McDonald

FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

DISSENTING OPINION

OF

COMMISSIONER SCOTT E. THOMAS

ADVISORY OPINION 1990-4

In Advisory Opinion 1990-4, the majority allows the American Veterinary Medical Association ("AVMA"), a membership organization, to accept non-member corporate treasury monies specifically designated to pay for the administrative expenses of AVMA'S separate segregated fund ("AVMAPAC"). Because, in my view, this determination allows prohibited corporate funds into the federal political process in contravention of 2 U.S.C. §441b, I dissent.

By its plain terms, §441b would appear to prevent professional corporations from contributing their treasury monies to a special AVMAPAC account for payment of AVMAPAC's administrative expenses. Section 441b broadly prohibits "any corporation whatever" or any labor organization from making a "contribution or expenditure in connection with any election" for federal office. "Contribution or expenditure" is defined in §441b to include "any direct or indirect payment, distribution,

loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section . . . ." In addition, §441b provides that it is unlawful for any political committee to accept or receive any such prohibited contributions.

The sweeping language of the statute ("any corporation whatever") would plainly include professional corporations. The statute provides no exemption from its coverage simply because a corporation asserts professional corporation status. Indeed, if professional corporations were not covered by the §441b proscription, they would be able to make contributions to federal candidates. To my knowledge, the Commission has never allowed a professional corporation to make contributions to a federal candidate.

Similarly, payments to underwrite administrative expenses of a federal political committee are generally considered contributions under the Act. See 2 U.S.C. §431(8)(A); see also California Medical Association v. FEC, 453 U.S. 182, 199, n.19 (1981). The law provides but one exception to that general rule. Under 2 U.S.C. §441b(b)(2)(C) and 11 C.F.R. §114.5(b), a corporation is permitted to use its general treasury funds to pay for the costs of establishing, administering, and soliciting contributions to its separate segregated fund. See also 11 C.F.R. §114.1(b). Therefore, under any common sense reading of existing rules, a corporation may not pay for the administrative

costs of any other non-affiliated separate segregated fund. Absent the narrow §441b(b)(2)(C) exception to the general §441b prohibition, payment of such expenses by a corporation would be considered a prohibited corporate contribution.

Since both the professional corporations and their payments to defray the administration costs of AVMAPAC appear to fall within the §441b prohibition, this should not be a difficult case. We must, however, contend with a line of Commission advisory opinions which have chipped away at the §441b prohibition. These opinions present a strained and, in one case, erroneous interpretation of §441b.

In Advisory Opinion 1980-59, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5515, the Commission allowed a corporate member of a trade association to contribute funds over and above its membership dues to the trade association to be used to defray the operational, administrative and solicitation expenses of the trade association's separate segregated fund. With little analysis of §441b and the applicable regulations, the advisory opinion asserted that "as a corporate member of [the trade association], [the corporate member] may donate funds to [the trade association] designated to defray administrative costs of [the trade association's political committee] without violating the prohibition against corporate contributions embodied in 2 U.S.C. §441b." There was no explanation as to why a corporate member of a trade association should be allowed to support the trade association's separate segregated fund with payments specifically designated for that purpose that were not part of

the general dues payment required of all members. No reference was made to the fact that the regulations only permit a corporation to support "its separate segregated fund."[1] 11 C.F.R. §114.5(b)(emphasis added).

In Advisory Opinion 1982-36, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5680, the Commission allowed a corporate member of a trade association to provide in-kind donations of corporate merchandise to defray solicitation costs of a trade association for its separate segregated fund. Again, there was no separate analysis justifying this role for a corporate member in the payment of expenses for the trade association's separate segregated fund. The advisory opinion's analysis of the issue was limited to a reliance upon Advisory Opinion 1980-59 and a general reference to §441b(b)(2)(C).

