



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 2737

DATE FILMED 4/6/89 CAMERA NO. 4

CAMERAMAN AS

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GUY VANDER JAGT, M.C.
CHAIRMAN

JOSEPH R. GAYLORD
EXECUTIVE DIRECTOR



320 FIRST STREET, S.E.
WASHINGTON, D.C. 20003

202-479-7000

06C#752

mm 2737

NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE

October 24, 1988

Lawrence M. Noble, Esquire
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20004

Dear Mr. Noble:

This Complaint, by the National Republican Congressional Committee ("Complainant"), 320 First Street, S.E., Washington, D.C. 20003, against David E. Bonior and the Bonior for Congress Committee (FEC ID # 023179), 47564 Cheryl Court, Utica, Michigan 48087, is filed with Exhibits with the Federal Election Commission ("FEC") pursuant to 2 U.S.C section 437g(a) of the Federal Election Campaign Act of 1971, as amended ("the Act").

David E. Bonior ("Bonior"), a candidate for the U.S. House of Representatives from Michigan's 12th Congressional District, and the Bonior for Congress Committee (FEC ID # 023179), Bonior's principal campaign committee ("the Bonior Committee"), have violated the Act by failing to disclose the sponsorship and authorization of various newspaper advertisements and direct mail pieces

88 OCT 24 PM 4:21

which advocated Bonior's reelection. 2 U.S.C. section 441d(a), 11 C.F.R. section 110.11.

I. FACTS

On October 19 and 20, 1988 advertisements appeared across the 12th Congressional District of Michigan in the following newspapers: The Armada Times, The Voice, The Review, The Courier Journal, The Independent Press, The Northeast Detroiter, The St. Clair Shores Herald, and The Harper Woods Herald. (Copies of these newspaper advertisements are attached as Exhibit A). The newspaper advertisements advocated Bonior's reelection to the U.S. Congress. The newspaper advertisements detailed Bonior's service in Congress, concluding that the 12th District is a better place today because of Congressman David Bonior.

The newspaper advertisements did not, however, contain the statements of sponsorship and authorization prescribed by Federal law. They did not say who paid or authorized them.

Bonior and the Bonior Committee have also mailed a

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number of advocacy pieces which lacked the same statements of sponsorship and authorization prescribed by the Act. (Copies of the direct mail pieces are attached as Exhibit B).

The disclaimer rules of the Act are designed to provide the public with complete information on the sponsorship and authorization for the newspaper advertisements and the direct mail pieces. Bonior's failures to use the required disclaimer appear to be an attempt to conceal from the public crucial information about his sponsors. Such failures, on their face, represent clear violations of the Act.

II. DISCUSSION

Federal law specifically provides that when a communication expressly advocates the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, must clearly and conspicuously display one of the following authorization notices:

if paid for and authorized by a candidate, an

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authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee. (Emphasis added). (2 U.S.C. section 441d(a)).

Additionally, the FEC has specifically ruled that any political advertising in a newspaper, however terse or cryptic, which advocates the election or defeat of a clearly identified candidate is subject to 2 U.S.C. section 441d and FEC regulations at 11 C.F.R. section 110.11(a). (See, FEC Advisory Opinion 1978-33 1 Fed. Election Camp. Fin. Guide (CCH), Para 5324 (1978).

The October 19th and 20th newspaper advertisements and the direct mail pieces advocated Bonior's reelection to Congress. However, there is no disclosure of who sponsored or paid for the advertisements or the direct mail pieces.

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Bonior clearly attempted to benefit from the advertisements and the direct mail pieces. But did Bonior's campaign pay for them? Does Bonior have anonymous benefactors? Or, was there help from sources Bonior does not want the public to know about? By violating 2 U.S.C. section 441d(a) and 11 C.F.R. section 110.11(a), Bonior and the Bonior Committee insured that the answers are hidden from the public.

III. CONCLUSION

Therefore, by failing to disclose the sponsorship and authorization of the newspaper advertisements and the direct mail pieces which advocated Bonior's reelection to the U.S. Congress, Bonior and the Bonior Committee have knowingly and willfully violated the Act.

IV. PRAYER FOR RELIEF

Complainant requests that the FEC investigate these violations and enforce the Federal Election Campaign Act and the Commission's regulations.

Complainant further requests that the FEC seek the

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maximum fines for the violations as set forth in 2 U.S.C. section 437g, and take all steps necessary, including civil and injunctive action, to prevent respondents from continuing their illegal activity.

