FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1986-6

of

COMMISSIONER THOMAS E. HARRIS

In its rulings on unannounced presidential aspirants the Commission has, step by step, gotten itself into the absurd position that it refuses to acknowledge what everyone knows: that Vice President Bush is running for President and is financing his campaign through the Fund for America's Future, Inc. which he organized and controls. Vice President Bush did not invent this scheme; he is merely doing what others have done and are doing, with the Commission's sanction.

Today, however, the Commission has loosened the reins more than ever by declining to adopt the General Counsel's view that disbursements by the Fund to influence the selection of delegates to the 1988 Republican Convention who will support the candidacy of Vice President Bush are expenditures for the purpose of influencing a federal election. The General Counsel is obviously right.

In one portion of the Advisory Opinion adopted by the Commission, the Commission rules, as it has before, that a presidential aspirant may create and control a multi-candidate PAC which may make contributions, within the statutory limits, to candidates for federal office, and also to state and local candidates, subject only to state law restrictions, if any. While one may suspect that these contributions are designed to secure support for the presidential hopeful, there appears to be no legal basis under the Act for barring them.

More important, however, the Commission has also sanctioned unlimited disbursements by PACs of this sort to finance a wide range of activities designed to promote the unannounced presidential candidacy of the PAC's founding father. Among the types of activities sanctioned are: (1) appearances by the presidential aspirant at political events all across the country, (2) the distribution of partisan publications and solicitations containing references to the presidential hopeful, and (3) the establishment of organized groups of supporters and volunteers in various states that are key to the 1988 presidential nomination.

Only persons just alighting from a UFO can doubt that activities of these sorts, which are engaged in over a period of many months, will promote the candidacy of the founding father. That, of course, is why so many would-be Presidents, of both parties, have created and utilized

PACs of this sort in recent years. The Commission, however, is willing to turn a blind eye to the realities so long as the presidential hopeful announces periodically that he will not decide whether to run until some future date (after the 1986 election is a popular date at present). This is just plain ridiculous. Disbursements for these activities are made for the purpose of influencing a federal election. They are contributions and expenditures under the Act, should trigger the requirement to register as a candidate with consequent reporting obligations, and should count against the national and state expenditure ceilings if the candidate opts for public financing.

The Commission has recognized that potential candidates should be permitted to take preliminary soundings to get a reading on their viability as candidates: hence the "testing the waters" regulations. I tend to think that the Commission (including myself) made a mistake when it adopted these regulations. Disbursements under these regulations are, however, subject to safeguards: (1) No disbursements that indicate that the individual in question actually has decided to become a candidate or that amount to conducting a campaign fall within the exemption; (2) only funds otherwise permissible as contributions to a candidate may be received for this purpose; (3) full records must be kept; (4) if the individual later qualifies as a candidate, the donations received for testing become "contributions" retroactively and count against the Act's ceilings on contributions, and all receipts and disbursements for "testing" must be disclosed; and (5) in the case of a person accepting public financing, the disbursements count against the limits on expenditures by such person. 11 C.F.R. 100.7(b)-(1), 100.8(b)(1), 101.3, 9034.4(a)(2).

Thus, if activities of the sorts envisioned by Mr. Bush's PAC were held to constitute "testing the waters," no substantial loophole would result. But, the Commission has held that these activities are not even testing.

Worse, the present ruling, or non-ruling, is the first to leave it open to presidential aspirant PACs to spend money, without limitations, to influence the selection of delegates to a national party convention held to select a Presidential nominee. This plainly undermines the contribution limits and expenditure ceilings of the statute.

