FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1981-3

of

COMMISSIONERS THOMAS E. HARRIS and ROBERT O. TIERNAN

We continue to dissent from our colleagues sanctioning of bookkeeping shell games whereby corporate and/or union money, banned from federal elections, may be used to support party political committees, on the fiction that these particular monies are employed for state elections or overhead costs, allocable to state elections. As the Supreme Court said in rejecting an analogous scheme, it "is of bookkeeping significance only rather than a matter of real substance." Retail, Clerks Local 1625 v. Schermerhorn, 373 U.S. 746, 753-754. Obviously using corporate or union contributions to pay for state political activities and overhead frees hard-to-get individual contributions for use in federal elections, and thereby subsidizes the political committee's federal election expenditures. Unions and corporations are thus permitted through a bookkeeping fiction to do precisely what the statute forbids, i.e. to make contributions to political party organizations in connection with federal elections.

The vice of this particular Commission ruling is exacerbated by the Commission's sanctioning of a related bookkeeping fantasy under which political committee costs not specifically in aid of particular candidates, such as overhead or get-out-the-vote expenditures, may be allocated between state and federal elections on the basis of the number of candidates supported by the committee for state office as compared with the number for federal office. AO 1978-102. Combining these two permissive interpretations permits corporations or unions to pay for 90 or perhaps even 95 percent of the total costs of a state party political committee. It is inconceivable that Congress intended such a result.

The lack of any legal justification for the Commission's ruling is highlighted by the differences between the way the Democratic Party of Wyoming states what it is doing, and the way the advisory opinion describes it. According to the party's submission, it is accepting paid corporate advertisements in its publication, which supports candidates for both federal and state office. Obviously such corporate payments cannot rationally be viewed as being used only to pay for that part of the publication which supports state candidates. The advisory opinion rules that everything is all right, however, so long as the portion of the publication's costs allocable to federal elections is paid out of the Party's

federal campaign committee account which does not contain corporate funds. However, that is not what is happening. The corporate payments for ads go into the account for The Spokesman, and support both state and federal electioneering. The publication is thus supported by commingled funds, some permissible for federal use and others permissible only for state use. Even according to the Commission majority's theory, these ad payments should go into a separate state political account, and that is what the Commission's regulations require. See 11 CFR 102.5. Then, according to the majority, an allocable part could be paid from the state account. But that is not what is being done, probably because Wyoming law forbids corporate, labor, and business contributions. (Presumably ads are not considered contributions, but we do not know that.)

There is thus a dilemma: The only way corporations could legally contribute to the costs of the publication under the Commission's very explicit regulation, even under the "allocation" fiction, does not appear to be permissible under Wyoming law. So the advisory opinion just ignores the fact that the corporate payments go into The Spokesman's commingled account.

One is reminded of the girl in "Oklahoma" who just couldn't say "no."