

Advisory Opinion 1990-5

CONCURRING OPINION

Commissioner Thomas J. Josefiak

This request sought advice on whether a newsletter published by a Federal candidate and distributed to the public would be considered an "expenditure" under the Federal Election Campaign Act and would, therefore, need to be funded by her campaign committee within the limits and prohibitions of the Act. I am glad that a majority of the Commission was able to answer this difficult question and provide the requestor some guidance.

This matter aroused considerable controversy because of the free speech interests at stake in setting any conditions upon such traditionally revered 'pamphleteering' activity. I resent the suggestion, however, that the Commission failed to take these interests into account, or that this opinion represents a new or burdensome constraint upon Constitutionally protected rights of free speech. I am fully sensitive to the impact upon First Amendment rights of the Commission's interpretation and enforcement of the Federal Election Campaign Act.

By regulating contributions and expenditures 'for the purpose of influencing Federal elections,' however, the FECA's intended purpose and unmistakable effect is to impose some constraints upon speech. Virtually any asserting of the Act's jurisdiction treads upon rights of free speech and political expression. The Commission has always been faced with the task of interpreting the law in a reasonable manner, giving meaning and effect to the Act without encroaching upon Constitutional rights. We may not be comfortable with that charge in many circumstances, but we cannot avoid it.

The problem for the Commission is not whether the FECA regulates speech, but how and in what manner. It is easy to preach about the primacy of the First Amendment, but it is hard to identify where the general protection for free speech under the Constitution can and must begin to give way to the legitimate jurisdiction of the FECA. This request required drawing lines and deciding consequences of crossing those lines under the FECA. Here, we struck a reasonable balance between FECA enforcement interests in keeping funding of candidate advocacy and promotion within the prohibitions and limitations of the FECA and constitutionally protected free speech interests in issue or public policy advocacy.

Invoking the sanctity of the First Amendment cannot win every argument regarding application of the Act, or the law would be unenforceable. Similarly, simply citing the spirit or intent of the Act in the name of campaign finance 'reform' would often reach too broadly into Constitutionally protected activity outside the FECA's recognizable jurisdiction.

This request presented facts indicating a significant basis for asserting potential FECA jurisdiction: communications to the public initiated and financed by a candidate for Federal office. Political activity, particularly involving communications to the public, that is conducted by or with the consent or cooperation of a Federal candidate is more clearly within the purview of the Act -- more evidently 'for the purpose of influencing a Federal election' -- than activity conducted independently of any candidate. Activity sponsored by or coordinated with a candidate is not necessarily a campaign "expenditure" under the Act, or a "contribution" to the candidate, but the likelihood is greater and the justification for imposing FEC jurisdiction is stronger. See Advisory Opinion 1988-28. It depends, of course, upon the nature of the activity itself and the content of any communication, not just upon who is engaging in it.

To suggest the Commission went far afield here in attempting to establish guidelines for when communications sponsored by candidates would be viewed as furthering the candidate's campaign, or to complain that the Commission intruded into protected free speech clearly beyond its appropriate concern, is to grossly minimize the unavoidable nexus between candidate activity and the Act. Moreover, to argue that this newsletter activity by a candidate is not campaign activity and is outside FEC jurisdiction is to argue that funding for such activity may come from any source and in any amounts.

It is nice to take the 'high road' on Constitutional questions, but our oath of office requires that we enforce the Act as written. To adopt an absolute 'free speech' philosophy would emasculate the Act. Eventually, the Commission has to engage in the hard business of line-drawing. To do less is to shirk our duties, leaving this requestor without guidance at all and opening the door to circumvention of the law by others.

Commissioners must try to work out their differences of opinion when people come to us seeking advice on keeping their activity within the law. While I will not compromise principle to reach consensus, I believe questions such as this one must be capable of being answered by an affirmative majority vote of the Commission, or else this law does not have a chance of fair and reasonable enforcement. Participants in the political process deserve to be told the rules with which they must comply.

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1. In Buckley v. Valeo, 424 U.S. 1 (1976), the U.S. Supreme Court generally upheld limitations on contributions to candidates as constitutional, recognizing "a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." FEC v. National Conservative PAC, 470 U.S. 480, 491, 497 (1985).

I think it was far better to give the requestor in this matter an answer that staked out the widest possible agreement on what type of candidate-initiated communications to the public would not necessarily trigger FECA jurisdiction than to have given no answer and cast a chill over the whole enterprise. Contrary to those who read this opinion as a diminishing of rights, I see this opinion as an unusually strong reaffirmation of the Constitutional limits upon the jurisdiction of the Act.

This matter also illustrates how the Commission must not make bad law from an innocent setting. Rights of free speech, and the jurisdiction of the FECA, do not depend upon naivete or small purpose. I have strongly resisted the use of vague, subjective 'totality of the circumstances' arguments to impose FECA jurisdiction through intuitive suppositions as to the motive, intent or purpose of activity. Similarly, I resist efforts to paint the requestor's proposed activity and purpose here as sufficiently harmless to avoid the Act. This was a request for an advisory opinion regarding proposed activity, not an opportunity for the Commission to exercise prosecutorial discretion.

This opinion had to be written in anticipation of a future Federal candidate deliberately engaging in similar newsletter activity with the intention of indirectly benefitting his or her candidacy right up to the edge of the FECA's jurisdiction. We have tried to describe in this opinion the identifiable manifestations of stepping over the line that would trigger the Act's jurisdiction.

The Commission is inevitably called upon to make sense out of the Act within Constitutional limits. This question put the Commission squarely to the test. The requestor expressed an expectation of some likely constraints upon her newsletter activity during the course of her campaign for Congress, and simply asked for the rules to be spelled out. I believe the Commission gave her a sound and fair answer.

April 26, 1990



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Thomas J. Josefiak