



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 30, 1985

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1985-14

Robert F. Bauer, Esq.
Perkins, Coie, Stone, Olsen & Williams
1110 Vermont Avenue, N.W.
Washington, D.C. 20005

Dear Mr. Bauer:

This responds to your letters of March 18 and April 9, 1985, requesting an advisory opinion on behalf of the Democratic Congressional Campaign Committee ("DCCC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the allocation and reporting of expenditures for certain political advertisements.

DCCC is registered with the Commission as a party-related, multicandidate political committee. You state that DCCC is "[o]rganized and operated by Democratic members of the House of Representatives" and "functions broadly as a national party organization in support of Democratic candidates to the House, as well as other public offices around the country." You state that DCCC plans to initiate a program involving criticism of the records of individual Republican members of the House of Representatives and of the activities of Republican Members of Congress as a class. Some of these Republican members may not be announced candidates for the 1986 elections, while some will have qualified as candidates pursuant to the Act. See 2 U.S.C. 431(2).

You state that DCCC plans to focus its program in 20-100 selected congressional districts but may expand it to include all districts represented by Republicans. You add that DCCC's program will have "the clear purpose of influencing voter perceptions of these candidates with a view toward weakening their positions as candidates for re-election in 1986." You state that some of the proposed communications will refer to the next or the last election, while other communications will criticize a congressman's record without any reference to any election or without any express advocacy language. These communications will include television and radio

broadcasts, newspaper and other print advertising, and direct mail brochures. You propose to produce and disseminate these communications currently and in September 1985.¹

In this context, you have provided the scripts for radio and television broadcasts and the text for a direct mail brochure:

"PLIERS AND TOILET SEATS" (Radio/TV)
Democratic Congressional Campaign Committee

Background: Loud laughter and applause

Voice No. 1: What's going on? What's so funny?

Voice No. 2: (laughing intermittently): Oh, that's the President getting a good laugh from the crowd in Washington, the Republicans in Congress. He says we should take care of the farm crisis by keeping the grain (begins to burst into uncontrolled laughter)-- and exporting the farmers!!!

Voice No. 1: (with anger): That's not funny at all; this farm crisis is real and endangering the very existence of family farms. People are really suffering.

Voice No. 1: Who cares? The Republicans sure don't. So just join the crowd and have a good laugh.

Announcer: But it is not a laughing matter. The President and his Republican supporters in Congress are enjoying this joke at the expense of the American farmer--but the last laugh is on you and on your children. And while the Republicans are breaking every election-year promise they ever made to the American farmer, they just look on and smile when multi-billion dollar defense contractors charge you--the taxpayer--\$_____ for a pair of pliers and \$_____ for a toilet seat. That's the real joke.

(Pause)

Announcer: Let your Republican Congressman know that you don't think this is funny.

(Or, in some ads: Let the Republicans in Congress know what you think about their sense of humor.)

[In some scripts, the text closes with "Vote Democratic"]

"Crumbling Foundation" (Radio/TV)
Democratic Congressional Campaign Committee

Sound: A crumbling, cracking sound of something "giving away."

Announcer (with sound in background): You read the newspaper nowadays and what do you find: stories about collapsing banks, people in a panic over the loss of their savings, federal and state government coming up with rescue plans and bailouts.

(Sound in background get louder)

Announcer: It all sounds too familiar, like 1932, but it's not then. It's now. And it's real.

(Sound in background increases in volume)

Announcer: The President and his Republican allies in Congress are all smiles, they tell us not to worry. But under their leadership, the budget deficit grows to monstrous proportions, Wall Street is nervous, the dollar begins to show signs of weakness.

(Sound comes to fore, very loud and then replaced by a moment of silence)

Announcer: We've seen all this before: let's make sure it doesn't happen again. Let your Republican Congressman (or in some ads, the Republicans in Congress) know that their irresponsible management of the nation's economy must end-- before it's too late.

[In some scripts, the text closes with "Vote Democratic"]

SAMPLE MAILER
17 x 22/One Fold

Front Face
8 1/2 x 11

Bulk mail
Wave of the future?
[dye-cut; beautiful sunset; couple walking
in ocean surf/beach]

Inside
17 x 22

Fold

The wave of the future could be an oil spill if
Cong. X has his way! [Picture of giant oil-
derrick in ocean ruins the lovely picture]

Text

List of X's contributions from oil industry
[Same couple on beach]

Back Cover
8 1/2 x 11

Don't be fooled by Republican rhetoric. Save our coastal
environment.

Let Congressman X know how you feel.

[In some scripts, the text closes with "Vote Democratic".]

You seek to determine whether DCCC's expenditures for these planned communications must be considered attributable contributions or expenditures under 11 CFR 106.1 and Advisory Opinion 1984-15. You have presented several specific questions:

1. Would broadcast advertisements and other general public communications (e.g. direct mail, leaflets, etc.) that specifically identify Republican congressmen and criticize their records, require allocation under 11 CFR 106.1(a) and AO 1984-15? Does the answer depend on whether the communications contain reference to "elections" or any "express advocacy" language?
2. Would broadcast advertisements and other general public communications that criticize the activities and record of Republican congressmen as a class require allocation under 11 CFR 106.1(a) and AO 1984-15 to the individual Democratic candidates, when ultimately nominated by the Democratic Party?
3. Does the answer to question 2 differ if DCCC directs these "generic" critiques to selected congressional districts?