V. VERIFICATION

The undersigned swears that the allegations and facts set forth in this Complaint are true to the best of his knowledge, information and belief.



Joseph R. Gaylord
Executive Director
National Republican
Congressional Committee
320 First Street, S.E.
Washington, D.C. 20003

Subscribed and sworn before me this 24 day of October, 1988.


Notary Public

My Commission Expires: July 14, 1992

89040742638

E H I B I T "A"

8 9 0 4 0 7 4 2 6 3 9

October 19, 1988 - Pg. 5c



Congressman David Bonior has represented his District for 12 years. He has set a standard for District services that is unmatched. His constituents receive help solving any problem they might have, from government agencies to a knocked-down mailbox. This commitment to service in his District has guided Congressman Bonior in Washington. He has led the fight to save our environment; he has supported fair trade legislation; he has worked diligently to provide health care coverage for all Americans; he has been the most outspoken advocate of improved services for Vietnam veterans; he has saved thousands of jobs in his District; and he has been a long-time supporter of aid for our children's education.

It has paid off.

The 12th District is a better place today because of Congressman David Bonior.

BONIOR

Tried and True



Congressman David Bonior has represented his District for 12 years. He has set a standard for District services that is unmatched. His constituents receive help solving any problem they might have, from government agencies to a knocked-down mailbox. This commitment to service in his District has guided Congressman Bonior in Washington. He has led the fight to save our environment; he has supported fair trade legislation; he has worked diligently to provide health care coverage for all Americans; he has been the most outspoken advocate of improved services for Vietnam veterans; he has saved thousands of jobs in his District, and he has been a long-time supporter of aid for our children's education.

It has paid off.

The 12th District is a better place today because of Congressman David Bonior.

BONIOR

Tried and True

8 3 3 4 0 7 4 2 6 4 1



Congressman David Bonior has represented his District for 12 years. He has set a standard for District services that is unmatched. His constituents receive help solving any problem they might have, from government agencies to a knocked-down mailbox. This commitment to service in his District has guided Congressman Bonior in Washington. He has led the fight to save our environment; he has supported fair trade legislation; he has worked diligently to provide health care coverage for all Americans; he has been the most outspoken advocate of improved services for Vietnam veterans; he has saved thousands of jobs in his District; and he has been a long-time supporter of aid for our children's education.

It has paid off.

The 12th District is a better place today because of Congressman David Bonior.

BONIOR

Tried and True

22740742642



Congressman David Bonior has represented his District for 12 years. He has set a standard for District services that is unmatched. His constituents receive help solving any problem they might have, from government agencies to a knocked-down mailbox. This commitment to service in his District has guided Congressman Bonior in Washington. He has led the fight to save our environment; he has supported fair trade legislation; he has worked diligently to provide health care coverage for all Americans; he has been the most outspoken advocate of improved services for Vietnam veterans; he has saved thousands of jobs in his District; and he has been a long-time supporter of aid for our children's education.

It has paid off.

The 12th District is a better place today because of Congressman David Bonior.

BONIOR

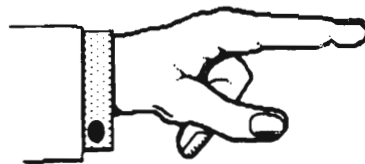
Tried and True

A copy of our report is held with the Federal Election Commission and is available for purchase from the Federal Election Commission, Washington, D.C.

89040742643

99040742644

E H I B I T "B"



...But what Doug
Carl did not tell
you was. . .

Doug Carl wrote a letter
to you and invited you
to a **FREE** spaghetti
dinner. He said he
wished to discuss how
he would increase your
Social Security pay-
ments.

**There
are
NO
FREE
Lunches**



Look at the TRUTH

The **CHANGES** Doug Carl wants to make in your Social Security would cost American taxpayers billions over the next ten years . . . and would completely bankrupt the Social Security Trust Fund.

BONIOR FOR CONGRESS
237 S. Gratiot
Mount Clemens, MI 48043



Bulk Rate
U.S. Postage
PAID
Permit No. 83
Mt. Clemens
Mich 48043

A Copy Of Our Report Is Filed With The Federal Election Commission And Is Available
For Purchase From The Federal Election Commission, Washington, D.C.

Congressmen Claude Pepper and David Bonior WORK TOGETHER FOR YOU



Congressman Claude Pepper says this about his friend Dave Bonior:

"Congressman David Bonior is one of the best leaders older Americans have in the entire Congress. He works hard to protect Social Security, to provide health care for all older Americans and strongly supports programs like meals on wheels."

