



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 10, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-23

Thomas N. Edmonds, President
Edmonds Powell Media
311 Massachusetts Ave., N.E.
Washington, D.C. 20002

Dear Mr. Edmonds:

This responds to your letters dated June 10 and June 1, 1992, as supplemented by your letter dated July 15, 1992, requesting an advisory opinion on behalf of the National Rifle Association - Political Victory Fund ("the NRA-PVF") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations to the publication and payment for advertisements addressing the records of particular Federal candidates.

The NRA-PVF is the separate segregated fund of an incorporated membership organization, the National Rifle Association. Your firm, Edmonds Powell Media, produced a series of radio and newspaper advertisements for the NRA-PVF, as part of an effort in the state of Arkansas to satirize the record of Congressman Beryl Anthony of that state. Each of the radio ads began with and each of the newspaper ads ended with the words, "Paid for by the NRA Political Victory Fund. Not authorized by any candidate or any candidate's committee." You have enclosed transcripts and a tape of the radio ads and copies of the newspaper ads as part of your request. The NRA would like to run similar ads in the future, paid for from NRA treasury funds instead of by NRA-PVF. Your request asks the Commission to view these ads as prototypes for others that will feature different 1992 Federal candidates and to issue an opinion whether payment by the NRA from its treasury funds for such ads would be permissible.

The Act and Commission regulations prohibit a corporation from making a contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). Courts have held in general that a corporate expenditure, not coordinated with a candidate or political organization, is prohibited by section 441b(a) if the message expressly advocates the election or

defeat of a clearly identified candidate. See Federal Election Commission v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238, 249 (1986). See also Faucher v. Federal Election Commission, 928 F.2d 468, 470 (1st Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 79 (1991).

If ads similar to the ones submitted were prepared and financed by the NRA, an incorporated membership association, rather than by NRA-PVF, a political action committee, the permissibility of such ads would depend upon whether they expressly advocate the election or defeat of a clearly identified candidate.^{1/} The ads satirizing Mr. Anthony's record appeared during May 1992, at the time of his campaign for re-election to the House of Representatives. The primary election was held on May 26, 1992, and Mr. Anthony was forced into a June 9 run-off election in which he was defeated.

The ads may be described as follows:

(1) A radio ad depicts Congressman Anthony thanking cheering crowds for re-electing him and then expressing a desire to an aide to "get out of here and back home to Washington D.C." The ad depicts Ricardo Montalban welcoming Mr. Anthony to Washington, known as "Fantasyland," and asking what he can do for the Congressman. At that point, Mr. Anthony asks for a vote to be scheduled at 1 a.m. on a new Congressional pay raise, asks for a junket to a sunny beach, and asks for more checks, stating, "Having enough checks is even more important than having enough money, if you know what I mean." The ad concludes with Anthony remarking on "the good life," and how he "owe[d] it all to the people of...," and then needing to be prompted as to the identity of his state.

(2) Another radio ad depicts Dorothy and her dog from "The Wizard of Oz" as having been carried by a cyclone from Arkansas to Washington, D.C., whereupon she meets her Congressman, Mr. Anthony. She asks Mr. Anthony for help in returning to Arkansas. Mr. Anthony assures her that the Pentagon could pick her up in a jet and take her anywhere she wanted to go, just as they had taken him to various named countries at taxpayers' expense. When Dorothy remarks that she is not a member of Congress, he suggests that she ask a lobbyist to fly her, just as lobbyists had flown him to various named locations. When Dorothy remarks that she doesn't vote on legislation affecting these lobbyists, he states that that was a good point and asks, "Why should they scratch your back when you can't scratch theirs?" When Dorothy remarks despairingly that she and her dog "will figure something out," Mr. Anthony replies, "Alright then. But when you get home, don't forget to tell your folks not to forget me." In reply, Dorothy angrily remarks, "I'm sure they won't, Congressman," and her dog growls.

