FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Advisory Opinion 1987-15

CONCURRING OPINION

OF

COMMISSIONER THOMAS J. JOSEFIAK

I concur with the Commission's unanimous decisions in answering two questions presented by this request. First, the Commission's regulations clearly do not provide a presidential campaign the legal authority either to refuse an unendorsed delegate committee the use of the candidate's name in their name or to require an unendorsed delegate committee to generally represent themselves as "unauthorized." Second, the Kemp campsign's proposed providing of fundraising mailing lists to delegate committees would have a detrimental effect upon the independence of future expenditures by those committees.

Unfortunately, the Commission was unable to reach agreement upon the questions raised by the request regarding the effect of communication between presidential campaigns and delegates for delegate 'endorsement' purposes upon the capacity of those delegates to make independent expenditures in support of the presidential candidate.

I. LEGAL QUESTIONS NOT PRESENTED

First, the Commission was not deciding in Advisory Opinion 1987-15 whether presidential campaigns and delegates may communicate, or on what basis that communication may generally take place. Under our presidential nominating system, and the myriad of state laws and party rules by which it is conducted, delegates and presidential campaigns have a natural and legitimate need to communicate. Deterring the communication reasonably necessary to this process would serve no sensible policy objective. Furthermore, nothing in the Act or regulations suggests the Commission has the authority to limit such basic communications, or a responsibility to prescribe rules for its conduct. We may, of course, recognize certain legal consequences resulting from varying degrees of interaction, including any effect upon the capacity of delegates to make independent expenditures.

Second, the Commission was not deciding in Advisory Opinion 1987-15 whether national convention delegates may make independent expenditures in support of their preferred presidential candidates. The Commission's regulations specifically recognize that delegates

and delegate groups may sponsor "general public communication or political advertising" that includes references to the presidential candidate. 11 CFR 110.14(d)(2)(ii). Consistent with the Act generally, such expenditures which "expressly advocate the election of a clearly identified presidential candidate and are not made with the cooperation or with the prior consent of, or in consultation with, or at the request of suggestion of, the presidential candidate or authorized committee of such candidate" are considered independent, and are neither subject to contribution limitations nor attributable to a candidate's expenditure limitations. 11 CFR 110.14(d)(2)(ii)(B).

These specific provisions of the delegate regulations make clear that delegate groups are afforded no less a right to free speech and political expression under the FECA than any other 'persons.' Legal standards for analyzing delegates' independent expenditure activity are essentially the same as those employed elsewhere in the Act. Delegates' legal (and Constitutional) standing is no more tenuous or suspect than that of other persons, despite the Commission's reasonable concerns that delegate activity carries an inherently heightened opportunity or even a greater likelihood for coordination with a campaign.

Third, some observers of the Commission's consideration of this advisory opinion appeared to confuse the 'authorizing' at issue in this request (involving authorization to use the candidate's name, or the approval, certification or endorsement of delegates or delegate slates) with the 'authorizing' of a committee by a candidate to receive contributions or make expenditures on his behalf under section 102.13(a)(1) of our regulations (by which a committee becomes an authorized candidate committee). That misinterpretation led to the conclusion that the Commission's inaction on these questions had opened a major loophole for circumvention of the limitations upon presidential candidates' expenditures, by permitting a proliferation of unaffiliated 'authorized' candidate committees in the form of delegate groups. The Commission was not presented in Advisory Opinion 1987-15, however, with issues of 'authorized' or 'affiliated' candidate committees within the specific meaning of the Act, and was not deciding whether a political committee designated an authorized candidate committee pursuant to 11 CFR 102.13(a)(1) may make "independent expenditures" on behalf of that candidate -- such a candidate's committee clearly may not.

II. MAIN QUESTION PRESENTED

The fundamental question presented to the Commission in Advisory Opinion 1987-15 was whether contact between delegates or delegate committees and a presidential candidate's campaign for endorsement purposes would inherently constitute that type of

'coordination' which would jeopardize the ability of those delegates to make independent expenditures on behalf of the presidential candidate.

Based upon the Commission's regulations, I concluded that Mr. Kemp's authorizing of a delegate committee to use his name in the delegate committee's name, or his approval or certification of favored delegates, would not, alone, compromise the capacity of those delegate committees to make subsequent independent expenditures on behalf of Mr. Kemp's candidacy. Communications reasonably necessary to facilitate authorization, approval or certification of delegates would not, per se, be the type of contact that would indicate subsequent expenditures by the delegates were made "in cooperation, consultation or concert with, or at the request or suggestion of" Mr. Kemp, his authorized political committee or their agents. See 11 CFR 110.14(d)(2)(ii). In my opinion, this proposed 'endorsement' activity, of itself, would not inherently or unavoidably suggest a candidate or his campaign had provided "information about the candidate's plans, projects or needs... with a view toward having an expenditure made." See 11 CFR 109.1(b)(4)(i).