The National Council of Senior Citizens has given Congressman David Bonior a perfect 100% rating for his work in Congress on behalf of all older Americans.

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BONIOR

FOR CONGRESS

237 S. GRATIOT
MT. CLEMENS, MI 48043

U.S. POSTAGE
PERMIT NO. 83
MT. CLEMENS, MI 48043

Bulk Rate
U.S. Postage
PAID
Permit No. 83
Mt. Clemens,
Mich. 48043

*A copy of our report is filed with the Federal Election Commission and is
available for purchase from the Federal Election Commission, Washington, D.C.*



Congressman David Bonior has represented his District for 12 years. He has set a standard for District services that is unmatched. His constituents receive help solving any problem they might have, from government agencies to a knocked-down mailbox. This commitment to service in his District has guided Congressman Bonior in Washington. He has led the fight to save our environment; he has supported fair trade legislation; he has worked diligently to provide health care coverage for all Americans; he has been the most outspoken advocate of improved services for Vietnam veterans; he has saved thousands of jobs in his District; and he has been a long-time supporter of aid for our children's education.

It has paid off.

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It has paid off.

The 12th District is a better place today because of Congressman David Bonior.

BONIOR

Tried and True

2 2 2 4 7 4 2 6 4 9





Attended St. Florian and Sacred Heart Seminary

Graduated from Notre Dame High School

Earned a Bachelor of Arts Degree, University of Iowa

Served 4 years in the U.S. Air Force

Earned a Masters Degree in History

Elected to Michigan House of Representatives in 1972

Elected to U.S. Congress in 1976

Father of two teenagers, Julie and Andy

Founder and Former Chairperson of Vietnam Veterans in Congress

Gallaudet Board of Trustees, National University for the Hearing Impaired

Democrat



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 25, 1988

SPECIAL DELIVERY

The Honorable David E. Bonior
1794 E. Chandler Lane
Mt. Pleasant, MI 48447

RE: 813 1777
The Honorable David
E. Bonior

The Hon. Bonior:

This letter is to advise you that on October 21, 1988, the Federal Election Commission received a complaint which alleges that you may have violated certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint is enclosed. We have numbered this matter 813 1777. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to "demonstrate" in writing that no action should be taken against you in this matter. Please submit any relevant legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the Federal Counsel's Office, must be submitted within 15 days of receipt of this letter. You are encouraged to respond to this notification promptly. In order to facilitate an expeditious response, we have enclosed a pre-addressed, postage paid, special delivery envelope. If no response is received within 15 days, the Commission may take further action based on the available information.

The complaint may be dismissed by the Commission prior to the receipt of your response if the evidence submitted does not indicate that a violation of the Act has been committed. Should the Commission dismiss the complaint, you will be notified by overnight express mail.

This matter will remain confidential in accordance with Section 437g(a)(4)(2) and Section 437g(a)(12)(A) of Title 2 unless you notify the Commission in writing that you wish the matter to be made public.

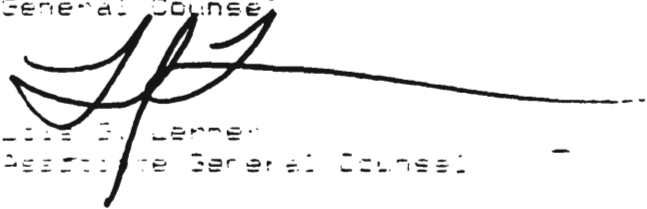
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If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

If you have any questions, please contact Michael Marinelli at (202) 375-9230.

Sincerely,

Lawrence M. Noodle
General Counsel

By: 
Assistant General Counsel

Enclosures
Completed
Procedures
Envelope
Post

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 25, 1988

SPECIAL DELIVERY

David M. Dregel, Treasurer
Senator For Congress
177th Liberty Island
Suite 71 48187

RE: 208 1777
Senator For Congress
and David M. Dregel,
as Treasurer

Dear Mr. Dregel:

This letter is to notify you that on October 14, 1988, the Federal Election Commission received a complaint which alleges that Senator For Congress and you, as Treasurer, may have violated certain sections of the Federal Election Campaign Act of 1971, as amended, the "Act". A copy of the complaint is enclosed. We are enclosing this letter by special delivery to this office for your immediate attention.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against you and Senator For Congress in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. You are encouraged to respond to this notification promptly. In order to facilitate an expeditious response, we have enclosed a pre-addressed, postage paid, special delivery envelope. If no response is received within 15 days, the Commission may take further action based on the available information.

