



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 6, 1987

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1987-7

Frank M. Northam
Webster, Chamberlain, Bean & McKeivitt
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Dear Mr. Northam:

This responds to your letters of January 22 and February 6, 1987, requesting an advisory opinion on behalf of the United States Defense Committee ("USDC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to those activities proposed in Advisory Opinion Request 1983-43, as supplemented by the Stipulation and Exhibits filed in United States Defense Committee v. Federal Election Commission, Civ. Action No. 84-CV-450 (N.D.N.Y.).

The above-referenced documents indicate that USDC is a non-profit, non-stock membership corporation which accepts funding from other corporations and is exempt from Federal income taxation under §501(c)(4) of the Internal Revenue Code. You state that USDC is not associated with any political party, committee, or candidate for elective office. Further, your Articles of Incorporation state that USDC's purpose is to help make the public aware of the "defense posture" of the nation as well as to educate the public on defense and national security issues. You also state that USDC has engaged and continues to engage in legislative activity to promote a strong national defense and a strong foreign policy.

The materials you have submitted for consideration indicate that USDC will collect information as regards the positions held on defense and national security issues by candidates for Federal office. It will develop this information from voting records of incumbent Members of Congress, from public statements of Federal candidates, and from responses to USDC questionnaires which USDC intends to send to all candidates for Federal office. The questionnaires, which will contain advocacy-type questions, will seek yes or no, or no response, answers to questions concerning the candidate's positions on issues of interest to USDC. You say that the purpose of the

questionnaires is to ascertain the candidate's position on these defense related issues before the election so that they can be held accountable for these positions after the election. To encourage candidates to respond, USDC will inform members of the public believed to agree with its positions about the questionnaires, and will encourage them to urge the candidates to respond or conform to USDC's views.

You state that USDC will compile and publish the responses (or lack thereof) to its questionnaires, and that publication will take the form of print media advertising, press releases, pamphlets and fliers, as well as mailings to the general public. Dissemination of the candidates' responses will take place some time prior to the primary or general election in which the candidates surveyed are running. This publication may contain the candidate's party affiliation and may indicate the percentage, number of times, or specific respects in which a candidate's responses comport with USDC's views. You indicate that you may run newspaper advertisements and other print media focusing on the responses of a particular candidate which urge the public to contact the candidate so that he or she will publicly take a position on the issues. You do not include an example of this type of advertising either in your prior requests or as an exhibit to the pending litigation.¹ You state that your intent as to all of these communications is to avoid use of any message expressly advocating the election or defeat of any candidate, pursuant to Buckley v. Valeo, 424 U.S. 1 (1976).

USDC also intends to disseminate to the public information concerning the voting records of Members of Congress on selected legislative proposals of interest to USDC, including an evaluation of those votes. You state that this information will be distributed periodically and not necessarily at or around the dates for election. Again, you say that USDC may characterize certain votes or voting records as being in accord with or against the position of USDC, and that the incumbent's party affiliation may be given for identification purposes. As with publication of the candidates' responses to the questionnaire, you state that your intent is that these voting records will not expressly advocate the election or defeat of any candidate.

Finally, these communications will be financed from USDC's general treasury, which includes both voluntary dues from members and contributions, and also contains corporate monies. In light of these facts, you ask whether the Act and Commission regulations prohibit expenditures from USDC's general treasury for the proposed communications.

The Act prohibits corporations from making expenditures in connection with a Federal election. 2 U.S.C. 441b. You have asked the Commission to consider the application of this prohibition to USDC's communications in light of the Supreme Court's decision in Federal Election Commission v. Massachusetts Citizens for Life, Inc., ("MCFL") 107 S. Ct. 616 (1986). The Court's opinion contains its most recent analysis with respect to the scope of 2 U.S.C. 441b. In MCFL, the Court carved out a limited exception to section 441b's application to "any corporation whatever" concluding that MCFL is not bound by section "441b's restriction on independent spending." The Court qualified its exemption for MCFL by setting out "three features essential to" its holding. One feature was the fact that MCFL's policy is not to accept contributions from business corporations or labor unions.

You have stated, however, that your membership does include corporations and that you accept corporate contributions as permitted by your bylaws. Paragraph 9 of Stipulation and Exhibit Eight of litigation file (USDC answer to Commission interrogatories dated May 23, 1985). You have not indicated that your acceptance of corporate contributions (or payments) to USDC excludes business corporations; therefore, the Commission assumes that USDC's treasury includes monies from business corporations. As a result, USDC clearly fails to satisfy the MCFL standard for exemption from the expenditure prohibition of section 441b and is still subject to that provision.

Nonetheless, 11 CFR 114.4(b)(4) and (b)(5) permit the distribution of voting records and voter guides in certain circumstances. This opinion will examine whether the specific materials you have presented for review meet the criteria prescribed in Commission regulations which would permit USDC, a corporation, to make expenditures for such activities.

Publication of Incumbents' Voting Records

The Commission considered a proposed opinion with respect to USDC publication of information concerning the voting records of Members of Congress on selected legislative measures. The Commission did not, however, approve an advisory opinion on these materials by the required affirmative vote of four members. 2 U.S.C. 437c(c).