DCCC's payments for these communications are reportable expenditures for the purpose of influencing Federal elections, and the sources of the funds used by DCCC to make these expenditures are subject to the limitations and prohibitions of the Act. See 2 U.S.C. 434, 441a, 441b, 441c, 441e, and 441f. Your questions relate to whether these expenditures are attributable to a specific candidate or candidates and, thus, subject to the Act's limitations on those contributions or expenditures made by DCCC.

You state that there may be no Democratic candidate, either announced or qualified under the Act, in the congressional districts selected to receive DCCC's proposed communications. Thus, the Commission assumes that DCCC's expenditures for these communications will not be made in cooperation or consultation with any candidate.² Instead, the Commission views your request as limited to the situation where expenditures for these communications are made without any consultation or cooperation, or any request or suggestion of, candidates seeking election to the House of Representatives in the selected districts.

In this context, the Act's limitations at 2 U.S.C. 441a(d) become relevant since the Commission has stated that expenditures pursuant to 2 U.S.C. 441a(d) may be made without consultation or coordination with any candidate and may be made before the party's general election candidates are nominated. See Advisory Opinion 1984-15.³ This section permits "the national committee of a political party" to make additional expenditures, subject to certain specific dollar limitations, "in connection with the general election campaign of a candidate for" the House of Representatives "who is affiliated with such party." 2 U.S.C. 441a(d)(3).⁴ A national committee of a political party, as defined at 2 U.S.C. 431(14), may designate the party's congressional campaign committee as its agent for purposes of making these expenditures, if such designation occurs before the designee committee makes the expenditures. See 11 CFR 110.7(a)(4); FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 28-29 (1981); First General Counsel's Report, MUR 1460.⁵

In Advisory Opinion 1984-15, the Commission considered the application of the limitations of 2 U.S.C. 441a(d) to expenditures for political advertising similar to DCCC's proposed communications. There, the Commission concluded that the limitations of 441a(d) would apply where the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message. See also Advisory Opinion 1978-46. Under the Act and regulations, a candidate is clearly identified if his or her name or likeness appears or if his or her identity is apparent by unambiguous reference. 2 U.S.C. 431(18); 11 CFR 106.1(d). Electioneering messages include statements "designed to urge the public to elect a certain candidate or party." United States v. United Auto Workers, 352 U.S. 567, 587 (1957); see Advisory Opinion 1984-62.

Both the "Pliers and Toilet Seats" and the "Crumbling Foundation" scripts offer two alternative taglines: one referring to "your Republican Congressman" and one referring to "the Republicans in Congress." You further state that some scripts will also close with a "Vote Democratic" statement. The Commission concludes that DCCC's expenditures for its proposed radio and television advertisements (with scripts as set forth in this opinion) that use the tagline, "the Republicans in Congress," either with or without the "Vote Democratic" statement (or other electioneering message), will not be subject to the Act's limitations. In addition, the Commission concludes that DCCC's expenditures for its proposed advertisements that use the tagline, "your Republican Congressman," without the "Vote Democratic" statement, will also not be subject to the Act's limitations. Instead DCCC may report these expenditures as operating expenditures. See 11 CFR 104.3(b). These conclusions also apply where the advertisements are directed to only selected congressional districts.

With respect to DCCC expenditures for the proposed radio and television advertisements that use the tagline, "your Republican Congressman," together with the "Vote Democratic" statement, the Commission considered alternative responses but on a tie vote was unable to agree whether such expenditures would or would not be subject to the Act's limitations and attributable pursuant to 11 CFR 106.1. See 11 CFR 112.4(a).

With regard to DCCC's proposed sample mailer, the Commission assumes that its references to "Cong. X" indicate that a specific congressman will be identified by name. The Commission also assumes that the mailer's dissemination may include part or all of the district represented by the identified congressman. The Commission concludes that DCCC's expenditures for producing and disseminating the mailer either with or without the "Vote Democratic" statement will be subject to the Act's limitations and attributable pursuant to 11 CFR 106.1.

You have indicated that DCCC's proposed program is for the purpose of influencing the 1986 election process and that these activities will be scheduled for approximately the next month and for September 1985. The Commission emphasizes that this opinion is limited to the timetable you have specified and does not address the implementation of the same or a similar program at some later date.

The Commission notes the foregoing discussion responds to the three questions you presented in your letter dated March 18, 1985.

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

Sincerely yours,

(signed)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1984-62, 1984-15, 1980-119, and 1978-46)

1. Your request indicates a schedule of April and September 1985, but you also note that this proposed schedule as to April will be adjusted depending on the timing of the Commission's response to your request.
2. See 2 U.S.C. 441a(a)(7)(B)(i); 11 CFR 104.3(b) and 104.13(a).
3. This interpretation is consistent with the reporting requirements. Expenditures made under 441a(d) and 11 CFR 110.7 are reported as expenditures by the committee making them. 11 CFR 104.3(b)(3)(viii). The candidate on whose behalf such expenditures are made, however, does not report these expenditures as contributions. 11 CFR 104.3(a)(3)(iii).
4. Party political committees are incapable of making independent expenditures. 11 CFR 110.7(a)(5) and (b)(4); Advisory Opinions 1984-15 and 1980-119; General Counsel's Report, MUR 273.
5. For purposes of this advisory opinion, the Commission assumes that DCCC is or will be the designated agent of the national committee of the Democratic Party for the purpose of making expenditures pursuant to 2 U.S.C. 441a(d)(3). This expenditure limitation is in addition to the limitation on contributions by DCCC pursuant to 2 U.S.C. 441a(a)(2)(A). See 11 CFR 110.7(b)(3); H.R. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976), reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1976, 1053 (GPO 1977).