

Murphy

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 ) MUR 200 (76)  
The Okonite Company ) MUR 210 (76)

## GENERAL COUNSEL'S REPORT

## I. Summary of Allegations

The two complaints raise the same issue. It is alleged that the Okonite Company, a corporation, placed full-page advertisements in four newspapers of general circulation in New Jersey which refer to Congressman Robert A. Roe and constitute prohibited corporate expenditures for the purpose of influencing his re-election in the 8th District of New Jersey or in connection with his election.

## II. Evidence

The advertisements appeared on the following dates in the following newspapers with circulations which include the 8th District of New Jersey: The Morning Call Paterson News, July 16, 1976; The Passaic Herald News, July 16, 1976; The Bergen Record, July 21, 1976; and The Newark Star Ledger, July 21, 1976. The advertisements appeared approximately five weeks after Congressman Roe's victory in the New Jersey primary election. The advertisements, which were the same

FEDERAL ELECTION COMMISSION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

77040022630  
in all of the newspapers, state in head-line style, bold-face type, "Thank You Congressman Robert A. Roe!". A large photograph of Roe, identifying him as the Congressman from the 8th District and accompanied by a statement explaining his "major" role in securing a grant to fund the corporation's new employee stock ownership trust [ESOT], appears at the top of the page. The bottom half of the advertisement consists of a photograph of Congressman Roe with Federal, State and Okonite Company officials and a five-paragraph tribute to Roe for his "untiring efforts in [the Company's] behalf resulting in the purchase of the Okonite Company by an [ESOT]." The advertisement ends with "Congressman Roe, we deeply appreciate all that you did to make our American dream a reality."

The Okonite Company has plants in Passaic, Paterson, Ramsey, and North Brunswick, New Jersey. The latter two facilities are not within the 8th Congressional District and no advertisements were placed in newspapers which cover the two areas.

In response to the Commission's preliminary inquiry to the Okonite Company, the attached letter from counsel to the company, John R. McKay 2nd, and affidavit from its chairman, president and chief executive officer, Victor Viggiano, were submitted

77040022631

to the Commission. Both documents indicate, in summary, that the Okonite Company has recently been in uncertain financial condition due to frequent changes in ownership. At the company's request, Congressman Roe was instrumental in obtaining a grant from the U.S. Department of Commerce Economic Development Administration to finance an ESOT for the company. Congressman Roe was contacted because he represents the congressional district in which two of the company's plants are located and is Chairman of the House Subcommittee on Economic Development. The Okonite ESOT was finalized on June 30, 1976. The aforementioned documents indicate that the purpose of the ads was to express gratitude to Congressman Roe for his material role in the establishment of the ESOT and to announce the change in corporate structure to Okonite's suppliers and customers and to the general public. The affidavit and letter from counsel do not deny that the ads were financed by corporate funds.

According to the affidavit, the ads were not placed at the request or suggestion of Congressman Roe or his authorized committee. Nor is there any evidence that Okonite consulted with Roe or his authorized committee regarding the placement of the ads. Congressman Roe and his authorized committee do not report any contributions from an Okonite PAC, nor does Okonite claim to have established a separate segregated fund.

FEDERAL ELECTION COMMISSION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

In an affidavit submitted pursuant to the Commission's investigation of this matter, Congressman Roe stated that "he did not participate in the preparation or placement of the advertisements; nor did [he] authorize anyone or any political committee to do so."

In an affidavit submitted on November 2, 1976, Victor Viggiano stated that the total cost of the advertisements was \$12,183.84. He further indicated that the Okonite Company has not placed any newspaper advertisements with respect to any other elected officials in Federal office.

Counsel for respondent, in a letter accompanying Mr. Viggiano's most recent affidavit, contends that the advertisements were in connection with the successful completion of the stock purchase and were intended to thank Congressman Roe and to promote the company's business relations. Respondent further argues that the content and timing of the advertisements and Mr. Viggiano's initial affidavit establish an absence of intention to influence the outcome of the election. Respondent concedes that the advertisements could be construed as favorable to Mr. Roe, but insists that they do not evidence active electioneering because they also communicated Okonite's own business interests. It is respondent's position that §441b of the Act is violated only by expenditures which are for the purpose of influencing an election and which constitute active

7704002263



electioneering. Respondent therefore asserts that since the advertisements did not mention the election, endorse Mr. Roe, or advocate the defeat of his opponent, they do not reflect the requisite intent to establish a violation of §441b.

