



FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1986-8

of

COMMISSIONER THOMAS J. JOSEFIK

I support the conclusion reached by the Commission in Advisory Opinion 1986-8 which permits Mr. Santini's 1986 Senate campaign to pay refunds to certain 1982 contributors. I dissent, however, from the new direction of legal reasoning adopted by the Commission in reaching this conclusion.

As recently as Advisory Opinion 1985-42, issued only three months ago, the Commission reaffirmed its long-standing principle that "the Act and regulations permit candidates and their campaign committees to make their own determination as to the types of expenditures that will most effectively influence their nomination or election."

This simple principle recognizes that the Commission is not the arbiter of what constitutes an effective campaign expense. It is the candidate's committee, and not the Commission, that decides what expenditures will most effectively influence each candidate's election to federal office. Further, this principle acknowledges the practical limits upon a campaign's discretion in making expenditures, including the significant role of public disclosure in revealing to contributors and to the general public a campaign's choice of expenditures.

The present opinion reaffirms this principle of campaign discretion and directs the 1986 Santini committee to report these refunds as "expenditures." The Commission, however, departs from its prior opinions by referring to 2 U.S.C. 439a, which permits "excess" campaign funds to be spent for "any other lawful purpose." It is to that reference, however brief and irrelevant to the remainder of the opinion, that I object.

The reference to 439a in the present opinion suggests the Commission's intent to begin applying this provision of the Act to current campaign expenditures, even though 439a is clearly intended to limit use of excess campaign funds for non-campaign Purposes. In this new and broader application, 439a is inappropriate, unnecessary, ineffective and confusing. I cannot subscribe to an approach of statutory construction that plucks a "standard" out of a clearly inapplicable part of the Act to fill a perceived void.

I believe that it is far better to retain the presumption that a campaign spends its money to influence an election, absent a clear assertion by the campaign or factual evidence to the contrary. The principle long followed by the Commission that a campaign is permitted wide latitude in its interpretation of a proper "expenditure" is reasonable and adequate to the task. Section 439a should be the exception invoked when the presumption of a campaign expenditure does not hold true, rather than the starting point for Commission consideration.

I disagree with the premise that the Act and regulations contain no other standard for campaign expenditures. From the definition of "expenditure" provided at 431(9)(A)(i), the Commission has sensibly adopted the principle of campaign discretion in deciding how to spend money "for the purpose of influencing any election for federal office."

In the factual circumstances presented in this advisory opinion request, Mr. Santini has not expressly described the purpose of the refunds. */ But where a campaign purpose would be reasonable and such expenditures are permissible, why would the Commission invoke 439a and presume the refunds are not intended to influence his current election campaign? Although the Commission has previously held that a campaign committee may determine it has "excess" campaign funds at any time, even in the midst of an active campaign, why would the Commission assume that a campaign is spending "excess" funds in what is reportedly a hotly contested Senate race?

Using 439a as the starting point turns the normal presumption upside down. I cannot support this subtle but ominous shift from a useful, time-tested principle to an approach that provides a "standard" that is neither needed nor effective.

*/ The requestor does indicate the current political relevance in making these expenditures by stating that any refunds that are not cashed will be counted as individual contributions to Mr. Santini's 1986 campaign committee.