FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION OF COMMISSIONER FRANK P. REICHE

TO ADVISORY OPINION 1981-35

On September 17, 1981, the Federal Election Commission approved an Advisory Opinion which held that the California Republican Congressional Reapportionment Committee was not a political committee and therefore was not required to file reports with the Commission under the Federal Election Campaign Act. The Opinion further held that contributors to the committee would not be subject to the contribution limitations and reporting requirements of the Act. With respect to the acceptance of corporate contributions, however, the Commission declined, by a 3-3 vote, to approve the recommendation of its Office of General Counsel that the Committee be authorized to accept corporate contributions to finance its activities. The Committee was organized to "finance activities solely related to the Congressional reapportionment process in California."

Although I joined with the rest of my colleagues in approving this Advisory Opinion, I expressed concern at the time that the portion of the Opinion dealing with the acceptability of corporate contributions

would be misconstrued as indicating unqualified Commission disapproval of these contributions. I do not believe that the Commission has a sufficient legal basis for prohibiting such contributions. On the other hand, neither do I believe that there is a sufficient legal basis for blanket approval by the Commission of corporate contributions to committees involved in the reapportionment, or, more appropriately, re-districting process. Acquiescence in the recommendation of our legal counsel would have constituted such blanket approval.

The truth of the matter is that Congress has not specifically addressed this issue. There is no evidence that Congress considered this issue when the Federal Election Campaign Act or amendments thereto were adopted. Indeed, there is little, if any, legislative history which would suggest Congressional awareness of the problem.

With respect to the first two questions posed by the requestor, the Commission's decisions regarding the Committee's potential political committee status and the possible application of contribution limits are governed by the definitional sections of the Act, specifically, 2 U.S.C. Section 431(8)(A)(i) and 2 U.S.C. Section 431(9)(A)(i). Both of these subsections refer to activities undertaken for the purpose of "influencing any election for Federal office". The Commission has long held the view, justifiable in my opinion, that the influencing of a Federal election implies active participation by a political entity. By way of contrast, 2 U.S.C. Section 441b, which governs

corporate contributions, is addressed not merely to political committees, but instead to a variety of organizations, including corporations. This subsection contains a different standard for determining political involvement and prohibits contributions or expenditures by any corporation organized by authority of any law of Congress "in connection with (emphasis added) any election to any political office". Traditionally the words "in connection with" have been construed by the Commission to encompass a broader range of political action than that involved in attempting to influence Federal elections. The "in connection with" language might be interpreted as including the reapportionment or redistricting activity proposed by the Committee whereas it would not, in my view, constitute an effort to influence a Federal election. I have not concluded that the activity contemplated herein unquestionably meets the "in connection with" test, but the possibility exists. There are those who would argue that the absence of any expressed prohibition against corporate contributions in reapportionment matters under Section 441b means that such activities should be permitted. This, however, is admittedly partisan political activity and would, if corporations were freely permitted to participate, fly in the face of the long history of Congressional prohibition of corporate political activity, including direct contributions, dating back to 1907.

Accordingly, I conclude that there is insufficient guidance in the legislative history, the statute or the regulations which would permit the Commission to determine that corporate contributions are either permitted or prohibited in reapportionment matters. We must remember that the issuance of Advisory Opinions by the Commission is precedent-setting in nature. For this reason, I sought, both in the deliberations of the Commission on September 17, 1981 and subsequently in considering a possible motion by me for reconsideration, to clarify what may have seemed to others to be a blanket prohibition of corporate contributions in this area. While I did not wish to see the Commission seemingly approve such contributions without restriction, I also did not believe that the Commission could defend any blanket prohibition of such contributions in a court of law without great difficulty. It is my belief that this concurring statement more nearly reflects the feelings of those who opposed Counsel's recommended approval of corporate contributions than does the motion by which the Commission declined to endorse such recommendation.

Dated: September 25, 1981

Frank P. Reiche

Frank P. Reiche, Commissioner