FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

DISSENTING OPINION
OF COMMISSIONER JOAN D. AIKENS
ON
ADVISORY OPINION 1992-38

I objected to and voted against Advisory Opinion 1992-38 because I believe that the response approved by my colleagues is in direct opposition to the position maintained by the Commission since its inception and does damage to the public financing provisions of the Federal Election Campaign Act (FECA).

The statutory provision covering Public Financing for the General Election is as clear as any provision in the entire FECA.

In order for a publicly funded candidate to establish eligibility under Title 26 U.S.C. 9003(b)(2) a candidate must certify to the Commission, under penalty of perjury, that "no contributions to defray qualified campaign expenses have been or will be accepted...".

The General Election Legal and Accounting Compliance Fund (GELAC) is a creation of the Federal Election Commission through regulation, and has no statutory base. In 1976, the Carter/Mondale Campaign asked how to pay those expenses that were not chargeable to the expenditure limit. The Commission approved the creation of a fund to which only contributions that comply with the limitations and prohibitions of the statute could be accepted or transfers of excess funds from the primary committee could be made, and which could be used to pay the costs of complying with the Law.

The Regulations and the Compliance Manual have always been clear on the permissible uses of the GELAC: 1) to defray the cost of legal and accounting services provided solely to insure compliance, 2) to defray civil or criminal penalties, 3) to make repayments, 4) to defray the cost of soliciting contributions to the Compliance fund, and 5) to be used for a loan to the General Election Committee prior to the receipt of federal funds. In the case of a loan made prior to the receipt of federal funds, restoration must be made within 15 days after receipt of such funds. Further, any funds received or borrowed must be deposited in a separate account and used only for such expenses.

The final audit of the Carter/Mondale Committee in 1980 included a section "Apparent Prohibited Use of Compliance Funds". The General Counsel's memo to the Audit division, prior to Commission review, stated that: "The Regulations narrowly restrict the use of these private funds in order to maintain the integrity of the separate accounts." The recommendation went on to say: "Use of the Compliance Fund for general election payments during the expenditure report period for the Committee's convenience disregards the regulation which strictly limits loans from the Compliance Fund and undermines the intent of public financing. As it appears that the Committee has taken undue advantage of the Compliance Fund contributions and thus may have violated the Act and Regulations, we recommend that these matters be referred to the Office of General Counsel and incorporated into the existing Matter Under Review related to this Audit."1/

The Commission concurred with the General Counsel's recommendation and in November, 1982 found Probable Cause to Believe that the Carter/ Mondale Re-election Committee violated 11 C.F.R. 9003.3(a), 9003.5(a), and 9004.4(b). The conciliation agreement in MUR 1389 included specific language on this violation and a civil penalty.

A review of the records on MUR 1389 shows that the vote on this matter was unanimous. All of my colleagues agreed with the General Counsel's recommendation that this loan of private contributions to the General Election Account was in violation of the regulations pertaining to the Compliance Fund.

The Commission has modified the regulations in each cycle since 1980. However, we have never changed this position. We have neither sanctioned a commingling of Public and General Election Legal and Accounting Compliance Funds, nor permitted private contributions to be used to pay expenditures that are subject to the limit, - and I believe we should not.

1/ Memorandum from Charles N. Steele, General Counsel, to Robert J. Costa
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Even the new regulations promulgated for this cycle do not permit the use of the General Election Legal and Accounting Compliance Funds for this type of expenditure. They only allow the Committee to defray unreimbursed Secret Service travel costs. This new regulation was added to the revisions made in 1991 on a last minute proposal by Commissioner Thomas, based on comments from the Democratic National Committee. The DNC raised the issue of perceived inequities between the amount reimbursed by the Secret Service at first class air fare rates which the incumbent pays, and the charter costs that the non-incumbent pays, which are often considerably higher and which rates the Secret Service would not fully reimburse. That unreimbursed portion did, however, count against the expenditure limit.

The clear intention of this new section [C.F.R. 9003.3(a)(2)(H)] was to overcome any perception of inequity and to permit those expenditures which would not be reimbursed from counting against the expenditure limits. At no time was it suggested during the discussion that this exception would apply to funds which were to be reimbursed but had not yet been refunded by the Secret Service.

The response given in this Advisory Opinion is a new and very different position than the General Counsel and my colleagues have taken in the past. A position which I believe, as the General Counsel said in 1980, seriously undermines the intent of public financing.

If the cash flow problem is as serious as the Clinton/Gore Committee states, I would not want to sanction an action that could - even for a short period - put them over the expenditure limit or in some way lead to a violation.

This seems to me to be exactly the wrong message to send to this or any campaign - or to the public. We are supposed to be the guardians of the public funds. The Statute is crystal clear in this instance. The acceptance of public funds carries with it the pledge not to accept private contributions to be used for qualified campaign expenses that come under the limit.

I urged my colleagues not to approve the General Counsel's draft in this Advisory Opinion. There were several alternatives open to the committee - a bank loan or line of credit or prompt submission of travel invoices to the Secret Service. I believe the Commission should maintain our long held position that the General Election Legal and Accounting Compliance Fund is for a limited purpose and may not be commingled with public funds, and that private contributions may not be used to pay qualified campaign expenses to which the limits apply. For these reasons I strongly dissent from the approval of AO 1992-38.

Joan D. Aikens
Commissioner

November 17, 1992