The delegate regulations indicate no presumption of coordination between delegates and presidential campaigns as to delegate expenditures, nor any lower threshold for imputing coordination that would disqualify delegates' independence. They indicate no legal distinction between endorsed and unendorsed delegates. In fact, the Commission specifically rejected making that distinction in its last revision of the delegate regulations in 1979. Any presumption to be derived from the deliberate inclusion of independent expenditure provisions in the delegate regulations, therefore, should favor a conclusion that ordinary and minimal contact between delegates and presidential campaigns, or an endorsement of delegates, does not automatically compromise the capacity of the delegates to make expenditures independently.

I fully recognize that even such minimal contacts between a presidential campaign and delegates as those reasonably necessary to satisfy state law or party rules regarding delegate selection carry an obvious opportunity for broader communications that would undermine the 'independence' of the delegates or delegate committees. Whether communications are pursued to that extent in a particular situation presents a fact question to be considered under the same analysis as for any other independent expenditure circumstance. Perhaps the Commission should have viewed the request of the Kemp Committee as too hypothetical, and should not have attempted to answer it without a fuller description of how the Kemp Committee proposed to conduct these communications. Absent some indication of an intention to pursue broader communications, however, I do not believe the Commission should

attempt to preempt legitimate, Constitutionally protected political activity because that activity may possibly (but not inevitably) cross the line in practice. The Commission should not try to forestall opportunity for violations by unreasonably restricting free speech in advance through conveniently 'clear,' but overbroad, prohibitions.

It is the Commission's responsibility, rather, to draw the line, warn those participating in the process of the consequences of crossing the line and then enforce that determination in cases brought before it. In this matter, the line should have simply been drawn at the traditionally recognizable point at which expenditures cease to be independent -- at coordination in the making of the expenditures. The Commission should have strongly emphasized that any cooperation or consultation between Mr. Kemp's campaign and delegates that went beyond that communication reasonably necessary for the authorization, approval or certification of those delegates under state statutes or party rules could preclude the delegates from making independent expenditures for general public communications or political advertising advocating Mr. Kemp's candidacy. Expenditures by delegates for advertising that includes references to the presidential candidate and are made in coordination with the candidate's campaign are not 'independent,' of course, and would be allocable to the candidate as an in-kind contribution. 11 CFR 110.14(d)(2)(ii)(A)(1).

III. "AUTHORIZED" USE OF CANDIDATE'S NAME

With regard to the first question, the circumstances of a candidate's 'authorizing' of delegate committees to use his name is not so conclusively an act of general coordination so as to compromise the delegate committees' subsequent expenditures. The regulations specifically permit a delegate committee to include the name of the presidential candidate it chooses to support in its committee name regardless of whether it is "authorized" to do so by the candidate (as recognized in the answer adopted by the Commission to the third question). 11 CFR 102.14(b)(1). The candidate's authorization of such use of his name, therefore, is legally unnecessary and irrelevant, and would seem to be only of an endorsement value. Again, this type of "authorized" use of the candidate's name clearly does not render the delegate group a candidate's authorized or affiliated committee within the meaning of the Act or regulations. And it does not "authorize" delegates to make expenditures in support of the presidential candidate.

The General Counsel asserted, however, that authorizing a delegate group to use the candidate's name "represents" coordination as to future expenditures by the delegates. But the supporting argument seemed to infer a quasi-official status that compromises

the independence of the endorsed delegates, rather than finding any coordination affecting expenditures in the contact necessary to the act of 'authorization': "... his authorization... would necessarily implicate some special relationship or affinity with that committee in contrast to others not similarly authorized." That analysis advances a regulatory hybrid for independent expenditure purposes of a not-quite-affiliated committee, whose status is created by an act of "authorization" to use a candidate's name that is redundant and devoid of legal consequence under the FECA. Under that approach, coordination would be presumed between candidates and "authorized" or endorsed delegate committees, who have no specially recognized relationship under the FECA and who may have had no contact bearing upon, related to or otherwise influencing the making of expenditures. The delegate regulations do not support imposing an in-between, semi-official status upon these delegate committees so as to deny their ability to make independent expenditures.

