FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION

OF

COMMISSIONER THOMAS E. HARRIS

RE

ADVISORY OPINION 1984-28

I agree with the result reached in the opinion approved, and would be content with the analysis contained therein but for the fact that it does not address the issue discussed by Commissioners Aikens and Elliott in their concurring opinion. They agree that the requestor's activities would not be "contributions" or "expenditures," but "do not, however, agree with the rational [sic] that leads to that conclusion." While their perception that the materials in question "evince no apparent attempt to influence the re-election of President Reagan" is understandable under the sparse facts presented, there is no debating that under other circumstances these very same campaign materials could be utilized effectively as part of a wide-scale communieation to promote the candidacy of the candidate to whom reference is made. The elements that Commissioners Aikens and Elliott would require before treating this as a "contribution" or "expenditure"-- mention of candidacy, advocation of election or defeat, and (or?) solicitation of funds-- would be easy for even mildly creative campaign advisers to avoid.

That an incidental reference in one's campaign materials to another candidate may result in a "contribution" to, or "expenditure" on behalf of, that candidate is no doubt a peculiar and rigid result in many situations. 1/ However, the statute defines these terms rather broadly, and I see no indication in the legislative history that Congress felt that one or more of the elements enumerated by Commissioners Aikens and Elliott need be present.

1/ Contributions by a candidate's committee to another candidate would be limited to $1,000 per election. 2 U.S.C. §441a(a)(1)(A). Contributions could not be made to a presidential candidate who accepts general election public financing, see 26 U.S.C. §9003(b)(2), though a candidate's committee could make up to $1,000 in "expenditures to further the election" of such presidential candidate. 26 U.S.C. §9012(f).

It should be noted that the Commission would treat as a "contribution" only those expenditures made in cooperation, consultation, or concert with, or at the request or suggestion of, the candidate referred to or his authorized political committees or agents. 2 U.S.C. §441a(a)(7)(B)(i). Thus, in many situations, where there is no prearrangement with the candidate to whom reference is made, there will be no limitation on the amount that might be spent. Indeed, only in the case of materials mentioning a presidential candidate who accepts general election public financing would there arise a limitation on non-coordinated expenditures.

In addition, the Commission's regulations make clear that only a portion, not the total, of the costs of the materials in question would have to be treated as a contribution to, or expenditure on behalf of, the other candidate mentioned. This allocation need only reflect "the benefit reasonably expected to be derived." 11 C.F.R. §106.1(a).

In recognition of the practical aspects of political campaigning, Congress in 1979 enacted the so-called "coattail" provision to allow candidates to make an incidental reference to another candidate in certain types of campaign materials without attributing part of the cost of such materials as a contribution to, or expenditure on behalf of, the candidate to whom reference is made. Thus, the costs of campaign materials "which include information on or reference to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising)..." are excluded from the definition of "contribution" and "expenditure." 2 U.S.C. §431(8)(B)(xi); 11 C.F.R. §100.8(b)(17).

The genesis of the "coattail" exemption appears to have been the advisory opinion request of the 1976 House campaign of Ed Koch. In the general election context, the Koch campaign asked whether the use of buttons that were imprinted with "Carter-Mondale-Koch" would constitute a contribution in-kind to the Carter campaign, or an "expenditure" if done "without prior consultation." The Commission issued a response saying that under the facts presented, the purchase and distribution of the buttons would not be considered a contribution in-kind. See Re Advisory Opinion Request 1976-78.

In response to the confusion that remained after issuance of Re Advisory Opinion Request 1976-78, both the Senate and House attempted to clarify the situation during passage of the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The Senate Report accompanying S. 1757 included the following reference:

> There was a large degree of uncertainty during the 1976 elections as to the extent a Senate or House candidate could mention and support his political party's Presidential nominee in the general election, without that support being classified as a prohibited in-kind contribution. The bill would amend the law to encourage the listing or mentioning of candidates with their party's Presidential nominee. Specifically, the value of listing or mentioning the name of any Presidential candidate in any Federal or non-Federal candidate's campaign material will not be a contribution where the purpose of such listing or mentioning is to promote the candidacy of such Federal or non-Federal candidate, and it is initiated by such Federal or non-Federal candidate. (Emphasis added).

S. Rep. No. 96-319, 96th Cong., 1st Sess., p. 5 (Sept. 17, 1979).

The House bill, H.R. 5010, contained the precise language currently in the statute at 2 U.S.C. §431(8)(B)(xi). In the House Report accompanying H.R. 5010, appeared the following explanation:

> Coattail provision. Currently, if any candidate for any public office mentions a Federal candidate in any of his or her campaign literature or advertising, that candidate technically has made a contribution to the Federal candidate, the amount of which is determined by apportioning the cost of the campaign literature or advertising. The new provision corrects this problem. A payment by such candidate for campaign material which includes reference to a Federal candidate will not be considered a contribution to the Federal candidate so long as (1) the payment is made from the candidate's own campsign account; (2) the payment is made from funds subject to tha limitations and prohibitions of the Act; and (3) the payment is used for campaign materials used in connection with volunteer activities and not for general public communication or political advertising. The Committee considered and rejected a test that the funds be made for the purpose of influencing the election of the candidate making the expenditure. This test was rejected because it was thought to be both too difficult to administer and because it ignored the practical reality of the situation. If a candidate makes an expenditure from his or her campaign account, the possibility that it is not for the purpose of furthering his or her election is remote at best. (Emphasis added).

When H.R. Rep. 5010 was introduced for House floor debate, Congressman Frenzel stated:

> Another difficulty occurring in the 1976 election was the so-called Carter/Koch problem. H.R. 5010 creates a solution for that problem and will go a long way to encourage candidates to run with other candidates as a "team." Candidates will be able to pay for certain types of campaign materials without the payment being either a contribution or expenditure to the other candidate.

125 Cong. Rec. H7628 (daily ed. Sept. 10, 1979).

The legislative history of the "coattail" provision demonstrates that Congress understood the reach of the terms "contribution" and "expenditure" to be quite extensive, such that a mere "mention" or "listing" of another candidate otherwise would fall within their meaning. Thus, the exemption was worded to include campaign materials "which include information on or reference to any other candidate." Clearly, there is no indication that Congress felt the campaign materials would have to expressly advocate the election of the other candidate, would have to solicit contributions to such candidate, or would have to refer to his or her candidacy in order to raise the potential of a "contribution" or "expenditure."

The "coattail" provision is the solution Congress adopted for the problem, and the Commission better discharges its duties by applying that provision where the facts so indicate than by creating a potentially far-reaching loophole by an unwarrantedly narrow definition of coattailing.

8-9-84
DATE

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