

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)	
)	
Opinion requested by:)	No. 77-032
Anthony L. Miller,)	Feb. 8, 1978
Chief Counsel for the)	
Secretary of State)	

BY THE COMMISSION: We have been asked the following questions by Anthony L. Miller, Chief Counsel for the Secretary of State:

(1) Prior to each statewide election, the Secretary of State is required to prepare a state ballot pamphlet. The ballot pamphlet includes arguments and rebuttals for and against state measures. These arguments and rebuttals are often prepared and submitted by legislators and other officials who are candidates in the same election at which the measures are submitted to the voters. The printed arguments and rebuttals traditionally have included the names of the persons submitting the arguments or rebuttals.

Does any provision of the Political Reform Act ("Act") preclude the Secretary of State from printing an argument or rebuttal in the state ballot pamphlet and including the name of the preparer, if the preparer is an elected state officer who has filed a declaration of candidacy for any office?

(2) The Secretary of State traditionally has included in the state ballot pamphlet certain materials that bear the name of the Secretary of State. For example:

(a) The back cover contains a copy of the signed certificate of correctness of the Secretary of State, pursuant to Government Code Section 88005(d) and Elections Code Section 3574(d).

(b) In addition, the Secretary of State has included a signed introductory letter to the voters inside the pamphlet.

(c) The cover typically indicates that the pamphlet was "compiled by _____, Secretary of State."

Does any provision of the Act preclude the Secretary of State from including the above mentioned items in the state ballot pamphlet?

CONCLUSION

(1) Even if the preparer is an elected state officer who has filed a declaration of candidacy, the Act does not prohibit the Secretary of State from printing an argument or rebuttal and including the name of the preparer in the state ballot pamphlet. Government Code Sections 88001, 89001.

(2) With respect to the inclusion of materials bearing the Secretary of State's name:

(a) The Secretary of State may inscribe her name on the certificate of correctness required by Government Code Section 88005(d) and Elections Code Section 3574(d).

(b) After she has filed a declaration of candidacy for any office, it would be an abuse of discretion for the Secretary of State to include a signed letter to the voters in the state ballot pamphlet.

(c) A majority of the Commission was unable to reach a decision and therefore does not give advice with respect to the inclusion of the Secretary of State's name on the cover of the ballot pamphlet after she has filed a declaration of candidacy.

ANALYSIS

The Act, Government Code Sections 81000, et seq.,^{1/} was enacted, in part, so that:

The state ballot pamphlet [would] be converted into a useful document so that voters will not be entirely dependent on paid advertising for information regarding state measure.

Section 81002(e)

^{1/} All statutory references are to the Government Code unless otherwise noted.

To implement this purpose, Sections 88000 through 88007 set forth certain requirements for the format and content of the ballot pamphlet.

(1) The Secretary of State's first question asks whether any provision of the Act precludes the Secretary of State from including an argument and the name of the preparer in the ballot pamphlet if the preparer is an elected state officer who has filed a declaration of candidacy for any office. Section 88001(c) states that the ballot pamphlet shall contain a "copy of the arguments and rebuttals for and against each state measure." The Elections Code sets forth procedures for the preparation of arguments concerning measures that are submitted to the voters by the Legislature. The supporting argument is drafted by the author of the measure and two persons appointed by the author. Elections Code Section 3526. The presiding officer of each house chooses a member who voted against the bill to prepare an opposing argument. Elections Code Section 3527. In addition, elected officers may be chosen to prepare arguments in support of or opposition to an initiative or referendum. Elections Code Section 3565. These statutory provisions contemplate that arguments and rebuttals for measures will be prepared and signed by members of the Legislature and other elected officials. We find nothing in the Political Reform Act which alters this established practice.

Thus, we conclude that arguments and rebuttals contained in the ballot pamphlet may be prepared and signed by elected state officers who have filed declarations of candidacy. Although Section 89001 prohibits publicly financed legislative newsletters or other mass mailings sent "by or on behalf of" any elected state officer who has filed a declaration of candidacy for any office, that section is not applicable to the instant situation. The ballot pamphlet is not sent "by" any of the officials preparing arguments or rebuttals nor could it be said that the pamphlet is sent "on behalf of" those officials preparing arguments or rebuttals. Moreover, the ballot pamphlet is required to be sent by statute and is consequently not a "mass mailing" within the meaning of Section 89001 and 2 Cal. Adm. Code Section 18901(b)(6).

(2) The Secretary of State's second question asked whether she is precluded from including in the ballot pamphlet certain materials that bear her name. Preparation of the ballot pamphlet is one of the responsibilities assumed by the person who serves as Secretary of State. Section 88000.

(a) Sections 88000 through 88007 make no specific provision for materials bearing the Secretary of State's name, with the exception of Section 88005(d) which requires the pamphlet to include "a certificate of correctness by the Secretary of State." We think that Section 88005(d) contemplates that the Secretary of State may attest to the accuracy of the pamphlet by signing the certificate of correctness.

(b) With respect to the second example provided by Mr. Miller, we do not believe Sections 88000 through 88007 permit the Secretary of State to include a signed letter to the voters in the pamphlet when she has filed a declaration of candidacy for any office.

(c) We do not give advice in response to Mr. Miller's third question, concerning the Secretary of State's name on the cover of the ballot pamphlet, because a majority of the Commission was unable to reach agreement with respect to this question.

COMMISSIONERS McANDREWS and REMCHO concurring in Parts (1), (2)(a) and (2)(b) and urging that the Secretary of State be prohibited from including her name elsewhere in the pamphlet in response to Part (2)(c):

The contents of the ballot pamphlet are specified by Sections 88000 through 88007. Of those sections, only Section 88001(e) allows the Secretary of State any discretion to determine the contents of the ballot pamphlet.^{2/}

Section 88001(e) does give the Secretary of State broad discretion to include materials which she determines will make the ballot pamphlet easier to understand or more useful to the average voter. However, that grant of discretion must be read in light of Section 81002(f) which states that one of the Act's purposes is to abolish "[l]aws and practices unfairly favoring incumbents ... in order that elections may be conducted more fairly."