The complaint may be dismissed by the Commission prior to the receipt of your response if the evidence submitted does not indicate that a violation of the Act has been committed. Should the Commission dismiss the complaint, you will be notified by overnight express mail.

This matter will remain confidential in accordance with Section 437g(a)(4)(B) and Section 437g(a)(12)(A) of Title 2 unless you notify the Commission in writing that you wish the matter to be made public.

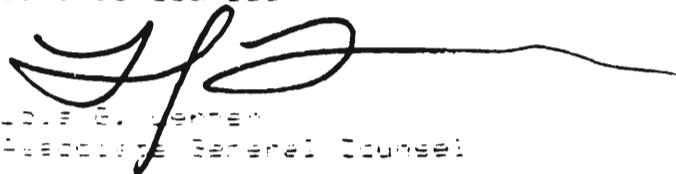
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If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

If you have any questions, please contact Michael Marinelli at (202) 775-8200.

Sincerely,

Lawrence N. Hoole
General Counsel



John G. Carter
Associate General Counsel

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535
TELEPHONE (202) 755-8200
FAX (202) 755-8200

890407442654



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 25, 1988

SPECIAL DELIVERY

Mr. Joseph P. Baylond
Executive Director
National Republican Congressional
Committee
111 First Street, SE
Washington, DC 20003

RE: NRC 1707

Dear Mr. Baylond:

This letter acknowledges receipt of October 22, 1988, of your complaints against Congressman David E. Bonior, and Senator Ted Thompson and David M. Bonior, as treasurer, alleging violations of the Federal Election Campaign Laws. A staff member has been assigned to analyze your allegations. The respondents will be notified of this analysis by letter by November 14, 1988. You will be notified by letter of the Commission's final action on your complaint. The Commission will also be notified of any action taken by the Commission on the matter.

Please be advised that this letter shall remain confidential in accordance with 2 U.S.C. Sections 4379(a) (4)(B) and 4379(e) (1)(A) unless the respondents notify the Commission in writing that they wish the matter to be made public.

Sincerely,

Lawrence M. Noble
General Counsel

By: Lois G. Lerner
Associate General Counsel

Enclosure
Procedures

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: *MWR* MARJORIE W. EMMONS/JOSHUA MCFADDEN *JM*

DATE: OCTOBER 31, 1988

SUBJECT: MUR 2737
FIRST GENERAL COUNSEL'S REPORT
OCTOBER 28, 1988

The above-captioned report was received in the Secretariat at 11:22 a.m. on Friday, October 28, 1988 and circulated to the Commission on a 24-hour no-objection basis at 2:00 p.m. on Friday, October 28, 1988.

There were no objections to the report.

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

SENSITIVE

EXPEDITED FIRST GENERAL COUNSEL'S REPORT

MUR: 2737E
STAFF: Michael Marinelli

COMPLAINANTS: National Republican Congressional Committee
Joseph Gaylord, Executive Director

RESPONDENTS: The Honorable David Bonior
Bonior for Congress Committee and David M. Diegel,
as treasurer

SUMMARY OF ALLEGATIONS

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The Complainant alleges that the Respondent violated 2 U.S.C § 441d(a) by failing to disclose the sponsorship and authorization of several newspaper advertisements and direct mail pieces that express support for Congressman Bonior's re-election bid. The Newspaper advertisements appeared from October 19 to October 20, 1988, in eight local Michigan papers. They are: The Armada Times, The Voice, The Review, The Courier Journal, The Independent Press, The Northeast Detroiter, The St. Clair Shores Herald, and Harper Woods Herald. Complainant has provided copies of the advertisements and the direct mailings.

PRELIMINARY LEGAL ANALYSIS

An examination of the copies of the advertisements and the direct mailings provided in the complaint indicates that the sponsors of these advertisements failed to provide the proper disclaimer required by 2 U.S.C § 441d(a). However, it is not immediately clear whether Respondents are the sponsors of the

advertisements and direct mailings. The Respondents must be given the opportunity to respond to the allegations before the Office of the General Counsel can make recommendations regarding this matter.

Lawrence M. Noble
General Counsel

Date

10-28-88

BY:


Lois G. Lerner
Associate General Counsel

89040742358

06C905
SACHS, NUNN, KATES, KADUSHIN, O'HARE, HELVESTON & WALDMAN, P.C.

