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July 8, 1987

N. Bradley Litchfield, Esquire
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Draft AO 1987-15

Dear Mr. Litchfield:

I thank you for your courtesy of advising me that the draft advisory opinion to the Kemp for President Committee was available yesterday and in response to my telephonic comments you suggested that there was no prohibition of making such comments in writing to the Commission for consideration at their meeting of July 9th. Accordingly, the following, I hope, will help focus certain thinking on the advisory opinion.

As I explained to you by telephone, we feel that the thrust of your answer to our question 1, would, in effect, do what Congress refused to do when the amendments to the Federal Election Campaign Act were before them in 1979. At that time suggestions were mada to include delegates and candidates fer delegate as reporting entities. Ultimately, Congress did not see fit to require such reports. And, as F.E.C. Counsel Susan Propper noted in her memorandum to this Commission dated September 11, 1986, "... the Commission has been aware that delegates themselves are not included within the Act's definition of 'candidate'" (page 2).

In faet the legislative history indicates that the Congress was concerned about "grassroots and volunteer activity" and that the same be encouraged. (See, Legislative History of Federal Election Campaign Act Amendments of 1979, page 549, comments by Senators Pell and Hatfield.) In Counsel Propper's memorandum, it is noted that "... the Commission has sought to provide some flexibility to delegates in furthering their campaigns, including

permitting a certain amount of interaction with the presidential candidates they support," (page 3). While it is recognized that the delegate committee or delegates' personal expenditures should not be utilized as a means of avoiding the limits imposed upon presidential financing imposed by the Presidential Primary Matching Fund Act, the effect of the draft advisory opinion would require the Presidential Committee to monitor and account for every delegate that is approved or selected by the presidential candidate or that uses the candidate's name in connection with his campaign to be elected delegate.

In those states which require some action by the presidential candidate to authorize the delegate candidacy, the opinion would apparently cause them to become "affiliated" to the presidential candidate. Apparently the presidential candidate will be required to report delegate expenditures as an affiliated committee and would be subject to the limitations on contribution, allocation to the state expenditure limits and expenditure limits on a national level. With the number of delegates to be selected by numerous candidates in both parties, the bookkeeping and accounting which will be required for relatively small amounts of expenditure will surely discourage grassroots participation. Certainly the election of the numerous delegates to national political conventions is the most numerous and lowest (but important) form of citizen participation in the federal election process. The Commission should be careful to avoid chilling such voter participation.

It is submitted that the General Counsel should make a different approach that would avoid the express problem of exceeding financial limits imposed by the Matching Fund Act. Two distinct actions may be seen in the relationship between the presidential candidate (and his committee) and his delegates (and their committee). First, there is the authorization--either by state law or party rule designation or approval--and use of the candidate's name, and, second, the expenditure of funds by the delegate committee. It is urged that these two functions should, under the unique situation of the delegate status, be considered separately. Thus, even if a candidate has listed a delegate as authorized and the delegate uses the candidates' name in his ballot and committee designation, this and other political communications should not prevent such candidate or his committee from making truly independent expenditures if such expenditures are otherwise made in accordance with Part 109 of the Regulations. The presidential candidate should not be required to "police" the expenditures made by each and every delegate and to be subject to accountability (and possible repayment of

federal funding) on the basis of a series of events far from his control. In fact, this is a fair reading of existing law and regulations as presently written.

A further problem has occurred recently, with the unauthorized use of candidates' names by various fundraising groups. Some of these questionable operations were recently noted by Brooks Jackson in the July 1 Wall Street Journal. The Kemp Committee has been faced with several independent fundraising groups using Congressman Kemp's name. Fortunately, all but one of those groups has ceased raising funds (little or none of which is used in behalf of the Kemp campaign). Most of those questionable operations have used the so-called "project" loophole to use the candidate's name. In light of Common Cause v. F.E.C., D.C. 1986, 83-2199, ¶ 9248 CCH Federal Election Campaign Financing Act, it appears that the project loophole as well as the loophole which would be created by the proposed staff advisory would contradict the law and would lead to additional deceit of the public.

It is submitted, now, that the effect of the "limited exception to the Act's prohibition on the use of the candidate's name in the name of any political committee" (page 5 of the Draft AO), will be to open the newest loophole for the unscrupullous fundraiser to raise funds, most of which will be paid to the promoters and consultants.

The draft opinion apparently suspects the motives and reasons for the requested opinion. The use of the term "guise" (page 13) is not responsive to the spirit in which the request was made. If the General Counsel believes this was the intent, it misses the mark. The suggested "minimum contacts" and "written questionnaire" would add restrictions on campaigns never expected by Congress nor is it realistic in the actual workings of national political delegate selections.

The General Counsel also negates the power of a presidential candidate to require an "unauthorized" delegate to be so designated. It is submitted that Section 432(a)(4) and 441d(a)(3) gives the Commission ample authority to enforce such requirement. In fact, the clear meaning of the wording of the statute, it is submitted, reqires such action. The abdication by the Commission of enforcement of these sections is particularly dangerous in light of the fundraising scams that have recently and historically been on the fringes of political money raising.

Finally, it is apparent that the same objections raised to "exchange" of contributor lists between a presidential candidate and delegate committees would apply equally to the exchanges heretofore approved in Advisory Opinions 1982-41 and 1981-46. Certainly those exchanges which the commission has approved would be between candidates and/or organizations with same or similar objectives. It is unusual to presume to presidential campaigns a bad faith that is certainly unjustified. Perhaps, had the Commission proceeded with the MUR against the Mondale Committee, rather than enter into the hasty conciliation agreement, a better definition of the extensive variety of delegate activity could have been defined. The variations of state laws, party rules and political practices dehors the draft of counsel.

I hope that the Commission will take these comments into consideration. The draft opinion, we submit, by curtailing active grassroots activity, will be counterproductive to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," "New York Times v. Sullivan, 376 U.S. 254, 270 (1964), Buckley v. Valeo, 424 U.S. 1, 9. (1976).

Respectfully,

James F. Schoener

James F. Schoener
Counsel, Kemp for President Committee

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