^{2/} Section 88001(e) states that the pamphlet shall contain:

Tables of contents, indexes, art work, graphics and other materials which the Secretary of State determines will make the ballot pamphlet easier to understand or more useful for the average voter.

When the Secretary of State is a candidate for election, the format and contents of the ballot pamphlet may be manipulated to the Secretary of State's own political advantage. For example, the inclusion of the Secretary of State's name on the cover of the pamphlet or at the bottom of a letter to the voters increases the candidate's name recognition among the voters. When the Secretary of State is a candidate, we think the importance of reducing the advantages of incumbency outweighs the ways in which the personal references might arguably make the ballot pamphlet easier to understand or more useful to the average voter. Consequently, it would be an abuse of discretion for the Secretary of State to include her name, other than on the certificate of correctness, when she is a candidate.

COMMISSIONER QUINN, concurring in Parts (1), (2)(a) and (2)(b) of the opinion and urging that the Secretary of State be permitted to include her name elsewhere in the pamphlet in response to Part (2)(c):

Sections 88000 through 88007 specify the contents of the ballot pamphlet. Of those sections, only Section 88001(e) allows the Secretary of State any discretion to determine the contents of the ballot pamphlet. That section states that the pamphlet shall contain:

Tables of contents, indexes, art work, graphics and other materials which the Secretary of State determines will make the ballot pamphlet easier to understand or more useful for the average voter.

Section 88001(e) gives the Secretary of State broad discretion to include in the ballot pamphlet materials that she determines will make the ballot pamphlet "easier to understand or more useful to the average voter." This is an area of authority specifically granted by the Act to an elected state officer into which we should not intrude without good reason. It is clear that the Secretary of State believes that inscribing her name on the front cover of the pamphlet is not an abuse of that discretion.^{3/} It is common

^{3/} Letter from Anthony L. Miller, Chief Counsel to Secretary of State March Fong Eu, to Natalie E. West, January 11, 1978.

in state government for elected state officers to place their names on official documents, as much as anything to define for the reader the source of the material. Historically, the Secretary of State has placed his or her name on the front of the pamphlet. Were the Act intended to prohibit this, it is not unreasonable to assume that a specific prohibition would be found in Sections 88000, et seq. None is found.

We hold that state officers may sign the ballot arguments found within the pamphlet, although Elections Code Section 3565 merely contemplates that authors of the ballot arguments will sign those arguments, notwithstanding the fact they may be candidates for elective office. We may assume that Government Code Sections 88000, et seq. likewise contemplate that the Secretary of State will include her name on the pamphlet, although her name is not specifically provided for. I do not believe that the inclusion of the Secretary of State's name on the cover of the ballot pamphlet constitutes an abuse of the discretion granted by Section 88001(e).

However, in my view a signed letter to the voters is distinguishable from other materials contained in the pamphlet. For one thing, a signed letter is not required by statute, as are other elements of the ballot pamphlet. This is not to say that the information included in the signed letter may not appear in the pamphlet, as long as it is informative in nature and serves the general purpose of the pamphlet as enunciated in Sections 88000, et seq.

The letter is sent by an elected state officer. I believe the letter may be severed from the rest of the pamphlet and be considered a mass mailing as defined in Section 82041.5. Thus, the provisions of Section 89001 may be applied to the signed letter; and the mass mailing exclusions of 2 Cal. Adm. Code Section 18901(b)(1-6), (c)(1-3).

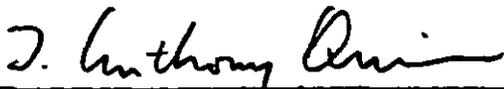
The signed letter does not enjoy the historical commonality of the Secretary of State's name on the pamphlet cover. Were it contemplated as among the discretionary items encompassed by Section 88001(e), the letter would have been referred to elsewhere in the ballot pamphlet section of the Act. This silence contrasts with the express provisions of Section 89001. After the Secretary of State has filed a declaration of candidacy for any office, Section 89001 prohibits the inclusion of a signed letter in the ballot pamphlet.

COMMISSIONER LAPAN, concurring in Parts (1), (2) and (2)(a), dissenting in Part 2(b) and joining with Commissioner Quinn in Part 2(c) of the opinion:

I believe that materials printed in the ballot pamphlet become part of the pamphlet and that the entire pamphlet is not a mass mailing for the reasons stated in the majority opinion. Consequently, I do not join in Commissioner Quinn's conclusion that a signed letter to the voters is severable from the rest of the ballot pamphlet and is a mass mailing after the Secretary of State has filed a declaration of candidacy for any office.

In my view, the Secretary of State's discretion to include signed materials in the ballot pamphlet includes the letter to the voters as well as her name on the cover. Although reasonable minds might differ as to the efficacy of the signed materials, I do not believe that their inclusion would constitute an abuse of the discretion granted by Section 88001(e). Moreover, I find no other provision in the Act to prohibit the inclusion of the materials. Therefore, I conclude that the Secretary of State may inscribe her name on the front cover and include the signed letter to voters as well as other materials that are described elsewhere in this opinion.

Approved by the Commission on February 8, 1978.
Concurring in Parts (1), (2)(a) and (2)(b): McAndrews, Quinn and Remcho. Commissioner Lapan concurred in Parts (1) and (2)(a) but dissented in Part (2)(b). Commissioner Lowenstein abstained.



T. Anthony Quinn
For the Commission