FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Advisory Opinion 1991-14

Dissenting Opinion

COMMISSIONER THOMAS J. JOSEFIAK

Advisory Opinion 1991-14 permits political party committees to place funds distributed pursuant to a State's taxpayer "check-off" program into the party's Federal account for use in support of Federal candidates. I acknowledge the majority's conclusion follows the general trend of Commission precedent in allowing State funding of Federal political activity. I consider prior Commission decisions in this area to be fundamentally misguided, however, and oppose the result in this opinion.

Financing Federal candidates and political committees with State tax revenues creates insurmountable problems under the FECA's regulatory scheme. As a jurisdictional matter, State legislative programs which serve to fund Federal candidate activity intrude into an exclusively Federal regulatory sphere and are preempted by the FECA. See 2 U.S.C. §453. As a statutory matter, giving State treasury funds to Federal political committees conflicts with the Act's contribution limits and prohibitions and with requirements for registration and reporting by organizations making "contributions" under the Act. See 2 U.S.C. §§431, 434, 441a and 441b. Irrespective of any policy merits of State funding of Federal candidates, the FECA as written does not permit it.

The Commission's earliest opinions on this subject ignored these legal obstacles. See Advisory Opinions 1982-17 and 1980-103. Recently, as in this opinion, the Commission has created a spurious "trace-back" analogy to call this funding something other than public financing of Federal candidates. See Advisory Opinion 1988-33. [1] The State's funding system described in this request is not a "pass-through" for otherwise permissible individual contributions, however. Paper designations by taxpayers regarding funds they are obligated to pay to the State do not convert these funds into donations.

The program described in this request is simply public funding of parties and Federal candidates using the State's general treasury funds. The Commission's endorsement of this approach reflects an instinctive view that these State revenues are "clean" or uncorrupted funds. That conclusion represents a policy determination regarding the merits of State public financing that is beyond the authority of the Commission to make and totally at odds with the scope and terms of the Federal Election Campaign Act.

I would draw the line to permit States to be intermediaries for individuals' actual donations passed along to party Federal accounts as unitemized "contributions". See Advisory Opinion 1983-15. [2] I would

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1. Advisory Opinion 1982-17 permitted State license plate fees to be used for Federal political purposes precisely because the funds were not contributions. The requestor in AO 1988-33 could have expected the prior opinion to have settled the issue, but the Commission distinguished permissible and impermissible "sources" for candidates' mandatory ballot access fees.

2. That position, however, might require the Commission to suspend its usual resistance to corporations (incorporated States) acting as conduits or otherwise facilitating the making of contributions. See Advisory Opinion 1986-4 and MUR 1690.

not permit State governments to donate general treasury funds to Federal candidates or party committee Federal accounts through the pretext of taxpayer designation.

Commission's Legal Analysis

The reasoning of Advisory Opinion 1991-14 illustrates the tenuous and inconsistent logic upon which Commission precedent has relied:

> Because the amount designated will not increase the taxpayer's liability, or decrease the amount of any tax refund payable to the taxpayer, the amount designated by the individual taxpayer is not a contribution by that taxpayer. Advisory Opinion 1983-15, n. 1. Instead, the proceeds would be miscellaneous receipts. Advisory Opinion 1982-17.
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> Even though such receipts are not contributions by the taxpayers, they are the source for funds that go into a Federal account and will be used by that account for contributions to Federal candidates. As stated in Advisory Opinion 1988-33, the Act and regulations "assume that the Commission, in enforcing the prohibitions and limitations, will need to trace the sources of funds proposed to be infused into the Federal election process."
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> The tax check-off funds are derived only from sources permissible under the Act, i.e., individual taxpayers, in amounts not exceeding the limitations. ...

I disagree with any analysis that views individual taxpayers as the legally recognizable "source" of money distributed by the State to party committees under the Kentucky check-off program. Furthermore, I wish to belatedly disassociate myself from the tangled "trace back" theory of Advisory Opinion 1988-33. Nothing could have more legal finality as to the character of monies than government receipt of revenue. Tracing back of government funds collected from obligatory tax payments to an earlier "source" for purposes of identifying "permissible funds" is completely unsupported by the Act or general legal principles.