ATTORNEYS AND COUNSELORS AT LAW

1000 FARMER

DETROIT, MICHIGAN 48226

(313) 965-3464

FAX NO. (313) 965-0268

88 NOV -4 AM 11:09

THEODORE SACHS
MELVYN J. KATES
A. DONALD KADUSHIN
ROLAND R. O'HARE
RONALD R. HELVESTON
BARRY P. WALDMAN
ROBERT G. HODGES
DAVID K. BARNES, JR.
RONALD S. WEINER
JOHN L. ZORZA II
EILEEN NOWIKOWSKI
KATHLEEN L. BOGAS
ANN E. NEYDON
I. MARK STECKLOFF
JAMES MICHAEL MONDRO
GREGORY M. JANKS
GRANNER S. RIES
MARY ELLEN GUREWITZ
GEORGE H. KRUSZEWSKI
GEORGE T. FISHBACK
JOHN R. RUNYAN, JR.

JOHN C. MCINTOSH
JOSEPH P. BUTTIGLIERI
MARK BREWER
ALISON L. PATON
ANDREW A. NICKELHOFF
DENISE L. MITCHAM
JOY A. TURNER
JOYCE M. OPPENHEIM
THOMAS HUGH PETERSON III
KAREN RUBENFAER
MARY KATHERINE NORTON
PHILLIP D. FREDERICK
JOHN S. MISCH
MICHAEL D. M. FERREN
JIM D. EDGAR
ALMA Y. HENLEY

D. CHARLES MARSTON
RETIRED
JEANNE NUNN
RETIRED

October 31, 1988

PONTIAC OFFICE
1200 PONTIAC STATE BANK BLDG
PONTIAC, MICHIGAN 48058
(313) 334 0582

FLINT OFFICE
6-1388 W. BRISTOL ROAD
SUITE 105
BRISTOL WEST CENTER
FLINT, MICHIGAN 48507
(313) 233 4202

LANSING OFFICE
419 S. WASHINGTON
LANSING, MICHIGAN 48933
(313) 482 4163

Lois G. Lerner, Esq.
Associate General Counsel
Federal Election Commission
Washington, D.C. 20463

Re: MJR 2737; The Honorable David E. Bonior

Dear Ms. Lerner:

Enclosed please find completed Statement of Designation of Counsel in the above-referenced matter.

Sincerely,

Mark Brewer
Mark Brewer

MB/plm
opeiu42afl-cio
Enclosure

cc: Theodore Sachs, Esq.
Honorable David E. Bonior

88 NOV -4 PM 1:50

STATEMENT OF DESIGNATION OF COUNSEL

MUR 2737

NAME OF COUNSEL: Mark Brewer, Esq.

ADDRESS: Sachs, Nunn, Kates, Kadushin, O'Hare,
Helveston & Waldman, P.C., 1000 Farmer
Detroit, MI 48226

TELEPHONE: (313) 965-3464

The above-named individual is hereby designated as my
counsel and is authorized to receive any notifications and other
communications from the Commission and to act on my behalf before
the Commission.

Oct 30 1988
Date

[Signature]
Signature

RESPONDENT'S NAME: David E. Bonior

ADDRESS: 37549 Charter Oaks
Mt. Clemens, MI 48043

HOME PHONE: (313) 465-4252

BUSINESS PHONE: (202) 225-2106

00040742650

SACHS, NUNN, KATES, KADUSHIN, O'HARE, HELVESTON & WALDMAN, P.C.

ATTORNEYS AND COUNSELORS AT LAW
1000 FARMER
DETROIT, MICHIGAN 48226

88 DEC -7 PM 2:09

(313) 965-3464
FAX NO. (313) 965-0268

PONTIAC OFFICE
1200 PONTIAC STATE BANK BLDG
PONTIAC MICHIGAN 48058
(313) 334-0582

FLINT OFFICE
G-1388 W BRISTOL ROAD
SUITE 105
BRISTOL WEST CENTER
FLINT MICHIGAN 48507
(313) 233-4202

LANSING OFFICE
419 S WASHINGTON
LANSING MICHIGAN 48933
(517) 482-4183

December 5, 1988

THEODORE SACHS
MELVYN J. KATES
A. DONALD KADUSHIN
ROLAND R. O'HARE
RONALD R. HELVESTON
BARRY P. WALDMAN
ROBERT G. HODGES
DAVID K. BARNES JR.
RONALD S. WEINER
JOHN L. ZORZA II
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MARK BREWER
ALISON L. PATON
ANDREW A. NICKELHOFF
DENISE L. MITCHAM
JOY A. TURNER
JOYCE M. OPPENHEIM
THOMAS HUGH PETERSON III
KAREN RUBENFAER
MARY KATHERINE NORTON
PHILLIP D. FREDERICK
JOHN S. MISCH
MICHAEL D. McFERREN
JIM D. EDGAR
ALMA Y. HENLEY

