



FEDERAL ELECTION COMMISSION
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**CONCURRING OPINION
OF
COMMISSIONER SCOTT E. THOMAS**

ADVISORY OPINION 1997-21

I voted to approve Advisory Opinion 1997-21 based on the factual record before the Commission. If that record is later found to be incomplete or inaccurate, of course, there would be grounds for the Commission to revisit this matter. As I understand the present factual record, the Firebaugh for Congress Committee reported, in disclosure reports filed with the Commission, the receipt of \$125,000 from Ms. Firebaugh as an "in-kind *contribution*" and not as a "loan." This representation by the Committee is significant. Under the statute, a campaign committee may not simply give campaign funds to a candidate for the candidate's personal use, see 2 U.S.C. §439a (personal use ban), but it may use excess campaign funds to repay to a candidate any *loan* which was used in connection with the candidate's campaign. 11 C.F.R. § 113.2(d). Accordingly, the Commission found in Advisory Opinion 1997-21 that the Firebaugh committee could use media refunds to repay \$7,723 given by the candidate to the Committee and reported to the Commission as a "loan," but the Committee could not repay the candidate for funds given by the candidate to the Committee which were reported to the Commission as an "in-kind *contribution*."

The fact that a candidate's committee has reported a receipt from the candidate as a contribution and not as a loan, however, is not necessarily dispositive. In the Commission's audit of Buchanan for President, Inc., for example, it initially appeared that the candidate in that matter had made a number of *contributions* to his committee. Indeed, the first candidate check to the Committee contained the notation "first *contribution*" and the Committee's disclosure reports described these receipts as "*contributions*" until October 1992, when the Committee's amendments to these reports characterized these receipts as "*loans*." Although there was no contemporaneous evidence in the record that these amounts were intended as loans, the Commission nevertheless accepted this retroactive classification when the candidate and campaign chair both presented affidavits explaining that the funds from the candidate were transferred as loans and were erroneously reported by the committee at the time as a candidate contribution.

The Advisory Opinion Request in this matter states that the candidate "advanced" \$125,000 of her personal funds to the Committee in order for the Committee to pay off a bank loan which the candidate had personally guaranteed. If the requestor could establish (as in the Buchanan audit) that these funds were actually a *loan* to the Committee and were erroneously reported to the Commission as an "in-kind *contribution*," there may well be a different result in this matter. The current record before the Commission, though, contains no such evidence. In view of the uncontradicted evidence that the \$125,000 received from the candidate was reported by the Committee as an "in-kind contribution" and not a loan, I have no choice but to support the Advisory Opinion's conclusion that the Committee may not use the media refunds to repay a portion of the \$125,000 received from the candidate.

10/2/97
Date



Scott E. Thomas
Commissioner