I found the analysis of our General Counsel persuasive on this point. For that reason, I quote it at length:

> Your request suggests that the Act's application to the Fund's proposed activity with respect to the precinct delegate election in Michigan is determined by whether the delegates are "candidates" under the Act and whether the delegate position is a "Federal office" under the Act. Such is not the case. The Act's application to this activity rests on the Commission's longstanding recognition that contributions and expenditures with respect to the delegate selection process are made for the purpose of influencing the nomination of a candidate for the office of President of the United States. See, 11 CFR 110.14; Advisory Opinions 1980-28, 1980-5, 1979-71, and 1975-12. 1/

Furthermore, these regulations apply to "all levels of a delegate selection process." 11 CFR 110.14(a). They also apply to individuals competing at any level of a state's delegate selection process, including local, county, district, or state conventions and in congressional district or statewide primaries. See 11 CFR 110.14(b); Advisory Opinions 1980-5 and 1975-12.

The Commission acknowledges that the position of precinct delegate is not a Federal office as defined by the Act and that individuals seeking election as precinct delegates are not candidates under the Act. See 2 U.S.C. 431(2) and (3). Nevertheless, it is equally incontrovertible that the election of these precinct delegates is also the first level in the Michigan process of selecting delegates to the 1988 Republican national convention, which will nominate the Republican Party's candidate for President of the United States. See Mich. Comp. Laws 168.611 (Supp. 1985).

Section 611 provides for the convention method for selecting delegates to a national nominating convention. Under this method, precinct delegates elected to the "prior fall convention" 2/ reconvene in presidential election years in county/district conventions held prior to the national nominating convention. These county/district conventions select delegates to the state convention, which in turn picks the delegates to the national nominating convention (by congressional district and at-large). 3/ Michigan law currently provides for the election of precinct delegates in the August primary in even-numbered years. 4/ See Mich. Comp. Laws 168.623a (Supp. 1985). Therefore, the precinct delegates elected in the August 1986 primary will serve two-year terms until August 1988 and will be the precinct delegates who meet in county/district conventions to begin the process of selecting delegates to the Republican national nominating convention in 1988.

These precinct delegates will form the closed universe of persons who will participate in the process of selecting delegates to the Republican national nominating convention in 1988. Thus, the August 1986 primary changes its character as merely an intra-party election and also becomes part of the Republican presidential nomination process for 1988 as the first step in Michigan's delegate selection process.5/

Consequently although candidates for precinct delegate will not appear on the ballot with any designation or identification, they may still choose to campaign by identifying their presidential preference in various ways. Since the August 1986 primary offers individual Republican voters their principal opportunity to participate in the delegate selection process for 1988, these voters may take into account the presidential preference of the precinct delegate candidates. 6/

Furthermore, the intra-party role of these precinct delegates does not alter, diminish, or dilute their key, influential role in the selection of national nominating convention delegates. The Commission notes that the precinct delegates who were previously elected in the now-abolished May presidential preference primary also served two-year terms and performed the intra-party functions of a precinct delegate as well as participating in the delegate selection process. The Commission also notes that delegates

to a national nominating convention, besides nominating a candidate for the Presidency, may often have intra-party roles that are generally outside the scope of the Act, such as adopting a party platform or rules. Nevertheless, the Act applies to contributions and expenditures with respect to the selection of these delegates, at all levels of the selection process, notwithstanding their intra-party roles.

Thus, the Fund's expenditures to recruit individuals as precinct delegate candidates, to disseminate information with regard to such elections, and to make donations to the campaigns of specific candidates for these positions must necessarily be treated as made for the purpose of influencing a Federal election, i.e., the nomination for election for the office of President of the United States. Furthermore, based on the facts presented in this request, a presumption will arise that the Fund's expenditures with respect to this precinct delegate election are made on behalf of the Vice President and with his consent, cooperation, consultation, request, or suggestion. 7/

This presumption will apply both to the Fund's direct expenditures to recruit and assist precinct delegate candidates and to its other expenditures, including those for activities such as campaign appearances, communications, steering committees, and volunteer programs, that are also directly attributable to this precinct delegate election. 8/

Accordingly, these expenditures by the Fund will constitute contributions under the Act as in-kind gifts of a thing of value to the Vice President for the purpose of influencing his nomination for the office of President of the United States in 1988. As such, they will be subject to the Act's contribution limitation at 2 U.S.C. 441a(a)(2)(A) and 11 CFR 110.2(a) and will be aggregated for purposes of determining the Vice President's candidacy status under 2 U.S.C. 431(2) and 11 CFR 100.3(a). If the Vice President becomes a candidate for President and establishes his eligibility for matching payments, these contributions will also count against the Vice President's expenditure limitation under 11 CFR 100.8(a) and 2 U.S.C. 441a(b). See also 11 CFR 106.2.

