



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

CONCURRING OPINION IN ADVISORY OPINION 1986-14

of

COMMISSIONER THOMAS E. HARRIS

To even a casual observer of Commission action, it must be readily apparent that the Commission's advisory opinions on whether payments to a political committee for goods or services are "contributions" are not a shining example of logic or consistency. One might conclude that the Commission's decisions reflect a "We know it when we see it" approach.

The Commission has sometimes seemed to allow political committees to treat receipts for goods or services not as contributions because the committee in question was terminating and the election was over. See, e.g., Advisory Opinion 1985-1, 1 Fed. Election Camp. Fin. Guide (CCH), P. 5807 (Feb. 28, 1985) (sale of a computer system by the Ratchford for Congress Committee). Yet, on other occasions, the Commission has treated such receipts as contributions. See, e.g., Advisory Opinion 1983-2, 1 Fed. Election Campaign Fin. Guide (CCH), P. 5109 (Feb. 24, 1983) (sale of computer services by Citizens for Emery Committee to retire debt of unsuccessful candidate). \*/

Sometimes the Commission has treated the proceeds of the sale of a committee's mailing list as contributions. See Advisory Opinion 1981-7, 1 Fed. Election Camp. Fin. Guide (CCH), 5595 (Mar. 9, 1981) (sale of membership list of PAC's connected union to credit card protection firm) and Advisory Opinion 1979-17, 1 Fed. Election Camp. Fin. Guide (CCH), 5416 (Jul. 16, 1979) (sale of RNC's list of contributors to banks for credit card promotion). On the other hand, on other occasions the Commission has deemed the payments for a committee's mailing list not to be contributions. See Advisory Opinion 1981-46, 1 Fed. Election Camp. Fin. Guide (CCH), 5629 (Nov. 16, 1981) (sale or exchange of mailing list by Committee for Congressman Ronald V. Dellums) and Advisory Opinion 1981-53, 1 Fed. Election Camp. Fin. Guide (CCH), 5643 (Feb. 19, 1982) (sale of mailing list of Bill Frazier for Congress Committee).

The rationale usually cited for permitting the sale of a committee's membership list without application of the "contribution" framework is that such lists are developed by the committee itself primarily for its own use, rather than for sale to others. If such analysis is to apply, I see little basis for distinguishing the sale of a committee's mailing list from the sale of a committee's campaign materials or poll results. Yet, the Commission has ruled the sale of the latter items to result in contributions by the purchasers. See Advisory Opinion 1980-70, 1 Fed.

Election Camp. Fin. Guide (CCH), 5526 (Aug 11, 1980) (sale of campaign materials by Committee for Independent Expenditures for Republicans) and Advisory opinion 1980-19, 1 Fed. Election Camp. Fin. Guide (CCH), 5472 (Mar. 14, 1980) (sale of poll results by Wendell Young for Congress Committee).

There is an obvious tension between the concept that a payment to a political committee is a contribution per se and the concept that a payment for goods or services of equal value is of no net benefit to the vendor. The Commission certainly must insure that payments to political committees for fundraising events are treated as contributions, even though the payor receives something of lesser value in return, such as a dinner or a campaign memento. Where a payor receives goods or services of equal value, however, the Commission's interests in finding the payment to be a contribution may be minimal.

Interestingly, the Internal Revenue Service faces much the same dilemma. So called "exempt function income" is not taxable to a political organization. This includes "proceeds from a political fundraising or entertainment event, or proceeds from the sale of political campaign materials, which are not received in the ordinary course of any trade or business," (emphasis added). 26 U.S.C. 527(c)(3)(c).

Perhaps the Commission would do well to attempt to articulate through regulation when it treats the proceeds of the sale of goods or services to be a "contribution." In my mind, the most important factors are: (1) whether the goods or services are sold in a partisan context, e.g., in conjunction with advertisements promoting a particular candidate or party, rather than in the open marketplace, (2) whether the sale of such goods or service will be an occasional or isolated instance versus a widespread or ongoing practice, (3) whether the committee receives in exchange an amount equal to no more than the fair market value of the goods or services, (4) whether the goods or services have an ascertainable value in the marketplace independent of their relationship to a political committee, e.g., a piece of office equipment, but not partisan bumper stickers, (5) whether the transaction is of such a nature that it lends itself to concealing a contribution, and (6) whether the committee in question is defunct rather than raising money for upcoming elections.

The foregoing factors would weigh in favor of the conclusion reached by the Commission today, it seems, but would not require the analytical gymnastics needed to work around the Commission's former advisory opinions. One could even hope that regulations on this subject would enable the regulated community to "know it when they see it."

\*/ One might note that the Emery Committee did not expressly state in its request that it would terminate, and that its sale of computer services potentially could extend over a protracted period of time. It could be assumed, I think, that the Committee was planning to terminate, however. The point to be made is that the Commission has not based its analyses solely upon whether the committee in question is defunct and not involved in an upcoming campaign.