FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

CONCURRING OPINION

OF

CHAIRMAN SCOTT E. THOMAS
COMMISSIONER JOHN WARREN MCGARRY
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ADVISORY OPINION 1987-15

Although we agree with the results reached by the Commission in Advisory Opinion 1987-15, we write this concurring opinion to discuss those questions on which the Commission was unable to reach agreement. Questions one, two and three raise the issue of whether delegate committees, which have received affirmative endorsements from Mr. Kemp, may later make "independent expenditures" on Mr. Kemp's behalf. It is our opinion that the affirmative and deliberate endorsements proposed by Mr. Kemp would constitute cooperation and consultation as defined by the statute. Accordingly, any subsequent general public media advertising made by an endorsed delegate committee must be deemed an in-kind contribution to the candidate committee.

I.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court differentiated between expenditures made "totally independently of the candidate and his campaign" and "prearranged or coordinated expenditures amounting to disguised contributions" which could be constitutionally regulated. Buckley, 424 U.S. at 47 (emphasis added). In response to the Supreme Court decision in Buckley, the Congress enacted as part of the Federal Election Campaign Act Amendments of 1976 a definition of "independent expenditure," now codified at 2 U.S.C. §431(17). The legislative history of this amendment has shown that the purpose of §431(17) was to preserve the distinction drawn by the Supreme Court between those expenditures which were "totally independent" of the candidate's campaign and those which were not. H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 38 (1976).

Section 431(17) of the FECA defines "independent expenditure" as:

> [A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Section 109.1(b)(4)(i) of the Commission's regulations explains that an expenditure by a person will not be deemed independent if there is "[a]ny arrangement, coordination or direction by the candidate or his. . .agent prior to the publication, distribution, display or broadcast of the communication."

Commission regulations further provide that delegate expenditures for costs incurred in public media uses (broadcasting, newspapers, magazines, billboards, direct mail or similar types of general public communications or advertising) which advocate the delegate's selection and include reference to a presidential candidate are in-kind contributions to that candidate if they are made in cooperation, consultation or concert with, or at the request or suggestion of the presidential candidate, his authorized committee or their agents. 11 C.F.R. §110.14(d)(2)(ii)(A). These in-kind contributions would be subject to the $1,000 contribution limit and would also be allocated to the presidential committee's expenditure limits. See 2 U.S.C. §§441a(a)(1)(A), 441a(b)(1)(A). See also 11 C.F.R. §§104.13, 110.14(d)(2)(ii)(A). In addition, any person who makes otherwise lawful contributions to the delegate committee may have to aggregate such contributions with those made to the presidential committee for purposes of the contribution limits. 11 C.F.R. §110.1(h).

II.

The first question asked by the Kemp Committee is:

> (1) If a delegate committee requests authorization from Mr. Kemp to use his name in their committee title, would such authorization destroy the ability of the delegate committee to make independent expenditures on his behalf?

In our view, the General Counsel correctly answered this question by stating:

> Mr. Kemp's grant of authorization to a delegate committee for the use of his name in the name of the delegate committee would preclude independent expenditures by such a committee on his behalf....In addition, such an authorization, depending on the facts and circumstances, may represent a designation of the delegate committee as an authorized committee of Mr. Kemp's presidential campaign.

Agenda Document #87-73 at 3-4.

Under Commission regulations, a delegate committee is required to use the word "delegate(s)" in its committee name and may, whether or not it is authorized to do so, include the name of the presidential candidate it chooses to support in its committee name. 11 C.F.R. §102.14(b)(1). 1/ "Because delegate committees are permitted to use Mr. Kemp's name in their committee name, whether or not he authorizes such use," the General Counsel properly reasoned that "[Mr. Kemp's] authorization for any delegate committee to use his name in such a manner represents cooperation, consultation, or concert with the delegate committee and would necessarily implicate some special relationship or affinity with that committee in contrast to others not similarly authorized." Agenda Document #87-73 at 5 (emphasis added). Thus, Mr. Kemp's authorization of the use of his name by any delegate committee would prevent those committees from making "independent" expenditures for the uses of public media on his behalf. 2 U.S.C. §431(17).

1/ The statute contemplates that if a candidate gives actual authorization to a committee to function on behalf of the candidate, then the candidate is required to provide written evidence of such authorization. 2 U.S.C. §432(e)(1). A candidate may not escape the consequences of actually authorizing a committee simply by failing or refusing to prepare a piece of paper when all the facts clearly show that the committee in question was established and is controlled by the candidate. It is the duty of the Federal Election Commission to monitor whether the written authorization is properly executed when the matter comes to our attention.

When a candidate gives this type of authorization to a delegate committee, it is understood that use of the candidate name means use of the name in activities that the delegates will undertake - in making phone calls, organizing supporters, encouraging people to come to the precinct, district, or state caucus or to vote in the primary, and in preparing materials. All this activity helps the candidate, and this is clearly known by the candidate when the authorization is given. Thus, the candidate's authorization of the use of the candidate name to a particular delegate committee precludes, in our opinion, the delegate committee from making any future "independent" expenditures. 2/

III.

The second and third questions asked by the Kemp Committee are:

> (2) In states where statutes or party rules require Mr. Kemp to approve a list of delegates, or give his order of preference among several competing delegates, would his approval or certification of favored delegates prevent them from forming delegate committees which could raise and spend funds independently of, and without attribution to the Kemp for President Committee?
>
> (3) In states where competing groups of delegates or delegate committees assert their allegiance to Mr. Kemp, may he authorize one group as Kemp delegates and require the other group to state that they are unauthorized, or may Mr. Kemp refuse the unauthorized delegates any right to use his name?