Taxpayer Check-Off Designations as Contributions

Kentucky taxpayers do not donate a nickel under the State check-off

program. An individual's tax obligation or refund amount is the same regardless of their check-off decision. No new money is collected for the State treasury by this program; permitting taxpayer designations of a political party choice do not constitute State "receipts" of $2 or severable State "funds" from $2 donations.

As Advisory Opinion 1991-14 concedes, the check-off exercise does not make the dollars disbursed to the parties "contributions" from individual taxpayers under the Act. If not contributors under the FECA, individual taxpayers (and their $2 designations) are not the "source" of funds for these disbursements. The general treasury of the State of Kentucky is the "source" of the funds distributed to Kentucky political parties under this program. The payments to state or local parties come from State funds that were collected from individual tax payments, corporate tax payments, bridge tolls, license fees, etc.

By this campaign financing program, the State is dispensing public monies which the legislature could have directed to schools or roads or any other public purpose. The State legislature may, as an alternative to traditional appropriations, choose to respect taxpayer choices in dispensing these State funds for assisting political parties and may thereby dedicate particular amounts of revenue to that purpose, but the disbursement is still an expenditure of State treasury funds. [3]

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3. Although much was made in Commission discussion of the level of "control" exercised by the taxpayers, rather than the State, a State government's declining to exercise control over its own funds or its delegation of appropriation decisions is purely discretionary. Use of taxpayer designation for dispensing State expenditures is a policy choice, not a legal distinction as to the nature or character of State treasury funds. The State is not giving the money back to taxpayers.

The act of taxpayer designation on a tax return of an arbitrary sum does not create "permissible" funds under the FECA. [4] Nor are these funds necessarily more "tainted" by the possibility that some State revenues may have come from fines paid by an incorporated landfill operation. There is no act or moment of "contributing" until the State disburses the money, and no legally relevant "source" of the funds behind the State treasury. The money is simply State treasury funds.

Application of the FECA to State Governments

The question was raised in considering this request of whether a State should be viewed as a "person" under Federal law and, therefore, directly subject to the limits and prohibitions of the Act. While that proposition may be subject to dispute in other areas of Federal law or regulation, particularly in situations involving the imposition of civil or criminal liability, I see a significant difference between laws that broadly create a potentially actionable right against "persons," to which States arguably should not or were not intended to be vulnerable, and a Federal scheme regulating particular activity in which a State might deliberately engage.

(Footnote 3 continued from previous page)

Moreover, the money provided from the State treasury under Kentucky's program is apparently not distributed to the party committees 'with no strings attached.' The main opinion describes the parameters set by the State law for party use of the funds, much like any government program. Such restrictions upon use of Federal political funds are inherently preempted by the Act. (Compare the State law described in Advisory Opinion 1983-15.)

4. By comparison, the "permissibility" of public financing through the Presidential Election Campaign Fund is by operation of the FECA itself, not by any legal significance afforded the taxpayer check-off on the Federal income tax form as a "source."

Under the Act, the term "Person" is defined to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. §431(11). The FECA does not specifically limit or distinguish its scope of application with respect to States. Nothing in the legislative history of the 1979 amendments to the FECA suggests Congress also intended to exclude States from being considered "persons" under the Act when, presented with the opportunity, Congress determined the "only change was the specific exclusion of the Federal Government from the definition." See H. Rep. No. 96-422, 96th Cong., 1st Sess. 11 (1979) (accompanying H.R. 5010).

Moreover, if a State is not a "person" under the FECA, what is it? What is the legal consequence of State payments to Federal candidates or committees? To attribute these payments as merely "miscellaneous receipts" to a Federal account (like bank interest or a tax refund for which a political committee might be legally entitled) is to beg the question, and to deny the purely donative origins of these payments -- albeit donated by a legislature from its State treasury.