The contention voiced by some that the regulations require the opposite result is without foundation. While it is true that in 1980 the Commission amended its regulations to loosen some of the restrictions pertaining to delegates in certain respects, it did not pretend to do away with the basic proposition that expenditures undertaken at the behest of an individual for the purpose of influencing his or her own nomination for the Presidency count toward the candidacy threshold and, if incurred by a third party such as a PAC, are subject to the limits on contributing to a presidential nomination. Some have been vexed by the following language which appears in the Commission's explanation of its current delegate regulations:

> [I]t should be noted that contributions made to a delegate for the purpose of furthering his or her selection are not considered contributions to any presidential candidate, regardless of whether or not the delegate is pledged to or supports a particular presidential candidate. Explanation and Justification of Regulations Concerning Contributions to and Expenditures by Delegates to National Nominating Conventions, 45 Fed. Reg. 34866 (May 23, 1980).

It would have been mindless folly for the Commission to have ruled that under no circumstances would contributions to a delegate be deemed contributions to the candidate for whom the delegate was acting. Therefore, I believe the qualifying language in the aforementioned explanation to have a common sense meaning: contributions made for the purpose of promoting the selection of a person as a delegate (i.e., "for the purpose of furthering his or her selection") and not for the purpose of furthering the nomination of a particular individual for the Presidency need not be treated as contributions to the latter, but contributions to a delegate that are for the purpose of furthering the nomination of a particular individual for the Presidency must be treated as such.

Admittedly, the Commission did intend to allow a good deal of room for contributions to delegates to escape regulation, e.g., where the contributor would have no basis for knowing whether a particular delegate privately had committed to a particular presidential hopeful. However, where the person providing support to a delegate has done so at the request or suggestion of the presidential aspirant, I can see no basis, legal or logical, for not treating such support as an in-kind contribution to the latter. Were it otherwise, I could envision countless large PACs and wealthy individuals funneling massive sums to delegates at the specific request of a particular presidential hopeful without affecting the contribution limits applicable to support for the nomination of such individual-- a wholesale evasion of the statute.

My reading of the regulations is required by the statute itself which specifies that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). 9/ The Commission could not, and did not, through its delegate regulations write this statutory provision off the books.

A close examination of the overall scheme of the delegate regulations corroborates the distinction I have noted between activity that is designed solely to support the delegate and activity that is designed to support a particular presidential aspirant. Clearly, expenditures by a delegate "to defray costs incurred to advocate only his or her own selection" are not regulated at all, whereas expenditures by a delegate for communications that "include [] information on or reference to a candidate for the office of President" are regulated under certain circumstances.10/ Compare 11 C.F.R. 110.14(d)(1) with 11 C.F.R. 110.14(d)(2). The Commission decided to leave delegates who were acting solely on their own behalf alone, but addressed the need to attribute certain other delegate activity to the presidential aspirant with whom it was coordinated. That is precisely the rationale which I feel ought to be applied on the contribution side of the equation as well.

I understand the natural reluctance of my fellow Commissioners to ascribe any activity in 1986 to the 1988 presidential campaign, and to warn a presidential aspirant that certain planned activities would, if carried out, render him a "candidate" under the law some nine months earlier than he had contemplated. The Commission did not create this predicament, however. It can and should only apply the law to the facts presented to it.

