FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1978-18

of

VICE CHAIRMAN JOAN D. AIKENS

The Commission is doing that which Congress would not dare do itself. By approving this Advisory Opinion, this Commission is successfully insulating elected representatives from the sometimes uncomfortable experience of having their positions on issues, as manifested by their votes in Congress, compared to the positions of various public organizations. The Commission has done this by construing § 441b in such a sweeping manner that the section may now encompass virtually any communication by a union or corporation (including corporations without capital tock) which can be interpreted as criticism of a Congressman's vote. If Congress had expressly articulated such an intended result, there, I think, would have been a significant and justified public outcry. The total absence within the legislative history of § 441b (and its predecessor 18 U.S.C. § 610) of any Congressional desire to regulate this type of speech seems to indicate a healthy respect for the political dangers of advocating such legislation as well as an appreciation of the enormous constitutional questions it would raise. There is no greater responsibility or more difficult chore for an administrative agency than to execute an Act of Congress exactly as Congress intended it to be executed. In the case of an Act like the Federal Election Campaign Act, as amended, which severely regulates forms of speech and communication, this becomes an even more sensitive exercise which demands precision. Although it is not our role to determine the constitutionality of this Act or its provisions, it is incumbent upon us to divine as best we can what speech, if any, Congress meant to prohibit or regulate. The courts will ultimately decide the constitutionality of whatever speech Congress intended to curtail. But because speech is involved, the Commission should seek some clear-cut, unequivocal legislative statement that § 441b applies to the type of publication described in the request from the Chamber of Commerce. There is no such statement. It must be recalled that there was, until the 1976 Amendments, some question as to whether not-for-profit corporations or corporations without capital stock were even covered by this statute. Representative Hansen himself indicated that SS 441b did not apply to certain organizations, specifically referring to Chambers of Commerce. 117 Cong. Rec. H11480-81 (daily ed. Nov. 30, 1977) (colloquy between Representative Hansen and Representative Dent). However, all doubt was removed when the1976 Amendments inserted the term "corporation without capital stock" in the second half of SS 441b. Consequently, groups such as the Chamber, the

American Civil Liberties Union, Common Cause, the Sierra Club, the NAACP and Public Citizen, all of whom apparently are incorporated for liability purposes, are subject to § 441b.

But to what extent did Congress intend these groups to be covered? The general prohibition is on any "contribution or expenditure in connection with" an election for Federal office. The Commission has been inclined to apply this expression so broadly, that any causal relationship, direct or indirect, which can be established between conduct by a union or a corporation and an "effect" on an election contravenes SS 441b. This approach is not supported by judicial decisions. The Supreme Court in U.S. v. CIO, 335 U.S. 106 (1948), demonstrated that the term "expenditure in connection with" must be construed in the light of legislative history. To do otherwise would have resulted in a prohibition on partisan communication by a union with its members. CIO, supra, at 121-23.

It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication." CIO, supra, at 123.

These types of communications were then and are now undeniably "in connection with" an election. Yet the Court held that the legislative history did not support such a construction. Legislative history similarly fails to support the conclusions reached in Advisory Opinion 1978-18. "Explicit words" should be required by this Commission to conclude that Congress intended SS 441b to restrict the distribution of voting records. There are none.

With respect to communication, pure speech, I believe that SS 441b is designed to limit the distribution of only those materials which are partisan in nature, that contain elements of active electioneering on behalf of a specific candidate or party. There are numerous Congressional references to the criteria of "active electioneering" on behalf of candidates orparties.*/ Section 441b was not designed to limit "free discussion of governmental affairs," Mills v. Alabama, 384,U.S. 214, 218 (1965), nor to limit the "open discourse of views on prominent national issues," ACLU v. Jennings, 366 F. Supp.1041, 1057 (1973) (three-judge court), vacated as moot, sub nom Staats v. ACLU, 422 U.S. 103 (1975). How an elected official votes is an inextricable part of any discussion or discourse of current affairs of government, just as "candidates especially incumbents are intimately tied to public issues involving legislative proposals and governmental actions." Buckley v. Valeo, 424U.S. 1, 42 (1976). The public should be aware that this Advisory Opinion in essence states that trade association groups cannot communicate with the general public their views on whether individual Members of Congress or Senators voted for or against their perceived best interest on issues before Congress. Furthermore, it would be a violation of the Act for the ACLU to finance a communication directed at the general public which states its views on any votes by elected Federal officers on legislation involving questions of civil liberties. But see ACLU, supra. The

