FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1983-9

of

COMMISSIONER FRANK P. REICHE

As a consequence of its approval of Advisory Opinion 1983-9 on April 28, 1983, the Federal Election Commission has, in my view, continued its ill-advised policy voyage in a direction unworthy of a responsible law enforcement agency. I refer to that portion of the Advisory Opinion which would enable an individual to contribute more than $50,000 to a pre-candidacy "testing-the-waters" effort and subsequently qualify for presidential primary matching funds despite the $50,000 limitation on such personal contributions contained in 26 U.S.C. Section 9035.

The issue revolves around activities undertaken by potential candidates during the period before they decide to become candidates, i.e. the time commonly referred to as "testing-the-waters". The issue first arose in connection with Advisory Opinion 1982-19 in which the Commission enunciated the doctrine that an individual may solicit contributions without regard to the contribution prohibitions and limitations contained in the Federal Election Campaign Act before declaring his or her intention to run, provided, however, that prohibited campaign funds and excess contributions under the Act are returned to the contributors within ten days after the individual becomes a candidate.

For an enforcement agency such as the Federal Election Commission to condone the use of funds normally not available to candidates under the Act, ostensibly on the theory that the Commission has no jurisdiction over matters arising prior to a declaration of candidacy by an individual, is, in my opinion, irresponsible. I understand the reasons for concluding that contributions and expenditures received and made during the "testing-the-waters" phase of a campaign are not technically contributions and expenditures under the Act. Thus, there is no need to report same unless and until the individual declares his or her candidacy. On the other hand, this pre-candidacy activity is frequently a crucial phase of potential campaigns. To permit the use of otherwise prohibited or limited funds in this area would be to thwart a basic purpose of Congress in enacting this law. While there may be a rational basis to delay the reporting of contributions and expenditures until an individual becomes a candidate, I can see no rational basis for altering the ground rules covering the types and amounts of funds which may be used to "test-the-waters" as contrasted with the ground rules governing funds available to candidates during a

campaign. I previously stated this position during the Commission's deliberations on Advisory Opinion 1982-19 and remain more convinced than ever that the Commission's position in this regard is morally wrong and legally unsound.

While in this case we are not dealing with the use of prohibited or limited funds during the "testing-the-waters" phase of a potential campaign, but are instead concerned with the subsequent eligibility of a potential candidate for presidential primary matching funds, the basic principal is the same. Among other things, this Opinion will unfairly assist wealthier potential candidates, who presumably have greater financial resources for "testing-the-waters" and generally have access to more funds than less wealthy potential candidates. In response to those who protest that limiting a potential candidate to the use of $50,000 of his own money during this pre-candidacy phase is forcing said individual to decide in advance of declaring his or her candidacy that he or she will eventually seek public funds for such campaigns, I would say that this is not an unfair burden. The impact of "testing-the-waters" activity upon the decision to seek public funding for a presidential primary campaign is usually slight since this is a decision normally based more on philosophic considerations. The problem posed by the Commission's position is the confusion attendant to the establishment of one set of ground rules for "testing-the-waters" and another set for the period after an individual becomes a candidate.

This is not a situation in which the theory underlying a prior Advisory Opinion, in this case, Advisory Opinion 1982-19, compels a particular conclusion in response to an Advisory Opinion Request. As outlined above, the question posed herein is different and leads inevitably to an extension of the doctrine proclaimed by the Commission in Advisory Opinion 1982-19 since the ten-day purification process is now extended to include not only contributions but also expenditures during the "testing-the-waters" period, and further, since this process is also being extended to the presidential primary matching fund system. The Commission had before it a clear choice and could easily have limited the effect of Advisory Opinion 1982-19 had it chosen to do so. Instead, the Commission has decided to expand this exception and by so doing has not only introduced addition confusion in this area, but has also further encouraged the use of funds which otherwise would not be available during a publicly financed presidential primary campaign. I seriously doubt whether any court of law would uphold the distinction which the Commission has attempted to draw.

For these reasons, I vigorously dissent from the views expressed by my colleagues in Advisory Opinion 1983-9. If the Commission does not change its approach to "testing-the-waters" activity, then one can only hope that Congress will, by amendment, correct the serious inequities which will result from the Commission's action.