

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20543

DESSERTING VIEWS
OF
COMMISSIONER MAX L. FRIEDERDORF
IN
ADVISORY OPINION 1980-45

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The National Conservative Political Action Committee (NCPAC) proposes to make independent expenditures in the form of a mass mailing advocating the election of a clearly identified candidate. It is anticipated that this mass mailing will result in contributions to the candidate being returned to NCPAC for subsequent forwarding to the candidate. No communication has occurred between NCPAC and the candidate or his agents and these proposed payments are to be made without the "cooperation, prior consent, coordination, or suggestion of the candidate or any of his agents." See 11 C.F.R. §109.1(a).

The Commission has determined that NCPAC's proposed expenditures do not qualify as independent expenditures but are in-kind contributions. Such determination is without statutory authority.

The characterization of an expenditure as "independent" or an "in-kind contribution" must be based on facts. An independent expenditure is defined as an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate which is made without:

- the cooperation,
 - the prior consent,
 - consultation, or
 - the request or suggestion of a candidate or any agent or authorized committee of such candidate.
- 2 U.S.C. §431(17). 11 C.F.R. §109.1(a).

Expenditures not qualifying under the above factual determinations are not independent expenditures and shall be a contribution in kind to the candidate. 11 C.F.R. §109.1(c).

The factual submission by NCPAC and the Commission's response assume that payments for the proposed mass mailing are independent expenditures at the time that the mailing occurs. The Commission cites no facts evidencing "cooperation, consultation, or coordination" with the candidate who may benefit from this mass mailing. Yet it concludes that these expenditures, which qualify as independent expenditures at the time they are made, become in-kind contributions only when accepted by the candidate. Such a magical transformation defies logic and is, I believe, completely without statutory or regulatory support.

In this Advisory Opinion, the Commission has established a new requirement which may destroy the "independence" of an independent expenditure. Here the candidate's acceptance of any contributions forwarded to him as a result of NCPAC's uncoordinated and independent mass mailing results in receipt of contributions in kind. Acceptance of the results of independent expenditures transforms those otherwise independent expenditures into in-kind contributions. We do not believe that such a requirement is supported by the statute, case law, or the regulations that have been approved by the Congress. Certainly the Commission is prohibited from establishing such a new rule of law in an Advisory Opinion. See 2 U.S.C. §437f(b).

For the foregoing reasons, I dissent from this Advisory Opinion.

Max L. Friedersdorf

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Commissioner

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