It is interesting to speculate what the Commission would do with an advisory opinion request involving State public funding of Federal candidates from general treasury funds outside of a check-off approach. If check-off funds are not "contributions" from taxpayers, what legal difference does it make if a State asks "permission" of taxpayers to dispense these funds? Clearly, the Commission's majority places great significance upon the designation by taxpayers, however, viewing that act "as good as" a donation. If a State attempted to fund Federal

candidates without the cover of a taxpayer check-off, I suspect the Commission would quickly conclude States are not exempt from the Act's definition of "person" and are not permitted to make contributions to Federal candidates or committees outside the limits, prohibitions or requirements of the FECA. \5

As a legal matter, there is no difference between the activity at issue in this opinion and a State grant program to Federal candidates. However "clean" small taxpayer donations would be if contributed has nothing to do with this expenditure of State general treasury funds. The Commission would never permit any other group or organization to collect one or two dollars from individuals and distribute the funds without limit to Federal political committees and candidates (and without registration and reporting obligations) on the premise it was originally -- or as good as -- "clean" funds.

Rather than subjecting State governments to the Act's particular regulation of political committees, however, I would think the correct and overwhelming legal point is that a State may not act as a "person" under the FECA because of the general preemption of State involvement

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5. Contributions by a State to Federal political committees would be prohibited by 2 U.S.C. § 441b if the State was incorporated. See MUR 1686. It is conceivable that an unincorporated State government would be permitted to make contributions to Federal committees subject to the limits upon contributions in §441a. The State would presumably be subject to the Commission's regulations at 11 CFR 102.5(b) for organizations not registered as political committees under the Act, so that the State would have to demonstrate the account from which the contributions were made contained sufficient "permissible" funds under the FECA. Morever, the State would be subject to the FECA's registration and reporting requirements as a political committee if Federal contributions aggregated $1000 or more. 2 U.S.C. §431(4).

with respect to Federal election activity regulated by the Act. [6] As a fundamental matter of jurisdiction, State governments have no business financing Federal candidate activity.

"Tracing Back" Sources of Funds

Federal election campaign finance regulation includes prohibitions and limitations upon the sources and amounts of monies that may be raised and spent to influence Federal elections. See 2 U.S.C. §§ 441a, 441b, 441c, and 441e. [7] Although restrictions upon "permissibility" of funds are fundamental to the FECA, the terms of the Act and Commission regulations speak for themselves. The rules and requirements of the law are applied to specific transactions carrying their own legal significance, consequences and finality. No further extrapolation or "tracing back" by the Commission behind legitimate activity is necessary or legally justifiable.

In a few circumstances, the Act and Commission regulations require transactions involving candidates or political committees be made from "clean" funds, even though the transactions may not constitute or are specifically exempt from the Act's definitions of "contributions" or "expenditures." These situations include payments by State or local party committees for materials used in volunteer activity or for voter

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6. At 2 U.S.C. §453, the Act provides: "The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."

7. Generally, individuals may make contributions to Federal candidates or committees from personal funds. Organizations permitted to make contributions or expenditures for Federal political activity are only allowed to collect monies from permissible sources and in amounts subject to limit. Compare 11 CFR 102.5(b), involving "unregistered organizations."

registration and get-out-the-vote projects on behalf of the Presidential ticket, and candidate committee payments for "slate cards" featuring other candidates. See 11 CFR 100.7(b)(15)(ii) & 100.8(b)(16)(ii), 11 CFR 100.7(b)(17)(ii) & 100.8(b)(18)(ii), and 11 CFR 100.7(b)(9) & 100.8(b)(10). In those cases, the Act exempts certain activity from being attributed as "contributions" to specific candidates, even though the expenditures benefit such candidates, but the Act still demands the activity be financed with funds permissible under the FECA.

Commission regulations also provide the repayment of a loan made to any person by a political committee must be repaid to that committee with funds permissible under the Act, even though such a reimbursement is not a "contribution" to the committee. 11 CFR 100.7(a)(1)(i)(E). This provision is particularly curious, since it involves a completely non-donative, quasi-commercial transaction in which a Federal account, which had presumably disbursed "clean" funds originally to provide the loan, is simply "made whole." Application of this provision can seem a little harsh (e.g. not permitting a candidate's campaign to be repaid money -- originally clean -- loaned or advanced to a corporate vendor). This rule appears to reflect a concern the payback situation involves an "infusion" of potentially impermissible funds into a Federal account so direct as to be offensive and too loaded with opportunity for abuse and manipulation. The requirement that only permissible funds be used in these situations is not a legal consequence of such "compensating" activity, since such reimbursements are inherently not donative, but represents a policy determination.