2/ We do not address in this concurring opinion the question of whether the "consultation or coordination" involved here would rise to the level of "affiliation." The statute provides that political committees will be considered affiliated if one political committee is established, financed, maintained or controlled by another political committee. 2 U.S.C. §441a(a)(5). Moreover, Commission regulations recognize that two committees may be deemed affiliated even though one of them is not a political committee under the Act. 11 C.F.R. §102.6(a).

It is our opinion that if Mr. Kemp affirmatively designates particular delegates as authorized or approved under state statutes or party rules, the coordination and consultation referred to in the statute and regulations has taken place. This affirmative authorization by Mr. Kemp would compromise the ability of those authorized delegate committees to make subsequent independent expenditures on behalf of Mr. Kemp. 3/

This conclusion recognizes that the selection of delegates to the national nominating convention is a critical phase in the election of a president. Delegates perform a task of supreme importance. Their vital business is the nomination of the party's candidate for the offices of President and Vice President of the United States. The selection of delegates is not a process taken lightly by the candidate.

In several states, delegates must be publicly approved by the candidate before delegates are listed on a primary ballot as supporting that candidate. In many of these same states, delegates must pledge that they will support their candidate for at least one or two ballots. A vote for the delegate is essentially a vote for the candidate.

Given the importance of the delegate selection role, we cannot accept the notion that there are only "minimum contacts" between a candidate and a delegate at the time of ballot authorization. Political experts have noted as much: "[t]hese days no one wants to wait for delegates to be chosen before trying to influence them. The idea is for candidates to get their supporters selected as delegates. . . . The same forces that persuade candidates to begin their drive for the nomination even earlier. . .impel them to begin the hunt for delegates ahead of time." Polsby and Wildavsky, Presidential Elections: Strategies of American Politics, 109 (1984)(emphasis added). Indeed, "[te] the extent that conventions have become arenas for competing candidate organizations. . .delegates have come to resemble mere instruments of their campaign." Arterton, Strategies and Tactics of Candidate Organizations, 92 Pol. Sci. Q. 633, 670 (1977-78).

This conclusion is reinforced by the intent of the state statutes at issue. After its review of the applicable state laws, the General Counsel correctly concluded that "these state rules seem to contemplate interaction or consultation or cooperation between delegates and presidential candidates

3/ Of course, any coordination or consultation between the candidate and the delegate committee prior to the delegate authorization also would preclude the delegate committee from making public media expenditures on the candidate's behalf.

for the purpose of giving the candidates some control with respect to those delegates who may aspire to an official relationship such as securing a 'committed' or 'pledged' ballot designation from the presidential candidate." Agenda Document #87-73 at 12-13 (emphasis added). In Ohio, for example, delegate selection rules require delegates to state their first and second choice for the presidential nominations, and the presidential candidate so named must give written consent to the use of his/her name. Ohio Rev. Code §§3513.05, 3513.12. Indeed, "[t]he delegates, according to the Secretary of State [of Ohio], are in actuality surrogates for the candidate himself." Anderson v. Celebrezze, 499 F. Supp. 121, 129 (S.D. Ohio 1980), rev'd. 664 F.2d 554 (6th Cir. 1981), rev'd. 460 U.S. 780 (1983).

IV.

The advantage of the "bright line" approach to the selection of delegates by a candidate is two-fold. First, it provides clear guidance to both candidates and delegates as to the time by at least which independent expenditures would be precluded. This contrasts with the inevitable uncertainties which will arise over a "minimum contacts" or an "activity reasonably necessary" test -- however those enigmatic terms might be defined.

Secondly, the "bright line" approach would help insure that delegate committees are not used as a loophole for evading presidential primary expenditure limitations. The statute imposes an overall expenditure ceiling for the candidate's entire primary campaign, and also individual ceilings on expenditures relating to the candidate's campaign in each state. See 26 U.S.C. §9035; 2 U.S.C. §441a(b)(1)(A). As has been shown above, the delegate authorization process under state law anticipates significant interaction between the delegate and candidate committees. The Commission should recognize the coordination and consultation which exists between a delegate and candidate committee at the time of ballot authorization for state law or party rules purposes. To ignore this political truth is to build temptation for those candidate campaigns which, in emergencies, may resort to unlimited pools of delegate money. Cf. Buckley v. Valeo, 424 U.S. at 264 (White, J., concurring in part, dissenting in part).

In closing a potentially large loophole to the Presidential Primary Matching Payment Account Act, the preclusion of independent expenditures by delegate committees authorized to use a candidate's name or authorized pursuant to State or party

rules, would affect only a small measure of delegate activity. Delegates may continue to participate in a wide variety of activities. For example, delegate committee expenditures for volunteer campaign materials (including pins, bumper stickers, handbills, brochures, posters and yard signs) which advocate the delegate's selection and also make reference to a presidential candidate are not limited under the Act. 11 C.F.R. §110.14(d)(2)(i). Moreover, expenditures made by a delegate committee to defray travel and subsistence costs or costs incurred in advocating only the delegate's own selection, are not limited by 2 U.S.C. §441a. 11 C.F.R. §110.14(d)(1).

The Commission has provided needed flexibility in areas that involve grass roots delegate activity. It must not simply turn aside when clear-cut candidate authorization for public political advertising on behalf of the candidate is involved.

8/17/87
Date

Scott E. Thomas
Chairman

8/17/87
Date

John Warren McGarry
Commissioner

8/17/87
Date

Danny L. McDonald
Commissioner