IV. COORDINATION, ENDORSEMENT AND THE "ANY CONTACT" THEORY

With regard to the second question, I was in fundamental agreement with the General Counsel's draft opinion that coordination with the presidential campaign in the making of expenditures would jeopardize the independence of expenditures by delegate groups, and that contact reasonably necessary to comply with state laws or party rules for approval and certification of delegates should be permitted without jeopardizing that independence. The disagreement arose on whether that contact was permitted on the basis that it did not itself represent coordination so as to compromise independence in making expenditures, or that it was to be allowed as a specific exception to the conventional treatment of coordination and independent expenditures.

The General Counsel's draft recommended the latter approach. I could not accept that perspective, even though it permits contact for endorsement purposes without compromising delegates' independence, because to formulate an "exception" to "allow certain 'minimum contacts'" necessarily means such minimum contacts are otherwise impermissable under existing law.

Independent expenditure issues, and particularly a workable definition of 'coordination,' have always been a thorny problem for the Commission. Three main views of 'coordination' between a campaign and the maker of expenditures seem to have evolved: 1) contact or communication regarding a specific expenditure will jeopardize the independence of that specific expenditure; 2) contact or communication generally relating to or bearing upon the making of expenditures will jeopardize the independence of expenditures; and 3) any contact or communication whatsoever will jeopardize the independence of expenditures.

The first alternative is not without support in a literal reading of the Act and regulations. That approach suggests a person's knowledge of a campaign's plans for a phone bank should not really compromise that person's independence in paying for a newspaper advertisement in support of that candidate. It permits contact between an expenditure maker and a campaign that may have relevance to 'advertising' generally, however, and requires distinguishing between cooperation involving one set of "candidate's plans, projects or needs" from another. The Commission has not followed an approach that such coordination need be that specific as to any single expenditure, project or plan.

I support the second alternative, which recognizes that contact or communication that provides information, guidance or particular encouragement for the making of expenditures would jeopardize their independence. That approach is directly based upon the words of those provisions of the Act and regulations regarding independent expenditures, which describe "an expenditure... which is made without" cooperation, prior consent, consultation, request or suggestion, arrangement, coordination, or direction. See 2 U.S.C. §431(17), 11 CFR 110.14 and 11 CFR 109.1(b)(4)(i). Those provisions clearly demonstrate that the coordination at issue must relate to or have some bearing upon the making of the expenditure. Contacts unrelated to or having no bearing upon advocacy 'advertising' would not undermine the maker's independence.

I think a majority of the Commission agrees with this second approach, as shown by the Commission's unanimous agreement on the fourth question regarding the proposed providing of fundraising mailing lists to delegate committees by the Kemp campaign. The providing of such lists would not directly determine whether or in what manner expenditures might be made by delegate committees, but would be sufficiently related to and in assistance of the expenditure activity so as to constitute coordination and jeopardize the expenditures' independence. The Commission's agreement on this matter demonstrates that it is able to properly apply this second standard without overly restricting legitimate political activity or opening the floodgates to coordination in the making of expenditures.

Members of the Commission applied that standard differently, however, in assessing the effect of an endorsement of delegate slates by a candidate upon the ability of those delegates to make subsequent independent expenditures. In my view, endorsement or approval of a delegate slate is not the equivalent of consenting to or authorizing the delegates' independent expenditures. Endorsed delegates are no more entitled, encouraged or directed to make independent expenditures than unendorsed delegates or delegates in states in which candidate approval of delegates is

not required. Endorsed delegates are not necessarily provided any more information about candidate's plans, projects or needs than unendorsed delegates. Expenditures by endorsed delegates are no more expected or appreciated by presidential candidates than those of unendorsed delegates. Ultimately, the 'endorsement' distinction is not based upon coordinated activity, but upon some sense of semi-official status of endorsed delegates, which the Commission declined to include in its regulations.

The General Counsel's draft adopted the third approach to coordination. Under that analysis, any contact or communication whatsoever between the maker of an expenditure and a candidate's campaign on whose behalf the expenditure is made would jeopardize the maker's independence. All sorts of contacts totally unrelated to the making of expenditures would then trigger the loss of independence: the mere sending of a contribution, a telephone call to the candidate's headquarters to find out the candidate's schedule or joining a campaign-sponsored busload of volunteers to attend a rally.

The "any contact" approach is a very new proposition. Despite the General Counsel's repeated and erroneous citing of Advisory Opinion 1984-30 (which involved admitted coordination in the making of expenditures in the same election cycle) for that principle, the Commission has never adopted that position. Congress could have drafted the Act to preclude independent expenditures subsequent to "any contact" but clearly did not. And no court has ever endorsed that standard in interpreting our law. In its most sweeping review of the independent expenditure issue, the U.S. Supreme Court simply and appropriately contrasted "expenditures... made totally independently of the candidate and his campaign" with those made through "prearrangement and coordination." Buckley v. Valeo, 424 U.S. 1, 47 (1976).