(3) The third radio ad depicts a "Jeopardy" style quiz show in which the correct answer to each question asked during the ad is "Who is Congressman Beryl Anthony?" The categories used are "Exotic Locations," "Outlandish Pay Raises," and "Out of Touch." The "questions" used for each category are, respectively: (a) "He's spent over \$35,000 of the taxpayers' money to travel to Switzerland, Thailand, Hong Kong, Australia and other exotic locations." (b) "He's voted to give himself a pay raise five times and now earns over \$129,000 per year paid for by the taxpayers." (c) "He voted for a New York City style gun ban even though he claims to be a representative from Arkansas." After each correct answer is given, "Groans and Moans" are heard from the audience.

(4) The fourth ad, which appears in comic strip format, is entitled "A typical day in the life of our public servant, Congressman Beryl Anthony." This title appears in the first of six frames. On top of the strip in bold letters is the designation "Doomsday 5-26-92." The strip depicts Mr. Anthony telling two staff members to put aside their work and to "[c]all up one of those nice lobbyists and get [Mr. Anthony] some more free tickets to some place warm... with pink sand." He states that he needs another free "fact finding" trip to study global warming. He then instructs his aides to "get [him] the campaign checkbook so [he] can pay for [his] hunting club dues, buy a new Japanese TV set and do a little 'entertaining'," calling them "legitimate campaign expenses." Finally, he asks his aides to cancel his evening appointment with constituents and to tell them he is "busy." He says that "one of those nice lobbyists" has offered him \$2,000 to speak at a dinner and this was his priority. Mr. Anthony then looks in the mirror and asks his aides to leave. One aide remarks to the other, "He's practicing looking humble ... He's got to go back to Arkansas this weekend and face the voters." The other aide is shown thinking, "If they only knew!"

(5) The fifth ad, also in comic strip format, is entitled "Congressman Anthony meets the press." It also displays at the top a designation in bold letters, "Doomsday 5-26-92." The frames show Mr. Anthony making statements to the press in 1979, 1982, 1987, 1989, and 1991 relating to Congressional pay raises and his financial situation. In the first four successive frames, Mr. Anthony is depicted as referring to (a) his low pension; (b) his comparatively low honoraria total resulting in his lack of remorse about voting for a pay raise; (c) his vote to increase his pay because he couldn't make a living on what he was paid and he just wanted to "keep pace"; and (d) the idea that a pay raise would improve governmental ethics because "[i]n exchange for more money from the taxpayers, we members of Congress agree not to take direct cash payments from lobbyists," and "[i]f you want honest government, you've got to pay for it." In the fifth frame, Mr. Anthony is depicted as asking, in 1991, why there was "a fuss over a measly 29.5% pay raise." He acknowledges various perquisites but refers to the price of "pick[ing] up the tab for dinner in this town" as a basis for needing the new salary. The final frame depicts a reporter's question and Mr. Anthony's response. The reporter asks, "Do you have any idea why the people back home in Arkansas are so unhappy with you, Congressman?" Mr. Anthony replies, "No, I don't. It seems to me their lives are a lot better than they were 14 years ago ... Mine sure is."

(6) The sixth ad, also a comic strip, displays the same "Doomsday 5-26-92" notation and is entitled, "Congressman Beryl Anthony establishing campaign priorities." The strip depicts Mr. Anthony meeting with an aide, demanding that there be no more interruptions, and being interrupted by another staff aide informing him of a phone call. The latter aide informs Mr. Anthony that a reporter was asking about 109 bounced checks. Mr. Anthony berates the aide for asking how to respond and instructs him to find out how other members are responding. The staff member in the meeting relays a phone message from another member asking Mr. Anthony if he wished to travel to London for the weekend. Mr. Anthony declines, explaining that he was just there last September and that it is presently too cold to play golf there. Mr. Anthony then reverts back to the subject matter of his meeting. He refers to items paid for by his campaign such as club dues, entertainment, and a Cadillac for his parents, and then asks why the campaign can't pay for suits since he wore them during campaign ads.