Survey of Candidate Issue Positions

Commission regulations permit a corporation to prepare, and distribute to the general public, nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. 11 CFR 114.4(b)(5)(i). The regulations set out several factors that the Commission may consider in determining if a voter guide is nonpartisan. See 11 CFR 114.4(b)(5)(i)(A) to (F). The regulations, however, also provide that a publication describing candidates and their positions on campaign issues need not comply with these guidelines if the materials: (1) are "obtained from a nonprofit organization which is exempt from Federal taxation under 26 U.S.C. 501(c)(3) or (4) and which does not support, endorse or oppose candidates or political parties"; and (2) if the publication does "not favor one candidate or political party over another." 11 CFR 114.4(b)(5)(ii). As stated in Advisory Opinion 1984-14, USDC comes within 11 CFR 114.4(b)(5)(ii) and may distribute candidate survey materials that do not comply with the factors enumerated in 114.4(b)(5)(i), given your representation that USDC is a nonprofit, tax exempt organization which does not support, endorse or oppose candidates or parties. See also Advisory Opinion 1984-17.

The Commission concludes herein that certain specified materials you have submitted in the past Advisory Opinion Requests, taken together with the facts as developed in the ongoing litigation, comply with the requirements set forth at 11 CFR 114.4(b)(5)(ii). Other materials do not comply. Accordingly, USDC expenditures for these communications are prohibited by 2 U.S.C. 441b. If USDC deletes from the materials reviewed here those items not permitted under Commission regulations, its expenditures for the remaining materials would not be prohibited by 2 U.S.C. 441b.

The candidate survey materials included in your request contain a packet of various letters to be sent to Federal candidates and the general public both before and after the initial results of the questionnaire have been obtained; the materials also include a draft roster of survey results. The materials sent prior to the compilation of the survey results restate the questions asked each candidate in all congressional districts of a particular state, as well as report their responses or non-responses to the questions. You have specifically stated that only the candidates' yes or no, or no response, answers will be reported. In addition, the letters you send to both the candidates and general public prior to the compilation of these records have the sole purpose of encouraging candidates to respond to the questionnaire so that USDC can publish the results.

Given that the purpose of these specific communications is to influence candidates to agree with USDC's positions on the issues it selects, and to enlist the assistance of the public in this endeavor, the Commission believes that these specific materials, including the actual roster of results, as presented, reflect primarily a "grass roots" lobbying or issue advocacy effort.²

USDC has also included two letters in its packet of materials which it intends to send to the general public after it has compiled the initial results of the candidate questionnaire.

Both of these letters (Items VII and IX of Exh. 1) are sent to members of the general public, and later to members of a specific congressional district less than four weeks before the state primary election. The first of these letters characterizes the candidate's responses as right or wrong answers and suggests that the recipient of the letter contact a candidate whose answers differ from USDC's position so as to persuade the candidate to change his or her mind before the election. The letter also continues its attempt to have the public encourage those people who have not responded to do so, and asks the public to thank those who agree with USDC's position.

The follow up letter is even more candidate and election specific since time is clearly identified as a factor due to the proximity to the election. Moreover, instead of allowing the recipient of the letter to ascertain who gave right and wrong answers, this second letter focuses on the candidates in a specific congressional district and is targeted at the constituents of that district. Indeed, while the incumbent (who is also a candidate) has not responded to the questionnaire, you discuss his voting record and label him unfavorably to USDC supporters. You now want the recipient to contact this incumbent as well as nonresponsive candidates so as to persuade the candidates to show that they represent their constituents. You also advise the recipient that an officeholder is "easier to convince...when he's looking for votes than...after he's safely in office."

As a result of the context and content of these letters given that a compilation of results was contemporaneously issued, as well as their proximity to the election, they no longer represent primarily "grass roots" lobbying or issue advocacy. Rather, your prior issue advocacy approach is now overshadowed by the election messages within these letters and their advocacy concerning specific candidates in the imminent election. These letters have the effect of converting otherwise nonpartisan materials into materials that do favor one candidate or political party over another. These materials are not exempt under 11 CFR 114.4(b)(5) and therefore are prohibited under 2 U.S.C. 441b.

To the extent that Advisory Opinions 1984-14 and 1983-43 are inconsistent with this opinion they are hereby superseded.

The Commission does not purport to express any opinion with respect to the USDC's qualifications for tax-exempt status under 26 U.S.C. 501(c)(4) or any other tax ramifications, since such issues are outside its jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Scott E. Thomas
Chairman for the Federal Election Commission

Enclosures (AO 1984-17)

P.S. Commissioner Elliott voted against approval of this opinion and will file a dissenting opinion at a later date.

1/ This opinion does not reach any issues concerning application of the Act or regulations as to such advertising activity because copies of such proposed newspaper or other print media advertisements were not included in the USDC materials, and because no publication schedule or other specific factual description of this activity was provided. See 2 U.S.C. 437f(a)(1), 11 CFR 112.1(b), (c).

2/ The Commission reserves any questions as to whether your communications would remain lobbying activities if there is a change in language or other circumstances. See 2 U.S.C. 437f(c), 11 CFR 112.5.