1/ Michigan's decision not to subject individuals seeking election as precinct delegate to the state's campaign finance law is also not determinative since the Act would preempt any Michigan state law in this regard. See 2 U.S.C. 453; 11 CFR 108.7. Thus, the Act's prohibitions regarding the sources of funds apply to contributions to delegates. 11 CFR 110.14(f). Contributions made to a delegate by the campaign committee of a presidential candidate count against the candidate's expenditure limitation under 11 CFR 110.8(a) and 2 U.S.C. 441a(b). 11 CFR 110.14(c). A political committee's contributions to delegates made on behalf of a presidential candidate and with that candidate's consent, cooperation, consultation, request or suggestion would constitute in-kind contributions to that presidential candidate subject to the Act's limitation under 11 CFR 110.2(a) and 2 U.S.C. 441a(a)(2)(A) and would also count against that candidate's expenditure limitation under 11 CFR 110.8(a) and 2 U.S.C. 441a(b). See 2 U.S.C. 441a(a)(7); Advisory Opinion 1985-40.

2/ Under Michigan law, the "prior fall convention" refers to the previous county and state conventions held as part of the process of nominating candidates for state office for the November general election. See Mich. Comp. Laws Sec. 168.596 (1978). For the delegate selection process in 1988, the "prior fall convention" will be the one held in 1986 after the August primary.

3/ Under the procedures of the Michigan Republican Party, any person is eligible to become a candidate for state convention delegate by filing a candidacy form that lists the candidate as uncommitted or with a presidential preference. Only the precinct delegates, however, participate in the selection of state convention delegates.

4/ For the period from 1972 through 1980, Michigan also provided for a presidential preference primary, held on the third Tuesday in May. The results of this primary allocated the delegates to a national nominating convention according to the vote for presidential candidates and bound the delegates to vote for their presidential preference. See Mich. Comp. Laws 168.613 and 168.619 (1978) (repealed 1983). Michigan law also permitted a party to alter the election of these precinct delegates in presidential election years from the August primary to the May presidential preference primary. Precinct delegates elected in the May primary in presidential election years also served two-year terms and performed the other functions of a precinct delegate as well as participating in the delegate selection process. Michigan abolished its presidential preference primary in 1983. The result of this statutory change returns the sequence for electing precinct delegates to that which existed prior to the institution of the presidential preference primary, as set forth in Section 611.

5/ The Commission notes that the August 1986 Michigan precinct delegate election as a step in the delegate selection process in Michigan is analogous to the Iowa precinct caucuses as a step in that state's delegate selection process. See Advisory Opinion 1979-71.

6/ Any registered voter may attend a county convention in 1988 and by signing an affidavit that he or she is a Republican may also participate in a presidential straw poll at

the county convention. The results of this poll, however, are advisory. They are not binding on the state convention delegates selected at the county conventions and do not provide a means for allocating state convention delegates according to presidential preference.

7/ The Fund's proposed activity is also distinguishable from the activity addressed in Advisory Opinion 1980-28. That opinion concerned a newspaper advertisement which advocated the election of delegates to the Republican national convention and was financed by a political party county committee. That opinion expressly reserved the question whether the local party committee's expenditures for such a newspaper advertisement would constitute an in-kind contribution to a presidential candidate subject to the limitations of the Act.

8/ This presumption will be supported where individuals who are recruited and financially aided by the Fund include in their campaign materials statements relating to a potential candidacy by the Vice President in 1988 or their support of such a candidacy. Furthermore, this presumption will be clearly established where the Fund's recruitment of, or financial assistance to, specific candidates for precinct delegates takes into account whether the individuals support, or promise to support, either a potential candidacy by the Vice President for Federal office in 1988 or the selection of delegates to the 1988 state convention who favor or will support such a candidacy.

9/ This provision is not inapplicable where the person coordinating or requesting the expenditure has not decided whether or not to run, as some might argue. Though it uses the word "candidate," and though the person in question may not otherwise have crossed the $5,000 threshold for candidate status, as soon as $5,000 worth of such expenditures have been made, candidate status would exist. See 2 U.S.C. 431(2).

10/ Again, the use of the word "candidate" is not a stumbling block vis a vis application of this regulation, for the very expenditures by a delegate that would require regulation as contributions in-kind would themselves count toward the "candidate" threshold. See n. 9, supra.