The majority opinion permits a candidate to spend, prior to the primary election, for some but not all purposes, contributions received for the general election. This result contravenes the general scheme of the statute of separate contribution ceilings for each election. Moreover, uncertainty as to the opinion's reach will give rise to numerous problems of interpretation and to much Commission hair splitting.

Inevitably candidates will during the primary solicit contributions designated for the general so that such funds may be used during the primary for disbursements that otherwise would have to be met with funds raised subject to the contribution limits applicable to the primary. Contributors who have given the maximum toward the primary will be solicited to contribute in advance for the general so that the campaign may front certain costs during the primary phase. In reality, such persons will be making contributions "with respect to" the primary election in excess of the applicable limit. 2 U.S.C. 441a(a)(1)(A),(2)(A).

I thought the Commission had learned the inadvisability of making contributions provisionally acceptable, but contingently retroactively illegal, in its handling of the "testing the waters" situation. Allowing the receipt and use of otherwise impermissible contributions for "testing the waters", subject to the condition that such funds must be returned later if the recipient became a candidate, clearly allowed circumvention of the Act's limits and prohibitions regarding contributions, and the Commission ultimately revised its regulations specifically to avoid this abuse. See 50 Fed. Reg. 9992 (Mar. 13, 1985). The majority's ruling In the matter
at hand raises similar concerns and permits campaigns to
treat certain contributions as initially legal that become
retroactively illegal at some later time. For, under the
opinion, general election contributions may be spent before
the primary, but must be refunded if the candidate does not
make it to the general.

Moreover, the position adopted by the majority will prove
very confusing in application. The line drawn would permit
use of general election funds "where it is necessary to make
advance payments or deposits to vendors for services that
will be rendered, or goods that will be provided, after [a
successful primary]." It would not permit the use of such
funds for "activities that influence the primary or nominating
process or expenditure allocations for goods or services to
be used in both the primary and general elections." Under
this rubric will a committee have to pay for the production
of a billboard with primary contributions (because it is a
good that will be used in the primary and general), but be
able to pay for rental of future billboard space in part with
general election contributions (because the use of space in
the general will be distinct from the use of space in the
primary)? If the same vendor provides the production and
rental of space, will a separate payment have to be made by
the campaign to represent the general election portion? If
not, will the campaign have to use a memo entry on its
Schedule B reporting form to clarify what portion of an itemiz­
able disbursement pertains to the general election? What if
the campaign is able to realize a discount for rental of
primary election billboard space through its combined purchase
of primary and general election usage? The simple rule hereto­
fere followed, that contributions designated for the general
may not be spent until after the primary, would avoid these
complexities. That rule does present difficulties because it
bars, for example, forward purchases of TV or radio time, but
it applies equally to all candidates.

Candidates faced with the opportunity to take in and
spend general election contributions during the primary will
be anxious to do so, even if they risk having to return such
funds. Yet defeated candidates, experience teaches, have
difficulty raising funds. By encouraging such creation of
potential debt, the Commission's action will generate more
compliance actions for the failure to refund contributions.
Candidates unable to raise funds no doubt will attempt to
obtain Commission approval of "debt settlements" regarding
these debts. See 11 C.F.R. 104.3(d), 104.11. Assuming that
the Commission will reject such attempts, it nonetheless will
have to monitor the continued reporting of campaign committees
that have not made the necessary refunds. Id. The Commission's
already scarce resources will have to meet these additions to
our workload.
In sum, from a legal, practical, and budgetary perspective, I see nothing to recommend the conclusion reached by the majority. As with our "testing the waters" experience, I suspect that one day the Commission will question the wisdom of its efforts to be accommodating.

6-30-86

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Date

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