In Advisory Opinion 1982-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5700, the Commission broadened the already suspect principle established in Advisory Opinions 1982-36 and 1980-59. Specifically citing those advisory opinions, the Commission concluded that individual members of a membership organization, who practiced in a corporate form, could use their corporate accounts to make donations to defray the administrative costs of the membership organization's separate segregated fund. With

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1. Nor was there any discussion of the Commission's explanation of its trade association regulations which makes clear that a member corporation may only pay for "incidental services, such as the distribution of the association's materials via the corporation's internal mailing system." Explanation and Justification of Part 114, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶923 at 1609.

little discussion on the point, the opinion simply noted that "[t]he Commission has held that members of a trade association may donate funds to that trade association for the purpose of defraying its costs in administering its separate segregated fund under 2 U.S.C. Section 441b."

The opinion left unexplained a significant distinction between Advisory Opinions 1982-36 and 1980-59 on the one hand, and Advisory Opinion 1982-61 on the other. In the former, corporate members of a trade association were allowed to use corporate treasury money to make donations to the trade association for the trade association's separate segregated fund. In the latter, corporate treasury money could be used to defray administrative expenses of a membership organization's separate segregated fund even though the corporation was not itself a member of the membership organization. Though I can accept the view that members of an organization can provide certain incidental support to the separate segregated fund of the organization,[2] I cannot read the law to permit non-members to do this without treating such support as a contribution.

In my view, there are two erroneous assumptions which underlie the Commission's approach in this line of cases. First, there is the apparent judgment that payments for the administrative expenses of a federal committee do not pose a serious threat of corruption or the appearance of corruption to the political process. Yet, this sentiment stands in stark

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2. I voted for Advisory Opinion 1989-18, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶5968, based on this principle.

contrast to the reasoning of the United States Supreme Court in California Medical Association v. FEC, supra. In that opinion, the Court rejected CMA's argument that 2 U.S.C. §441a(a)(1)(C) should be declared unconstitutional to the extent that it restricted CMA's right to contribute administrative support to CALPAC, a political committee. The Court found that:

> contributions for administrative support clearly fall within the sorts of donations limited by §441a(a)(1)(C). Appellants contend, however, that because these contributions are earmarked for administrative support, they lack any potential for corrupting the political process. We disagree. If unlimited contributions for administrative support are permissible, individuals and groups like CMA could completely dominate the operations and contribution policies of independent political committees such as CALPAC. Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit.

453 U.S. at 199 n. 19 (emphasis added). In Advisory Opinion 1990-4, however, the majority not only dismisses the proposition that payments for the administrative expenses of a political committee are to be regulated as contributions; it also allows

those contributions to be made by a prohibited source -- corporations.

A second misconception underlying the majority's decision is that the professional corporation of an individual who is a member of a membership organization is somehow related to the membership organization through the individual member such that it should be allowed to defray the administrative expenses of the membership organization's PAC. This approach, however, disregards corporation law. A corporation is viewed as an entity completely separate and distinct from its incorporators. Recognizing this, the Commission has taken great care to distinguish between corporations and the individuals associated with those corporations. For example, while individual partners of a law firm have been permitted to make contributions to a partnership PAC, professional corporations set up by partners have been denied this option. See, e.g., Advisory Opinion 1982-63, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5704. Similarly, the Commission has held that individuals who only hold derivative membership in an organization by nature of their corporate employer's membership are not solicitable as members. See Advisory Opinion 1985-11, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶5815, and Advisory Opinion 1980-75, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5531. Yet, here the majority would blur the distinction between corporations and the individuals associated with them and would allow the corporations to make payments to support a federal political committee when, at most, only the individuals have any claim to make such payments.

In the past, the Commission has not hesitated to supersede wrongly decided advisory opinions. Indeed, in Advisory Opinion 1990-4 itself, the majority took a fresh look at an issue regarding the date of receipt for credit card contributions and superseded, in pertinent part, Advisory Opinion 1978-68. In my opinion, the majority also should have taken a fresh look at its strained interpretation of §441b and the parallel regulations and should have superseded Advisory Opinion 1982-61. Because Advisory Opinion 1990-4 reinforces a line of advisory opinions which weaken the prohibition of 2 U.S.C. §441b, I dissent.

Scott E. Thomas
Commissioner

6/20/90
Date