These provisions are exceptions to the normal operation of the Act, requiring permissible funds to be used in transactions not constituting

"contributions" or "expenditures." They stand on their own, and have their own policy justification. Contrary to the analysis of Advisory Opinions 1991-14 and 1988-33, these provisions (and the Act's general prohibition and limitation provisions) do not grant the Commission general authority to look behind, trace back or view as pass-throughs transactions with their own legal consequences and finality -- either to permit State treasury funds to enter the Federal political process (as here) or to disallow a particular "infusion" of funds in which impermissible monies are not reasonably implicated. See MUR 2544.

A "trace-back" or "pass-through" approach undermines the legal separateness of persons and groups and their actions under the Act. It ignores the legal significance and finality of transactions and searches for attenuated legal consequences. Ultimately, it treats political committees who receive and then make contributions as merely conduits. [8] In Advisory Opinion 1991-14, it dismisses the finality attached to the point at which individual tax obligations, once paid, become state general revenue funds, irrespective of check-off gimmicks.

"Tracing back" clearly goes against the grain of the FECA. The Act itself makes such an attenuated view unnecessary. Absent fraud or willful circumvention, the terms of the Act and Commission regulations straightforwardly preserve the "cleanliness" of funds used to influence Federal elections if we just follow them. The Commission does not need to get into metaphysical notions of trace-back and pass-through and

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8. Whatever the policy theory behind "political action committees," PAC contributions are not just bits and pieces of their own contributors' money in the eyes of the Act. Under the FECA political committees -- groups giving money to influence Federal elections -- are not merely intermediaries or conduits, but recipients and makers of contributions in their own right.

original sources for money never "contributed" until the last step. [9]

While it is conceivable that a trace-back determination would be necessary in the course of interpreting or enforcing general provisions of the Act or regulations, as where the identity of the real contributor is misrepresented, it should be a rare exception and not a general operating premise. Absent fraud, the permissibility of transactions should be decided by their inherent legal consequences under the terms of the Act and regulations, not by a "trace back" reconstruction of events. [10]

Conclusion

The Federal Election Campaign Act gives no support to characterizing State treasury monies from obligatory tax payments collected from individuals as "permissible funds," or viewing check-off designations as a separate pool within a State's general treasury. The Commission has apparently decided public funding of Federal political activity by State governments is harmless as a policy matter and, therefore, benign from

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9. The dangers of the trace-back theory, and the potential for it to become unmanageable, is fully demonstrated by the "House that Jack built" application in Advisory Opinion 1988-33. Not only did that opinion trace the payments to the party committees back behind the State treasury to the candidates who paid the fees, it traced the "source" of the funds further back to the contributors who gave money to the candidates who paid the ballot access fees to the State who distributed funds to the party committees. Carried to extremes, I suppose the Commission could use this reasoning to look at the source of funds of the individual contributors to the candidates to identify if their personal funds included salaries received from corporations.

10. Although 2 U.S.C. §441b (and 11 CFR 114.1(a)(1)) refer to "any direct or indirect payment ... in connection with any [Federal] election," no identifiable "contribution" moment occurs until the State hands over the money to the party committees. An individual's payment of State income tax obligations is not a 'payment in connection with a Federal election.'

an FECA standpoint. That conclusion cannot be reconciled with the words or jurisdiction of the Act itself, however, and cannot be reached within the Commission's statutory authority.

If permitting States to fund Federal political activity is good policy, Congress should amend the FECA. Absent that, the Commission should defend the Act's limits, prohibitions and requirements and the FECA's preemption of State involvement in Federal political activity. Failing to do so necessitates untenable and dangerous legal arguments, and invites State encroachment upon Federal jurisdiction.

July 18, 1991

COMMISSIONER THOMAS J. JOSEFIAK