Finally, no one would argue that delegates are 'independent' in the sense they are unbiased or not predisposed to support their preferred presidential candidate. The degree of intensity of personal 'commitment' is not a relevant consideration as to the making of independent expenditures under our Act and regulations, however, since any person who advocates the election of a candidate would presumably be supporting that candidate. Artificial distinctions of status between delegates who are or are not approved, certified or 'authorized' to use the candidates name are similarly based upon irrelevant considerations of the 'seriousness' of delegate commitment.

V. EXCEPTION FOR "MINIMUM CONTACTS"

The General Counsel's draft virtually conceded that the limited contacts between presidential campaigns and potential

delegates that are necessary to facilitate the delegate selection process do not inherently constitute coordination in the making of expenditures:

> "Generally, state rules that give some role to presidential candidates in delegate selection either require or permit them to submit lists of approved delegates. They may also require a delegate to obtain written permission from a presidential candidate in order for that delegate to be identified on a primary election ballot as 'committed' or 'pledged' to that candidate.
>
> These state rules do not require that presidential candidates (or their authorized personnel) conduct meetings or interviews or any other consultation process with delegates who are under consideration for the candidate's approved delegate list."

Nevertheless, based upon the "any contacts" theory and upon the fear that such communications could be a "guise" or "pretext for consultation, cooperation, or concert with the delegates or delegate committees," the General Counsel's draft recommended a "narrow exception" and presented a lengthy prescription of the "scope" of information that may be requested from delegates by presidential campaigns (including a prohibition on asking delegates about "their past or future [?] Federal election contributions or expenditures") and the "method" by which it may be sought (including a recommended questionnaire).

This advisory opinion requeat did not demand of the Commission that it establish a new set of not-quite-regulations to govern contacts and communications between campaigns and delegates, but only required it to more particularly interpret existing independent expenditure regulations with reference to the proposed specific activity. Rather than trying to prescribe rules of conduct, we should be explaining that which the law proscribes: cooperation and consultation relating to the making of 'independent' expenditures.

Moreover, I would not support an interpretation of our law and regulations regarding independent expenditures by delegates that is dependent upon state laws or party rules. Surely nothing would seem more obvious a field for federal preemption than the making of independent expenditures advocating the election of a candidate for president. The test should not be "relevance" to 50 or 100 state delegate selection rules, upon which the General Counsel's scheme depends, but the extent of any "cooperation or consultation" and its relevance to expenditures.

Particularly in the field of indepeedent expenditures, I

would also question whether the Commission even has authority to carve exceptions to standards of 'coordination' found in the Act and regulations, at least absent the full regulatory process and Congressional review. The Commission is no more justified in substituting existing standards for 'coordination' in the delegate selection process than it is in any other circumstance in which independent expenditures are at issue. And if the Commission believes that delegates or endorsed delegates are inextricably agents of their candidate's campaign, then the Commission should drastically revise the delegate regulations to reflect this determination.

VI. CONCLUSION: CONSTITUTIONALITY

Delegate committees have a right to make independent expenditures that are undertaken without coordination with the presidential candidate. That right does not depend upon the Commission's granting of an allowance, concession, or special permission, or the prescribing of a new set of rules for conduct.

The U.S. Supreme Court has consistently declared the making of independent expenditures to be a strongly and specially protected form of free speech. The Court reaffirmed only last year: "Independent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms.' Buckley [v. Valeo]..." Federal Election Commission v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616 (1986).

Following the direction of the Supreme Court in the area of independent expenditures, and being sensitive to that direction in specific cases, is not a matter of "second guessing" the Court's interpretation. That might be a valid criticism if deference to the Court was in anticipation of the Court's reaction to a part of our law which the Court had never addressed, but that kind of speculation is not necessary with respect to independent expenditures. Certainly, the Commission should not exaggerate the sweep of Supreme Court decisions, but neither should it disregard them by reading their factual settings so narrowly, or by devising artificial distinctions, so as to diminish the Constitutional principles upon which the decisions are based.

On the basis of Buckley and Massachusetts Citizens for Life, I am convinced the Court would consider the Commission's broadening of the meaning of 'coordination' in the making of expenditures to mean either 'any contact' or delegate 'endorsement,' and then utilizing that standard as trigger for disqualifying independent expenditures by delegates, to be beyond a justifiable governmental policy interest and contrary to the First Amendment.

8/21/87

Thomas J. Josefiak