CONCURRING OPINION IN ADVISORY OPINION 2003-17

of

COMMISSIONERS MCDONALD, THOMAS, and TONER

We joined the Commission's opinion because we believe that federal candidates have wide latitude under the Act to use campaign funds to pay for legal expenses that arise out of campaign activities. We write separately because we believe Mr. Treffinger should have been permitted to use campaign funds to pay for all of the legal expenses at issue, rather than just for some of the expenses that the Commission permitted.[1]

Our reading of the law in this area is guided by several general principles and concerns. First, 2 U.S.C. § 439a(a)(1) states that federal candidates, including candidates who are also federal officeholders, may use campaign funds for "authorized expenditures in connection with the campaign for Federal office of the candidate or individual." Although Congress, in enacting the Bipartisan Campaign Reform Act of 2002 ("BCRA"), amended other aspects of Sec. 439a, Congress did not alter or in any way restrict the broad statutory language in Sec. 439a(a)(1) that permits candidates to use campaign funds for expenses incurred in connection with a federal election. That Congress in BCRA did not disturb Sec. 439a(a)(1) is significant given the Commission's past reliance on this statutory provision in numerous advisory opinions affirming the ability of federal candidates and officeholders, notwithstanding the personal use restrictions, to use campaign funds for a wide variety of legal expenses.

[1] Mr. Treffinger was indicted on 20 counts of criminal activity. However, Mr. Treffinger did not seek to use campaign funds to pay for Count 19 of the indictment, which was wholly unrelated to campaign activities. Count 19 alleged that Mr. Treffinger conspired with his hairstylist to embezzle public funds by using the Essex County, NJ payroll to pay the hairstylist for no meaningful services.

Commissioner Toner made a motion to permit Mr. Treffinger to use campaign funds to defray the legal expenses for the 19 counts at issue; that motion failed by a vote of 3-2, with Commissioners Thomas, McDonald, and Toner voting affirmatively, and Commissioners Smith and Mason voting against. The Commission then voted 4-1 to permit Mr. Treffinger to use campaign funds pay for nine of the 19 counts at issue, with Commissioners Thomas, McDonald, Mason, and Toner voting affirmatively, and Commissioner Smith voting against. Chair Weintraub was recused from this matter.

Second, under 2 U.S.C. § 439a(a)(1), federal candidates who are not federal officeholders have the same ability as federal candidates who are federal officeholders to use campaign funds to pay for legal expenses that arise out of campaign activities. Other provisions of Sec. 439a are only available to federal officeholders – such as Sec. 439a(a)(2), which permits federal officeholders to use campaign funds for bona fide officeholder expenses, such as fact-finding trips. However, the ability of all federal candidates to spend campaign funds on campaign activities turns on Sec. 439a(a)(1), which applies with the same force to congressional challengers who do not hold federal office, such as Mr. Treffinger, as it does to incumbents who do hold federal office.

Third, the ability of federal candidates under the Act to use campaign funds for legal expenses that arise out of campaign activities exists regardless of whether the legal proceedings are civil or criminal in nature, and regardless of whether the candidate is a target, subject or witness in a criminal investigation. There is certainly no basis under the Act or the Commission's regulations to conclude that federal candidates have less ability to use campaign funds for criminal matters than they do for civil actions. Criminal proceedings involve the highest possible stakes, and it is essential that federal candidates be able to use campaign funds to defend themselves.

The importance of this conclusion is heightened by BCRA's enhanced criminal penalties for election law violations. Many commentators both before and after the passage of BCRA have noted the increased effort to criminalize some aspects of American politics. Indeed, since the 1996 elections, one only needed to read the newspapers to learn of numerous grand jury investigations of campaign activities, some of which involved federal candidates and officeholders as targets, subjects or material witnesses. In light of this history, and what may lie ahead, it is critical that all federal candidates have an equal ability to use campaign funds to pay for legal expenses – whether incurred in criminal, civil or agency proceedings – that arise from campaign and political activities.

In light of the foregoing, we believe that federal candidates under the Act have broad discretion to use campaign funds to pay for legal bills that relate, in any way, to campaign and political activities. Here, the Commission permitted Mr. Treffinger to use campaign funds to pay for legal expenses for nine counts in the indictment, which arose directly out of the Act or involved filing false reports to the Commission. See Counts 4, 15, 16, 17 & 18 (alleging the filing of false FEC reports in violation of 18 U.S.C. § 1001); Count 20 (alleging fraudulent misrepresentation of campaign authority under 2 U.S.C. § 441h); and Counts 12, 13 & 14 (alleging fraudulent use of Essex County money and property for campaign activity).

However, the Commission concluded that Mr. Treffinger was barred from using campaign funds to pay for legal expenses stemming from 10 other counts in the indictment. Although some of these counts may not have arisen exclusively or even predominately out of the Act, they did relate to Mr. Treffinger's campaign activities. Moreover, none of these 10 counts would have been possible if Mr. Treffinger had not been a candidate for federal office.

Counts 1 through 18 and 20 of the indictment related directly to the Treffinger for Senate campaign. These counts allege that Mr. Treffinger, as County Executive of Essex County, awarded contracts to a company in exchange for political contributions to the Treffinger for Senate campaign. Further, the allegations contained in counts 7 through 10 are based on the actions Mr. Treffinger undertook to conceal the existence of these illegal corporate campaign contributions and the method by which these contributions were obtained. Count 11 alleges that Mr. Treffinger attempted to extort $5,000 in contributions to the Treffinger for Senate campaign from another contractor doing business with Essex County.

All of these actions were clearly undertaken in connection with Mr. Treffinger's campaign for the U.S. Senate, and any legal expenses incurred in the defense of these allegations would not have existed irrespective of Mr. Treffinger's campaign for Federal office. As such, Mr. Treffinger should have been able to use campaign funds to pay for these legal expenses under 2 U.S.C. § 439a(a)(1).

Given the broad language of 2 U.S.C. § 439a(a)(1), federal candidates should be permitted to use campaign funds to pay for legal expenses that have any connection whatsoever to campaign and political activities. Where, as here, multiple counts of a criminal indictment arise directly out of the Act, all of the counts in the indictment should be payable with campaign funds, unless the charges are entirely unrelated to campaign and political activities, such as the hairstylist allegation in Count 19 here. Such an approach is consistent with the plain meaning of Sec. 439a(a)(1) and would provide candidates with greater clarity and predictability in this area of the law.

August 29, 2003

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Danny L. McDonald, Commissioner

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Scott E. Thomas, Commissioner

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Michael E. Toner, Commissioner