political advertising to publicize (Mr. Baker's) intention to campaign for Federal office," even though the solicitations are to be mailed not only to former contributors to Mr. Baker, but also to former contributors to RMF, a non-authorized multicandidate committee separate in form from Mr. Baker's former campaign organization. At a minimum, the Commission should have cautioned that, at some point, solicitations purportedly for "testing" may, due to their content, distribution, or frequency, go beyond "testing the waters."

Footnote 1, continued

Id. at 21. Initially there was some disagreement as to the answer. The Assistant General Counsel responded: "I would think if he's genuinely running the ad and collecting the money to test the waters, he would benefit from the exemption." Id. But the Acting Staff Director countered: "I would think he would at that point be covered by the general public political advertising." Id. and at 22. Then, Commissioner Tiernan commented: "The announcement of a cocktail fundraiser, that's what I am saying. Does that come in under that definition (general public political advertising)? I am afraid it does; and I am leery of having that kind of limitation...." Id at 22.

Ultimately, the General Counsel indicated his staff would seek to clarify the language to indicate that general public political advertising is not "testing:"

> I think particularly in line with the 5010 (the House Bill that was enacted in 1980) distinction between general public advertising and other activities that we should look back and make that clearer. As written now, it would suggest the possibility of the general public political advertising to raise testing the waters funds, which is--I would feel--should be prohibited. Id. at 25.

The subsequent draft of the "testing" exemption indeed was revised to make clear that general public political advertising was beyond "testing" even though there may not be evidence that campaign funds were being amassed to be spent after the individual becomes a candidate (see Memorandum to Commission dated Feb. 19, 1980, Agenda Doc. No. 80-68). This version of the regulation was approved.

I also would treat RMF costs of ferrying associates and representatives of Mr. Baker to events or meetings where their purpose is to encourage other persons to support Mr. Baker as in-kind contributions toward Mr. Baker's nomination, rather than mere "testing."1/ The "testing" exemption becomes unwieldy and overbroad if extended beyond travel by the prospective candidate himself. Moreover, since an express purpose of these emissaries is to encourage other persons to support Mr. Baker, this activity rises to the level of promoting his candidacy rather than sampling existing opinion.

I also would hold RMF's costs of setting up steering committees in several states to be more than "testing the waters." Though one ostensible purpose of such committees would be to advise RMF on its House and Senate candidate support decisions, obviously the primary purpose as presented in the request is to encourage support of Mr. Baker as a prospective candidate for the Presidency. The creation and staffing of such ongoing "storefronts" to urge support of Mr. Baker in several states across the country is well beyond the types of activities set forth as examples of "testing" in the regulation. Some might argue that an individual testing the waters for a presidential race must enlist the support of others to make the necessary inquiry about the degree of existing support. I would concede that it can be a large undertaking, but, in my view, the "testing" regulation contemplates that polling consultants can be utilized to gather this information. The establishment of an organizational structure across the country comprised of 25 to 100 individuals in each state seems to go beyond what is necessary for finding out what people feel about a potential candidacy; it suggests that the decision to become a candidate has been made.

The language of the majority opinion regarding steering committees is utterly confusing. It reads in pertinent part:

> The Commission concludes that the proposed setting up of RMF steering committees, as described in the advisory opinion request, will assist Mr. Baker's testing-the-waters activities, and will not be "activities relevant to conducting a campaign." However, the described "understanding" by some committee members that the steering committees will become Mr. Baker's campaign organization if he becomes a candidate runs the risk of falling outside the exemption for testing-the-waters activity if the steering committees engage in activities on behalf of a Baker candidacy or if a campaign organization is actually established. As such, the setting up of these RMF steering committees will constitute in-kind support for Mr. Baker's testing-the-waters activities, and will be subject to the $5,000 limit.

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2/ If it somehow could be established that a secondary purpose of sending these emissaries is to assist RMF in its role as a multicandidate political committee supporting House or Senate candidates, the travel costs could be allocated in part as overhead cost of RMF or in-kind support of specific House or Senate candidates as appropriate. See 11 C.F.R. 106.1(a)-(d).

Having made a flat statement that RMF's establishment of the steering committees would amount to "testing," the opinion then backtracks and indicates that this plan may run the risk of falling outside the "testing" exemption if certain actions are taken. The next clause beginning with "As such ..." would seem to refer to the activities described immediately beforehand that may fall outside "testing," and yet that clause indicates that such activities would be viewed as "testing." Perhaps the intention is to say that the bare setting up of the steering committees will be viewed as testing so long as they do not engage in the enumerated questionable activities. If the Commission's aim is to be Delphic, it has succeeded.

In yet another area I would find the activities inquired about to be in-kind contributions to Mr. Baker's nomination, rather than "testing the waters." I refer to newsletters or solicitations by RMF that contain references to Mr. Baker's "testing" status. As explained earlier regarding the proposed solicitations by the Fund, I prefer an analysis that would have treated any such mailings that rise to the level of "direct mailing" as "general public political advertising to publicize (an) intention to campaign for Federal office3/ and hence beyond "testing." In addition, I would argue that any mailings of the size suggested in the request probably are an attempt to amass campaign funds for purposes beyond mere "testing the waters." The cost of travel, telephoning, and polling can be exorbitant for a presidential aspirant, but that does not mean that one can ignore the factors the Commission has written into its regulations that make certain activities fall outside the "testing" exemption.

As a final matter, I am troubled by the decision of the majority of the Commission to exclude from the opinion language proposed by the staff that would have cautioned the requestors that engaging in their proposed activities over a protracted period of time would indicate that Mr. Baker had decided to become a candidate. Since this criterion is explicitly set forth in the Commission's regulations (see 11 C.F.R. 100.8(b)(1)(ii)(D)), I am puzzled by the vote to delete the reference.

The opinion of the majority places the Commission in the position of sanctioning massive disbursements which may go undisclosed for months and perhaps forever. It blatantly undercuts the one aspect of the Federal Election Campaign Act which has universal support--full disclosure.

1-28-86
Date

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3/ I note that the recent revision of the "testing the waters" regulation added the modifying phrase "to publicize an intention to campaign for federal office" after "general public political advertising." Compare former 11 C.F.R. 100.8(b)(1), effective Apr. 1, 1980 (see 45 Fed. Reg. 15094, Mar. 7, 1980) with current 11 C.F.R. 100.8(b)(1)(ii)(A), effective July 1, 1985. I discern no intent to expand the category of activities that would fall within the "testing" exemption in making this recent change.