The express advocacy standard was created by the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976) to avoid problems of overbreadth in regulating speech, i.e., the application of reporting requirements to communications as to public issues that also happened to be campaign issues. MCFL, 479 U.S. at 248; Buckley, 424 U.S. at 80. The Court in Buckley explained the express advocacy standard as limiting the reporting provision to "spending that is unambiguously related to the campaign of a particular federal candidate." Id. at 80. The rationale for the express advocacy standard was that

the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

MCFL, 479 U.S. at 249, quoting Buckley, 424 U.S. at 42.

In Buckley, the Court indicated that express advocacy would contain express words of advocacy of election or defeat such as "vote for," "support," "reject," or "Smith for Congress." Id. at 44, n. 52. Subsequent court decisions have clarified the scope of express advocacy. The Court in MCFL indicated that a communication need not include the catch phrases listed in Buckley in order to be express advocacy. The fact that the message at issue was "marginally less direct" than such phrases did not change the fact that the "essential nature" of the communication went "beyond issue discussion to express electoral advocacy." 479 U.S. at 249.

Similarly, in Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987), the court stated that the list in Buckley "does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." Id. at 863. To limit the concept of express advocacy to certain key phrases would preserve First Amendment rights "only at the expense of eviscerating" the Act and would permit independent campaign spenders to "remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate." Id. at 862-863. Instead, to be express advocacy under the Act, speech "must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Id. at 864.

The Commission concludes that each of the ads are such an exhortation and not simply issue discussion. See MCFL, at 249. Congressional pay raises and perquisites, Congressional travel, the House bank overdraft scandal, the influence of lobbyists, and the use of campaign funds are all public issues. However, the content and timing of these advertisements lead us to determine that they expressly advocate the election or defeat of a Federal candidate. All of the sample advertisements were run in close proximity to Congressman Anthony's election. The written advertisements provided to the Commission make specific reference to the date of the election (which is referred to as "doomsday"), and the requester states that the radio advertisements would be "similar" to the Anthony radio commercials. These ads encourage no action in

connection with the issues mentioned (such as urging the Congressman to vote for or against specific bills).^{2/}

Because each of these ads constitutes express advocacy of the defeat of a clearly identified candidate, the Commission concludes that similar ads may not be run with respect to other candidates in similar circumstances and funded by the NRA from any general treasury account. Such funding would constitute a corporate expenditure prohibited by 2 U.S.C. 441b(a).

Finally, the Commission notes that your letter of June 1 asks that you be informed "how close [you] are to the mark" and what specific rules must be followed in order to comply with the Act. To the extent that your request asks for specific alternative language for the ads, the Commission may not provide such advice since it would be based on purely hypothetical circumstances. The advisory opinion procedure may be used to present other specific ad proposals that the NRA may wish to develop and present to the Commission. See 11 CFR 112.1(b). The Commission notes that one of its current rulemaking projects pertains to express advocacy and related issues. You may participate in this rulemaking by submitting written comments or oral testimony at a future date. Commission proposals were published in the Federal Register on July 29, 1992, at pages 33548-33568.

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)

Joan D. Aikens
Chairman for the Federal Election Commission

ENDNOTES:

1/ Certain corporations are permitted to make such independent expenditures. These are nonprofit corporations that are: (1) formed for the purpose of promoting political ideas and not engaging in business activities; (2) having no shareholders or other persons affiliated so as to have a claim on its assets or earnings (thus no economic disincentive for disassociating); and (3) not being established by a labor union or business corporation and having a policy of not accepting contributions from such entities. MCFL, 479 U.S. at 263. The NRA has been found not to fit into this small group. See Federal Election Commission v. NRA Political Victory Fund, 778 F.Supp. 62, 64 (D.D.C. 1991), appeal pending, 91-5360 (D.C. Cir.).

2/ In reviewing the language of these ads for express advocacy purposes, the Commission is not reviewing the disclaimers at the beginning or the end stating that they were paid for by the NRA-PVF and not authorized by any candidate or candidate's committee. The purpose of your request is such that, if the ads are determined not to constitute express advocacy, similar ads paid for by the NRA would need no disclaimer. See 2 U.S.C. 441d(a).