FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**DISSENTING OPINION OF
COMMISSIONER TREVOR POTTER
TO ADVISORY OPINION 1993-21**

The request in this matter comes from the Ohio Republican Party ("the Party"). It asks the Commission to reconcile the requirements of the Ohio law creating the Ohio Political Party Fund ("the Ohio Fund") with allocation regulations issued by the Federal Election Commission. Those regulations detail approved payment methods for expenses of mixed Federal and non-Federal activities. I differ from the conclusions reached by my colleagues in this Advisory Opinion for the reasons outlined below.

The State of Ohio has created the Ohio Fund, through which an amount of general state revenue money (determined by the number of Ohio tax filers checking-off a $1 contribution) is distributed to Ohio political party executive committees and county executive committees. R.C. §3517.16. In return for this grant of taxpayer funds, Ohio requires that party committees receiving the funds maintain them "in an account separate from all other assets of the political party" and file statements of contributions and expenditures, indicating the amounts received and the purposes for which they are spent. The Ohio state auditor then audits the statements of each party's state committee and county committees to ascertain that the funds are expended only for those purposes provided for by Ohio law. R.C. §3517.17(A).

Federal Election Commission regulations now require state party committees which engage in "party-building" and "get out the vote" activities to pay for a portion of those activities with funds raised under Federal rules and restrictions. The regulations provide that committees with separate Federal and non-Federal accounts may pay the expenses of these mixed Federal and non-Federal activities in one of two ways. 11 CFR 106.5(g)(1). The committee can pay the entire amount from one of its regular Federal accounts and transfer funds from one of its non-Federal accounts to the Federal account solely to cover the non-federal share of the allocable expense. In the alternative, the committee can establish a separate allocation account into which funds from its Federal and non-Federal accounts will be deposited solely for the purpose of paying the allocable expenses of mixed Federal and non-Federal activity. 11 CFR 106.5(g)(1)(ii).

Since 1991, the Party has utilized the second alternative, an "allocation account." This allows the Party "to allocate administrative expenses associated with the lease and maintenance of the state headquarters office, staff salaries, office supplies, etc." between Federal and non-Federal sources. 11 CFR 106.5. To meet vendor expenses, funds were periodically transferred into this allocation account from a variety of accounts, including a "separate segregated account" composed of funds from the income tax check-off. As the result of a State audit of the Party's Income Tax Check-Off Account for the years 1990 and 1991, the auditor asserted that the Party had violated State law by transferring the income tax check-off funds to this allocation account. The Auditor objects that the transfer results in a mixing of the monies provided by the State of Ohio with other funds, contrary to the explicit provisions of the Ohio law. Further, the Auditor maintains that the expenditures from the allocation account may be made for purposes prohibited by State law, and are not reported in sufficient detail for the State of Ohio to perform an audit.

I believe that the State of Ohio has the right in these circumstances to subject the transfer of state taxpayer funds to the condition that they remain in a separate account, thereby enabling the State to audit the use of such funds. The State clearly has a legitimate interest in ensuring that its funds are used only for the limited purposes enumerated by State law. The use of the Commission-approved allocation account may frustrate these state goals. For instance, the Auditor of the State of Ohio notes the following in his December 8, 1993 Comment to the Commission:

> [I]n calendar year 1991 Income Tax Check-off funds were transferred from the allocation account to pay $52,384.87 for staff salaries. Some of those employees may have worked on candidate campaigns, an activity prohibited under Ohio law. See 12/8/93 Comment at 2.

Once Ohio taxpayer funds are transferred to a party committee, conditioned on the requirement of usage only for enumerated purposes and with appropriate oversight, the recipient committees should not be able to take the funds and then claim that Federal regulation pre-empts State law. Such an interpretation would enable committees to advantage themselves of the State funding plan, while avoiding conditions integral to that plan.

To provide for Federal pre-emption in these circumstances seems incorrect. The Party may transfer other funds under its control into the allocation account, thereby utilizing the payment mechanism provided for in our regulations while still meeting the conditions of Ohio law for the usage of State funds. Here, the majority of the Commission in effect allows state party committees to assume the powers of the federal government at will, by giving parties the discretion to invoke our regulations and pre-empt any state control which is stricter than federal law.[1]

In Common Cause v. F.E.C., 692 F.Supp. 1391 (D.D.C. 1987), the court specifically rejected the position taken by Common Cause that no allocation method was permissible under that Act, and that even solely state party election expenditures must come from funds not prohibited by the Federal Election Campaign Act of 1971, as amended ("FECA"). The court stated "[i]t is clear from the statute as a whole that the FECA regulates federal elections only. This limit on the FECA's reach underlies the entire act." Id. at 1395. The court was correct: the FECA and

---

1. Perhaps the reason my colleagues do not reach this same conclusion is that they presume that the monies provided by the State of Ohio are "Federal dollars," meaning money which may be used in connection with Federal elections. This is so because the source of the money, in a useful legal fiction, is considered to be comprised of contributions from individual Ohio taxpayers who check-off money to the fund. This is so despite the fact that the individual's tax liability does not increase as a result of the check-off, and the monies transferred to the Party come directly from the State's general accounts. However, the result of this legal theory is that the Party and the Commission consider these state monies to be raised under the Federal rules and restrictions, and thus usable by the Party to pay its Federal share of the allocation costs.

The Ohio Auditor, however, appears to assume that State taxpayer funds which may not be used to influence any election should be considered non-Federal monies:

> Since Ohio taxpayer dollars are not allowed to be used to influence federal elections, basic principles of federalism require the Commission to defer to state statutes limiting the use of these funds for permissible activities. December 8, 1993 Comment at 3.

basic principles of federalism require the Commission to defer to state regulation of purely State elections, including State funding of those State elections. I believe our allocation regulations fairly balanced this fundamental fact with the Commission's interest in Federal election financing by establishing certain minimums for federal funding of general state party activity in elections with both Federal and non-Federal candidates. The majority opinion here undoes that balance by again allowing state parties to seek refuge in our allocation regulations from State laws when (and only when) it is in the interests of state parties to do so. This approach is vulnerable to both statutory and policy challenge. See Aikens and Potter Dissent in AO 1993-17.

It also appears from the submissions in this matter that this dispute may encompass a state partisan dispute, which is certainly an area in which the Commission should not be entangled. The State Auditor has apparently referred the commingling allegation to the Ohio Elections Commission for investigation and possible prosecution, and the Party vigorously denies these allegations as a matter of State law. This Advisory Opinion will only serve to further muddy those already murky waters.

Thus, for the reasons stated above I do not agree with the majority opinion issued in Advisory Opinion 1993-21.

Trevor Potter (by PAB)
Trevor Potter

December 21, 1993