



FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1996-01

of

CHAIRMAN LEE ANN ELLIOTT

I largely agree with the majority opinion issued in this matter, but ultimately I could not vote for the draft presented by the Office of the General Counsel due to the unprecedented extension of Commission authority over the political activities of certain individuals as a result of the coordination discussion found on page seven (7) of the opinion. That coordination discussion begins correctly by warning the requestor about the potential impact of the Association of Trial Lawyers of America's ("ATLA's") internal communication program on subsequent ATLAPAC independent expenditures involving the same candidates. The independence of ATLAPAC expenditures is compromised if specific facts establish that ATLA's previous contacts served to pass relevant information regarding the candidate's plans, projects or needs between the candidate and ATLAPAC with the goal of making coordinated expenditures. Commission regulations at 11 CFR 109.1(b)(4)(i)(A) are quite clear that the independence of an expenditure is presumed to be overcome in such situations.

I also agree with the draft statement that "[c]oordination is also presumed where an expenditure is made by or through any person who is, or has been authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent." The Office of General Counsel correctly cites 11 CFR 109.1(b)(4)(i)(B) for this proposition.

I cannot make the next step taken by the draft which goes beyond the statute, regulations or prior Commission precedent to presume coordination in all instances involving an ATLA member, who occupies a significant position in a candidate's campaign, and is also either a member of ATLA's executive committee, an officer of ATLAPAC, or a person otherwise involved in the planning and execution of ATLA's or ATLAPAC's political programs. First, there is no clear definition of what constitutes "a significant position in a candidate's campaign." Inclusion of the parenthetical phrase, "as you describe above," does not sufficiently limit the broadness of this otherwise amorphous "significant position" standard. Limitations on individual political activity should be narrowly applied only to ATLA members with authority to decide ATLAPAC activities, and presumed to cause coordination because of their agency status with the committee as defined in 11 CFR 109.1(b)(4)(i)(B).

I am convinced that in some instances an individual can wear two hats. Furthermore, one individual's right to participate in political activity cannot automatically taint all organizations in which he is otherwise involved. I understand, and agree with, the view that it would be impossible to overcome the presumption of coordination should one individual serve as both a candidate's treasurer and a PAC treasurer making integral financial decisions for both, or if the same individual was a paid agent of both the PAC and candidate committee. The draft adopted by the majority is broader because it establishes an amorphous presumption based on any PAC member occupying "a significant position in a candidate's campaign." This standard does not consider the other side of the equation, namely the degree of that member's input upon ATLAPAC contributions. Thus, under the majority opinion a PAC could be tainted forever by any member holding a "significant position in a candidate's campaign," even if that member had no decisive authority over PAC expenditures. Furthermore, holding a "significant position in a candidate's campaign" is substantially different from the regulatory standard which would require that the member be aware of the candidate campaign's "plans, projects, or needs." See 11 CFR 109.1(b)(4)(i)(A).

While the draft notes that the separate internal governance of ATLAPAC and the ATLA Executive Committee may not foreclose the application of the presumption of coordination, I cannot impute one executive committee member's knowledge obtained by holding a "significant position" in a campaign to the entire executive committee, nonetheless to all of ATLA as well as ATLAPAC political programs. Such a large jump to establish coordination is not warranted when the result is the limitation of an individual's First Amendment rights.

4/18/96