



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 15, 1982

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1982-3

Allyn O. Kreps
One Century Plaza
Suite 3600
2029 Century Park East
Los Angeles, California 90067

Dear Mr. Kreps:

This responds to your letter of January 20, 1982, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the establishment and activities of an exploratory committee.

Your letter states that Senator Alan Cranston has authorized the formation of a committee, the sole purpose of which will be to advise Senator Cranston on the desirability and feasibility of his becoming a candidate for the Democratic nomination in 1984 for the office of President of the United States. You note that Senator Cranston is not now a candidate for the office of President, and he wishes to avoid taking any action at this time or have any action taken by the committee which would cause him to become a candidate under the Act. You add that no full time public officials or union officials have been included as members of the committee, although such persons may be advisors to or consulted by the committee.

The committee will make a thorough study and evaluation of the potential presidential candidacy of Senator Cranston and report to the Senator. You emphasize that Senator Cranston has not made a decision to become a candidate and will make no such decision until after the committee has completed its exploratory work and reported its recommendation to the Senator in late 1982 or early 1983. The committee will raise a limited amount of funds for the sole and exclusive

purpose of supporting the activities of the committee and the Senator in "testing the waters."*
You state that no funds will be raised or sought for any possible later activities by the Senator as a candidate or any possible campaign by the Senator as a candidate.

The committee will make disbursements of funds for the sole and exclusive purpose of supporting the activities of the committee and the Senator in "testing the waters." You state that these activities would include the following:

1. Travel by the Senator, committee members and perhaps others for the purpose of "testing the waters," including speaking to groups on a variety of public issues and meeting with opinion makers.
2. Reimbursement of certain expenses incurred by the Senator, committee members and perhaps others for the purpose of "testing the waters," including some expenses which, if the Senator were to become a candidate, would be contributions to the committee if not reimbursed.
3. Hiring independent contractors in such fields as polling, political consulting, public opinion, communications or research for specific tasks relating to "testing the waters."
4. Compiling and maintaining information concerning persons who indicate an interest in the possible candidacy of Senator Cranston. There will be no expenditures for mass mailings to such persons or to the general public.
5. Organizing advisory groups on critical and substantive issues requiring expertise and particularized knowledge.

Committee members will serve without compensation as volunteers. It is anticipated that other individuals also will provide services without compensation as volunteers for the purpose of "testing the waters." At the present time it is not contemplated that the committee will rent any office space, or have any paid staff or personnel. The committee does not intend to engage in any activities to promote a campaign, to make expenditures or engage in activities for general public political advertising, or to raise any funds for any subsequent campaign that may develop should the Senator decide to become a candidate.

Under these circumstances you ask the Commission to confirm your belief that the formation of the committee and the conduct of the activities outlined in your letter fall within the "testing the waters" exemption of 11 CFR 100.7(b)(1). As you indicate, Commission regulations set forth

* Your letter states that the committee understands that the Act does not require reporting of receipts or disbursements during the time it is "testing the waters," but that the committee will file with the Commission quarterly reports of receipts and disbursements to ensure complete and full disclosure of its financial activities. Such reports, you add, will be made by the Treasurer of the committee, and that you will maintain all necessary accounts and records for making such reports.

exemptions from the definition of contribution and expenditure which permit an individual to finance a variety of activities to assist in making a determination of whether to become a candidate for Federal office. The regulation which grants the exemption from the definition of contribution provides:

(1) Funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not contributions. Activities permissible under this exemption include, but are not limited to expenses incurred for: conducting a poll, telephone calls and travel, to determine whether an individual should become a candidate. The individual shall keep records of all such funds received and payments made. If the individual subsequently becomes a candidate, the funds received and payments made are contributions and expenditures subject to the limitations, prohibitions and requirements of the Act. Such contributions and expenditures must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received or the payments made. This exemption does not include funds received or payments made for general public political advertising; nor does the exemption include funds received or payments made for activities designed to amass campaign funds that would be spent after the individual becomes a candidate. 11 CFR 100.7(b)(1), see also the parallel exemption to the definition of expenditure at 11 CFR 100.8(b)(1).

Activities which are conducted within the exemption do not result in the occurrence of a contribution or expenditure, and therefore do not by themselves cause the person to become a candidate under the Act. If and when the individual becomes a candidate, the regulation has a retroactive effect in that the financing of all activities coming within the exemption must be reported and otherwise treated as contributions and expenditures for purposes of the Act and regulations.

These limited exceptions, commonly referred to as the "testing the waters" exemptions, were included in Commission regulations so that an individual would, not be discouraged from pursuing a variety of activities to determine whether a candidacy for Federal office is feasible. Advisory Opinion 1981-32, copy enclosed. The Commission has indicated that the exemptions are available to determine "political support" for a potential candidacy and that under the exemption funds may be spent to determine whether one should become a candidate. Advisory Opinion 1979-26. In another opinion, the Commission recognized that the exemption would apply to funds spent during a time period when one is "evaluating" a candidacy for Federal office. See Advisory Opinions 1978-40, and 1981-32. Accordingly, it is apparent that the regulations seek to draw a distinction between activities directed to an evaluation of the feasibility of one's candidacy, as distinguished from conduct signifying that a private decision to become a candidate has been made. AO 1981-32. Furthermore, the Commission has recognized that engaging in these "testing the waters" activities over a protracted time period would tend to diminish their usefulness for testing the waters purposes and would conversely suggest that their effect as a means of building campaign support would be magnified. AO 1981-32.

The Commission is of the opinion that the testing the waters exemptions of the regulations permit all of the activities described in your request provided and only so long as Senator Cranston in undertaking any single activity, or all the various activities, continues to deliberate his decision to become a presidential candidate for 1984, as distinguished from pursuing the activity as a means of seeking some affirmation or reinforcement of a private decision he has already made to be a candidate. Thus, if any of the activities take place in a factual context indicating that the Senator has moved beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities designed to heighten his political appeal to the electorate, then the activity would cease to be within the exemption, and candidacy would arise.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Frank P. Reiche
Chairman for the
Federal Election Commission

Enclosures (AOs 1981-32, 1978-40, and 1979-26)