### III. Analysis

The issue in these MURs is whether Okonite's advertisements -- concededly made out of general treasury funds -- were in connection with Congressman Roe's re-election campaign in the 8th Congressional District of New Jersey, and therefore subject to the general prohibition of §441b(a) on corporate expenditures.

Although respondents state that their intent in placing the ad was solely to express gratitude to Mr. Roe and to publicize the change in Okonite's corporate structure, it is our opinion that when the ad is placed in an objective factual context, one must presumably conclude that it falls within the ambit of §441b. We reach this conclusion mindful of the fact that there is no definitive judicial interpretation of the phrase "in connection with;" however, our conclusion follows from the legislative evolution of §441b and its predecessor 18 U.S.C. §610. It also follows from established Commission policy.

FEDERAL ELECTION COMMISSION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

77043011631

The proximity of the general election and the content of the advertisements overshadow Okonite's purported informative purpose and give the advertisements a clear political message. The medium -- general circulation newspapers which include Roe's district -- and the timing of the advertisements -- shortly after his primary victory -- inevitably have the impact on voters of seeming to promote the merits of Roe as a candidate in the general election. Both the text and lay-out evidence a decided emphasis on Roe's achievements in aiding a corporate constituent, the Okonite Company. The advertisements are only tangentially related to Okonite's other claimed purpose to promote business relations and publicize its change in corporate structure. In fact, only three sentences of the entire text are devoted to the formation of the Okonite ESOT. The Okonite Company, according to the advertisement, has plants in other areas of New Jersey which are not within Roe's congressional district. Yet, the advertisements were published only in newspapers whose area of distribution included Roe's district. Although the advertisements do not expressly call for Roe's election, they unmistakably serve as a tribute to him. As such, it is reasonable to infer that the advertisements appeared to the general public as related to Roe's merits as a candidate. In our view, it is not conclusive that the advertisements did not directly mention Roe's

candidacy; his primary victory made that candidacy a known fact and the impact of the ad must be assessed in that context.

A. Case Law

No court has reached the precise issue which arises here, i.e., whether a corporate expenditure for a communication which does not contain words which directly call for the election of a clearly identified candidate but can be inferentially interpreted as doing so is "in connection with" an election, and therefore, within the ambit of §441b. (See, e.g., Cort v. Ash, 423 U.S. 812 (1975), where the Court expressly declined to decide whether 18 U.S.C. §610, the predecessor of 2 U.S.C. §441b, proscribed corporate expenditures for specific advertisements.) Thus, there has been no definitive judicial decision as to whether §441b establishes a broader standard than 2 U.S.C. §431(f) and describing the content of the "in connection with" standard.

Although some lower courts have alluded to 18 U.S.C. §610 as establishing an active electioneering standard, see Miller v. AT & T Co., 507 F. 2d 759, 764 (3d Cir. 1974); United States v. Lewis Food Co., 366 F. 2d 710, 712 (9th Cir. 1966), that view is contrary to a consistent line of

FEDERAL ELECTION COMMISSION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

77040022635

legislative intent and Commission policy. It should be noted that both cases were decided on the basis of the 1972 law, before the 1974 amendments gave §610 a different internal definition of "contribution or expenditure" than "the purpose of influencing" test in 18 U.S.C. §591 which underlay the court's enunciation of the active electioneering test. <sup>1/</sup> Moreover, courts which imposed such a test were generally motivated by concerns to which the Congress has subsequently directed specific legislative attention in the Hansen Amendment and the statutory provision for the formation of separate segregated funds as permissible vehicles for corporate political activity. (See Discussion, infra, section B, p. 10 et seq.)

Respondent relies on Ash v. Cort, 350 F. Supp. 227, 232 (E.D. Pa. 1972), aff'd, 471 F. 2d 811 (3d Cir.), rev'd. on other grounds, 496 F. 2d 416 (3d Cir. 1973), rev'd. on other grounds, 423 U.S. 812 (1975), where the district court found permissible under §610 advertisements in national magazines expressing a corporation's views as to a statement made by an unnamed candidate. The Third Circuit Court of Appeals, however, disagreed with the district

---

<sup>1/</sup> See Miller v. AT & T Co., supra, at 765. Even in that case the court held direct proof of a partisan purpose on the part of the defendants was not necessary. Rather, it held that the plaintiffs needed to produce  
(Cont'd.)



court's narrow interpretation of §610. Chief Judge Seitz, writing for the court stated:

Nothing in the language or legislative history supports an interpretation of sections 591 and 610 [of Title 18] that would make lawful an expenditure simply because in the communication it paid for no candidate was named. There is no evidence Congress thought the American public so unperceptive that it would recognize a statement as supporting or attacking a particular candidate only by use of his name; such a requirement would eviscerate §610. 496 F. 2d at 425. (Emphasis added.)

