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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DISSENTING OPINION

OF

COMMISSIONER LEE ANN ELLIOTT

IN ADVISORY OPINION 1987-7

I dissent in part from the Commission's application of the Act and regulations to the activities proposed in Advisory Opinion Request 1987-7.

In AO 1987-7, the United States Defense Committee ("USDC") sought application of the Act to their compilation and publication of Congressional candidates' opinions and voting records on matters of foreign policy and defense. To promote candidate responsiveness, USDC will encourage members of the public to urge the candidates to respond and thank those Congressmen who have answered in accordance with USDC's views. It is the stated intent of USDC to avoid any message expressly advocating the election or defeat of any clearly identified candidate.

In FEC v. Massachusetts Citizens for Life, Inc., ("MCFL") 107 S. Ct. 616 (1986), the Supreme Court created an exception from the prohibitions of 2 U.S.C. §441b for corporations with certain essential characteristics. More importantly, the Court also defined the scope of §441b by unanimously stating "we therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibitions of §441b. 107 S. Ct. at 623. These two holdings by the Court in MCFL -- first, the applicability of §441b or to whom it does not apply and, second, the scope of §441b or what it prohibits -- clarify the Supreme Court's interpretation of §441b and continue its reaffirmation of the principles in its Buckley decision. This is just the type of assistance I needed in interpreting and applying these difficult sections of our Act.*/

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*/Both parts of the MCFL decision are clearly applicable to this advisory opinion request. Although USDC is not exempt from the coverage of §441b since it lacks the essential characteristics of MCFL, USDC's public corporate communications are subject to the Supreme Court's "express advocacy" threshold. It is illogical to say the Court intended the "express advocacy" threshold of the statute to apply only to exempted corporations like MCFL. The Court simply would not create standards within a statute and then hold these standards only apply to corporations constitutionally exempted from the statute.

The Commission was unfortunately not able to reach agreement on the Act's applicability to USDC's proposed publication of incumbents' voting records. Although the Commission's majority opinion does not, in my opinion, reach a desirable result, I applaud it for not containing language offered in an alternative draft stating the Supreme Court in MCFL "emphasizes that communications expenditures prohibited by Section 441b must convey election messages" (emphasis added). The Supreme Court specifically used the words "express advocacy" in its holding, words with a strong legal meaning created in the Buckley case to preserve the distinction between constitutionally protected discussions of issues and office-holders and the regulated advocacy of the election of candidates. Conveying an "election message" is completely distinct from "express advocacy" and there is no indication the Court meant "election message" when it said "express advocacy."

Further, it is fortunate that the Commission's majority opinion does not include language offered in an alternative draft which stated these voting record materials would not be prohibited by §441b since they are "not for the purpose of influencing a federal election." Part of the difficulty in accepting this language was the fact that the words "for the purpose of influencing a federal election" do not appear in §441b. These words do, however, appear in our §114. regulations which, in my opinion, stand small in the shadow of the Supreme Court's recent rulings in MCFL.

The Supreme Court has, in MCFL, illumicated the constitutional limits of 2 U.S.C. §441b. The Supreme Court has instructed that §441b does not prevent certain corporations with the characteristics of voluntary political associations from participating in the political process and does not prohibit a corporation's communications which do not expressly advocate the election or defeat of clearly identified candidates.

Accordingly, I voted against the majority opinion which stated both of USDC's proposed letters to the general public in connection with the voter guides were prohibited by 2 U.S.C. §441b. I do, however, support the majority's conclusion that USDC may distribute its candidate survey materials as described in its request.

4-16-87
Date

Lee Ann Elliott
Commissioner