"right" or "wrong" voting sheets for which the AFL-CIO is so well known may not be sent to persons who are not members of the Federation.

It is one thing to freely quote the language of the Supreme Court of the United States in Pipefitters v. U.S. which adopts Congressional pronouncements on the scope of the prohibition in § 441b, i.e., "the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates." 407 U.S. 385, 431. It is quite another matter to extrapolate from this that implicit aspersions cast on Congressmen's votes should be characterized as "support of, or opposition to, Federal candidates." That is how the Chamber's publication of voting records has been characterized even though there is no reference to an election, or to any Congressman's status as a candidate, and absolutely no advocacy of election or defeat. The Commission has adopted its view on the basis that one could construe such publications as partisan. By this standard, any reader dictates the scope of an organization's ability to disseminate commentary on the votes of Congressmen. Ironically, this is the type of analysis rejected by the Court in Pipefitters with respect to the voluntary donations raised by a union for its separate segregated fund under § 441b. The Court distinguished funds raised as a condition of employment or membership from those "contributions[which] appeared compulsory to those solicited."Pipefitters, supra, at 395 (emphasis added). In the latter situation, the Court held that the union was not in violation of § 441b unless "payments to the fund were actually or effectively required for employment or union membership." Pipefitters, at 439. This distinction by the Court recognizes the danger of placing the author of a communication "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent or meaning."Thomas v. Collins, 323 U.S. 516, 535 (1945). By the same token, the Commission must be chary to characterize a publication as partisan simply because someone, somewhere, could interpret it as such. Nevertheless, this is what the Commission has done. Discussion of issues and political personalities, including (or should I say especially) incumbent officeholders is not in and of itself active partisan electioneering. I recognize that the distinction between the two may evaporate just as "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." Buckley, supra at 42. For this very reason, the Commission should, when the distinctions become muddled, place the benefit of doubt on the side of that argument which concludes that the communication is not covered. This is especially true when there is no apparent Congressional intent to envelop all questionable communications financed by entities subject to § 441b.

Rather than using a scalpel to carefully excise the scope of § 441b and its regulation of speech, the Commission has chosen to use a dull ax. This has been done, in part, because it is an easier course to take. It represents the path of least resistance and facile enforcement. But enforcement of this Act is necessarily burdensome and short-cuts cannot be taken by resorting to broad interpretations. See U.S. v. National Committee for Impeachment, 469, F. 2d 1135, 1142 (2d Cir. 1972).Advisory Opinion 1978-18 brings to reality what was previously "the potential for arbitrary administrative action." Impeachment, supra, at 1142. It is for all these reasons that I voted against the Opinion.

April 4, 1978

*/ 117 Cong. Rec. H11477, H11478 (daily ed. Nov. 30, 1971) (remarks by Representative Hansen); 117 Cong. Rec. H11481 (daily ed. Nov. 30, 1971) (remarks by Representative Thompson of New Jersey); 117 Cong. Rec. H11486 (daily ed. Nov. 30, 1971) (remarks by Representative Steiger of Wisconsin); see also Congressional debate on proposals, including the Packwood Amendment (codified in 2 U.S.C. SS 431(f)(4)), which reflects concern only with those communications which advocate the election or defeat of a clearly identified candidate, 122 Cong. Rec. S3554-58, S3676-79 (daily eds. Mar. 16, and 17, 1976), and 122 Cong. Rec. H2665-61 (daily ed. Apr. 1, 1976).