770400022637  
Although the court of appeals in Ash required evidence that the communication was partisan, supra at p. 425, the court enunciated a standard which encompasses communications which do not expressly identify the target candidate. While the court did not expressly address the issue of how explicitly partisan a particular communication must be to fall within the sweep of §441b, analogous logic would suggest that the same standard of public perception of the election relatedness of the communication would be applied to that question as well.

---

1./ (Cont'd.) evidence to support the inference that the only discernible reason for the defendants' failure to collect a debt owed by a national committee of a political party was a desire to assist that committee in a Federal election.

FEDERAL ELECTION COMMISSION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

77040012633

In summary, the content and evidentiary parameters of "in connection with" remain undefined. Analysis of the cases does suggest, however, that factors such as whether communications financed from a corporation's general treasury are aimed at the general public, are partisan in nature, and are not part of the corporation's normal organizational activity will trigger strict scrutiny. See generally, United States v. Auto Workers, 352 U.S. 567 (1957); United States v. C.I.O., 335 U.S. 106 (1949).

B. Evolution of Statutory Prohibitions on Corporate Contributions and Expenditures in Connection With Federal Elections

The lack of clarity in the case law requires that this matter be resolved by reference to statutory history and Commission policy. The statutory history and legislative intent surrounding §441b and its predecessors evidence a clear desire to subject corporations to a different and more restrictive standard with respect to political activities than that applied to individuals. The evil which Congress has sought to eliminate by §441b and its predecessors is not only direct, partisan political activity by corporations, but also more generally, the use by corporations of treasury funds to promote their own political views by endorsing or opposing candidates for Federal office.

Accordingly, in 1947 Congress extended the prohibition of §313 of the Federal Corrupt Practices Act to "expenditures" to prevent corporations and labor unions from circumventing the Act by way of indirect disbursements. 61 Stat. 159 (June 23, 1947). <sup>2/</sup>

Pursuant to the legislative purpose discussion above, Congress has narrowly limited the audience to which a corporation may direct communications having some connection with a Federal election when such communications are financed from general treasury funds. Thus, in explaining his amendment to §610, Representative Hansen stated:

---

<sup>2/</sup> See also United States v. Auto Workers, supra, 352 U.S. at 582, 585; United States v. C.I.O., supra, 335 U.S. at 112, 115; and United States v. Chestnut, 394 F. Supp. 581, 587 (S.D. N.Y. 1975), aff'd., 533 F. 2d 40 (2d Cir. 1976), for judicial recognition of Congress' intent to curb those corporate expenditures which, in substance, exerted direct or indirect influence over Federal elections. These cases also make it clear that corporations have long been on notice of the strict prohibition on the use of their funds in connection with elections of candidates for Federal office.

The dividing line established by section 610 is between political activity directed at the general public in connection with Federal elections which must be financed out of political donations and activities directed at members or stockholders which may be financed by general funds. 117 Cong. Rec. H. 11478 (Nov. 30, 1971).

At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates. . . . 117 Cong. Rec. H. 11479 (Nov. 30, 1971).

77040022641

It should be noted that the class of persons to whom corporations may communicate regarding political matters has been restricted even when such activity is clearly non-partisan. For example, in the Conference Report on the 1976 Amendments to the Act, H.R. Rep. No. 94-1057, 94th Cong., 2d Sess. 63-64 (1976), the conferees provided that corporations may take part in nonpartisan registration and get-out-the-vote activities that are not restricted to stockholders and executive or administrative personnel only if such activities are jointly sponsored by the corporation and an organization that does not endorse candidates and are conducted by that organization. The restrictions on non-partisan activities by corporations suggest that Congress did not intend "in connection with" to import an express advocacy or active electioneering test, but rather, intended that phrase to be construed broadly.



Okonite's advertisements praising Congressman Roe appear to be communications directed to the general public and whose predictable impact is to make that public believe that Roe's candidacy is supported by a corporate entity in the body politic, a form of communication which §441b contemplated in its prohibition. Unlike the house organ at issue in United States v. C.I.O., supra, and exempted by §441b(b)(2)(A) of the Act, Okonite's advertisements were not published in the course of its normal business activities and predictably reached an audience much larger than the permissible class of stockholders and executive and administrative personnel and their families.

Further evidence of congressional intent to make the statutory restriction on the use of corporate treasury funds broader than that for individuals is afforded by the various 1974 and 1976 amendments permitting use of corporate funds to facilitate the establishment of separate segregated funds for soliciting individual contributions. This evolving statutory outlet constitutes a legislative response to suggestions of judicial concern over interference with corporations' (and labor unions') ability to communicate with their respective members, and in certain circumstances, with the public at large. (Cf. C.I.O. case, concurring

FEDERAL ELECTION COMMISSION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

77040012641  
opinion of Justice Rutledge at 335 U.S. 152, ff., referring to the potential for a "bludgeon[ing] of First Amendment rights resulting from an expansive, absolute restriction on the political uses of unions' general treasury funds"). The amendments provide a clear method -- available here to Okonite -- for political association or expression by individuals connected to the corporation, while continuing the explicit bar on corporate funds being directly used for the same purpose.

#### C. Commission Policy

Commission policy has been consistent with congressional intent in interpreting the prohibition on corporate contributions and expenditures strictly and preserving "in connection with" as a standard distinct from "for the purpose of influencing." While the proposed regulations permit independent expenditures by an individual, partnership, committee, association, etc., they expressly prohibit such expenditures by labor organizations, corporations, and national banks. See §§109.1(b)(1) and 114.1(a)(1) of the proposed regulations. Further, §100.4(b)(15) excludes from the term "contribution" "a gift, subscription, loan, advance, or deposit of money or anything of value made

77-0400-2643

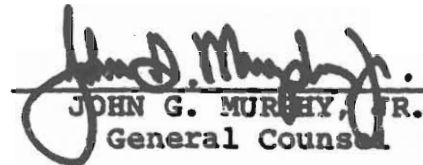
with respect to the recount of the results of a Federal election, or an election contest concerning a Federal election, except when made by an organization subject to the prohibitions of §114.2." (Emphasis added.) Finally, the existence of two separate and distinct standards is evident in the Policy Statement on Presidential Debates in which the Commission held that disbursements by the League of Women Voters through a charitable trust fund "are not made for the purpose of influencing a Federal election and are therefore not contributions as defined in 2 U.S.C. §431(e)," but are "'in connection with' a Federal election and accordingly may not be made with funds from corporate or labor organization treasuries."

In light of the foregoing, it is our view that Okonite's expenditures for a tribute to Congressman Roe evince the requisite elements to establish a violation of 2 U.S.C. §441b. The advertisements' timing, medium, intended audience, and logical effect of influencing the general public to support Congressman Roe bring the expenditures within the ambit of §441b.

FEDERAL ELECTION COMMISSION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

IV. Recommendation

Find reasonable cause to believe that a violation of 2 U.S.C. §441b has occurred. Send attached letters. We expect to report to the Commission shortly on a proposed conciliation agreement for this matter. In view of the uncertain case law parameters associated with the phrase "in connection with," the conciliation agreement will not recommend a fine.

  
JOHN G. MURPHY, JR.  
General Counsel

DATE: December 17, 1976

77-0400-22641







Mr. Louis D. G. O'Hara  
c/o The Lou O'Hara Committee  
31 Tours Street  
Providence, Rhode Island 02904

It is my understanding that you spoke with David Anderson of this office on Friday, August 6, 1976, concerning your advisory opinion request of July 7, 1976. At that time Mr. Anderson advised you that the Commission lacks jurisdiction under 2 U.S.C. §437f to issue an advisory opinion on the constitutionality of Rhode Island invalidating, according to State law, certain signatures on the nominating petitions circulated in behalf of your Federal candidacy.

This will confirm the correctness of the advice and accordingly we are closing our file on this matter.

Sincerely yours,  



N. Bradley Litchfield /  
Assistant General Counsel

FEDERAL ELECTRONIC DIVISION  
OFFICIAL FILE COPY  
OFFICE OF GENERAL COUNSEL

76 JUL 19 P12: 21

c/o The Lou O'Hara Comm.  
31 Touro St.,  
Providence, R.I. 02904

The Honorable Robert F. Burns, Sec'y of State  
State House, Providence, R.I. 02908

**SUBJECT:** Simultaneous filing, 17Jul76, 5:00PM  
National Candidates

Greetings:-

This letter as an objection is herewith simultaneously filed.

Enjoined are objections as a class action for citizens of Rhode Island weighing on yet unanswered questions on applicable rules of law as to constitutionality, undue discrimination, arbitrary actions and other capricious restrictions both administrative and statutory nullifying the citizen right of suffrage and nomination as to state ballot requirements. The intent is to show cause that these restrictions nullify both federal and state constitutional rights as part of achieving civic compliance as regulated. For jurisdiction, 2 U.S.C. § 439 applies on national candidates for filing to the newly established federal commission.

An advisory opinion is requested to be enjoined on this petition for redress as a class action to include citizens of Rhode Island weighing these questions on the right to run as a Republican U.S. Senatorial Candidate. This remedy would allow my nomination to stand as valid for insertion as a certified candidate for the United States Senate at the primary election to be held as scheduled on Tuesday, September 14th 1976.

If necessary for the purpose of voting equity as citizens of this state, a grant of equal time up to August 12th, 1976 would be allowed as part of this remedy for the additional period of 35 added days on a par basis for supposedly declared Independent Party nominees per the enabling Act of the General Assembly passed and signed effective into law on June 1st, 1976 by the signature of Governor Philip Noel. This act by its text and intentions creates a purported recognition of a quasi-Independent Party here in Rhode Island as of June 1st, 1976.

Self evident proof submits that the many Republican candidate vacancies throughout the state as of this date are void by lack of current nominees, which deficiencies are to later be summarily be filled of nominees by the restrictive single signatory action applied through limited jurisdiction organizational by-laws by the Republican State Chairman of the State Central Committee. This situation is in fact an undue and unequitable burden on the Republican State Chairman (Mr. Americo Campanella) in the perfor-

77  
FEDERAL RESERVE  
OFFICIAL  
OFFICE OF GENERAL COUNSEL

to: Federal Election Commission (cont'd)

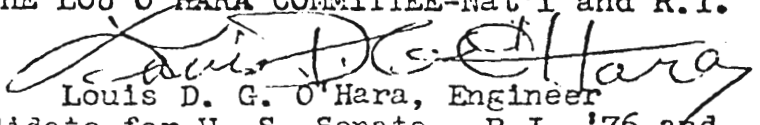
mance of the fine leadership that he is endeavoring to give to the Republican Party. In this respect, attention is further invited to the many vacant chairs showing a probable lack of a roll call quorum, raising reasonable doubt as to the validity of the purported nomination endorsement of another national candidate to the U.S. Senate for Rhode Island at the state convention held as a bi-annual meeting so required for compliance of June 1976 at Rhodes on the Pawtuxet. In this latter case, the allowed capricious privilege of multi-listing of purported endorsed candidates renders a 7 to 1 disadvantage, whereas a 5 to 1 advantage for such multi-listing is the limit allowed by law. This but adds to the contempt of citizens as to the validity of such convention endorsement on a national office.

As to Sec. 17-16-11 for validity to nomination papers filed..... "whenever any such nomination paper shall be filed with said board, on any date on which a primary election of any political party is to be held, said clerk shall not certify the qualifications of such signers until after the primary..... Again applying Sec. 17-16-16 on the question of conformity as to Sec. 17-16-11, "they shall be conclusively presumed to be valid." It would seem that the equal fairness clause of the U.S. Constitution can be applied equally to a Republican Candidate as is presumed valid for an identified Independent Candidate so designated by a new state statute.

The hearing requested on this objection is to show cause so that this citizen candidate on citizens nominating petitions can stand open as to Republican Candidates for the United States Senate at the scheduled Republican Primary Election for September 14th, 1976. It is intended to submit a brief to the Federal Election Commission as it applies to myself and another nominee, namely:- Citizen John Chafee.

For and on behalf of myself and citizens of Rhode Island.

Respectfully submitted,  
THE LOU O'HARA COMMITTEE-Nat'l and R.I.

  
Louis D. G. O'Hara, Engineer  
Candidate for U. S. Senate - R.I. '76 and  
for Kansas City considerations (Pres./V.P., U.S.A.)  
(For continuance of federal/state REVENUE SHARING)

Encl.

Committee Cash Balance Statement  
as National Candidate-2nd Qtr.-1976

77040022665