D. CHARLES MARSTON
RETIRED
JEANNE NUNN
RETIRED

Michael Marinelli
Federal Election Commission
Washington, D.C. 20463

Re: MUR 2737; The Honorable David E. Bonior and Bonior for Congress

Dear Mr. Marinelli:

This letter is submitted pursuant to 11 C.F.R. §111.6 in response to the above-referenced complaint and demonstrates that no action should be taken against either of the respondents, Congressman David E. Bonior or his principal campaign committee, Bonior for Congress, based upon that complaint. The complaint lacks merit on numerous factual and legal grounds, as more fully set forth below, and the General Counsel should recommend to the Commission that it find no reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act (hereinafter "FECA" or "Act") and that the Commission should close its file in this matter.

STATEMENT OF FACTS

The complaint's alleged "Statement of Facts" is not accurate or complete - it contains a number of omissions and erroneous legal conclusions. The relevant facts are as follows.

David E. Bonior is the incumbent United States Congressman from the 12th Congressional District of Michigan and he was reelected on November 8, 1988. His principal campaign committee is Bonior for Congress.

Bonior for Congress paid for the advertisements appended to the complaint published on October 19 and 20, 1988 in 6 of the 8 newspapers listed in the complaint. Bruley Affidavit 14. No advertisements were purchased in the Harper Woods Herald and Northeast Detroit. Id. 1/ No other person, including David Bonior, made any expenditure in connection with the advertisements purchased by Bonior for Congress. Id. As requested by the Commission, the cost of each advertisement to Bonior for Congress, the cost of each newspaper

1/ The complaint's mistake in this regard is due to the fact that the St. Clair Shores Herald is published by the same publisher as the other two papers and all three papers are listed across the top of each page of each newspaper, giving the false impression that the ad was published in all three papers when in fact Bonior for Congress purchased only an ad in the St. Clair Shores Herald. Hereafter, any reference to "advertisements" refers only to those purchased by Bonior for Congress in the 6 newspapers.

to the public, and the circulation of each newspaper are appended to this letter as Exhibit A. The newspapers, three of which have a common publisher, are listed individually or by publisher. The text of the advertisements speak for themselves and are not "advocacy" pieces as the complaint mischaracterizes them in its erroneous legal conclusion.

Bonior for Congress also mailed, entirely at its own expense, the two direct mail pieces appended to the complaint. Bruley Affidavit ¶4. No other person, including David Bonior, made any expenditure in connection with those advertisements. Id. Also in response to the Commission's request, Bonior for Congress' printing and mailing costs for the two pieces and the number of each mailed are appended to this letter as Exhibit A. Again, the text of each piece speaks for itself and does not support the complaint's legal conclusion as to their alleged "advocacy" nature.

None of these advertisements were intended, expressly or impliedly, to solicit contributions to Bonior for Congress and, to the best of respondent Bonior for Congress' knowledge after reviewing its records, resulted in no contributions to Bonior for Congress. See Bruley Affidavit ¶5.

Further facts as necessary are detailed in the Argument.

ARGUMENT

THERE IS NO REASON TO BELIEVE THAT THE COMPLAINT
SETS FORTH A VIOLATION OF THE ACT AND THE COMMISSION
SHOULD CLOSE ITS FILE IN THIS MATTER.

- I. THERE IS NO REASON TO BELIEVE THAT DAVID BONIOR AS AN
INDIVIDUAL OR AS A CANDIDATE VIOLATED THE ACT.

The complaint names two respondents, Congressman David Bonior and his principal campaign committee, Bonior for Congress. The file in this matter as to David Bonior can and should be closed for fundamental legal and factual reasons.

The FECA does not charge David Bonior or any federal candidate with fulfilling its various ministerial requirements - recordkeeping, filing reports, disbursing funds, following disclosure requirements, depositing contributions, and the like. Those tasks are the obligation of a candidate's principal campaign committee.

Indeed, by statute and regulation any federal candidate who receives a contribution, obtains a loan, or makes an expenditure is deemed to have done so not in his or her individual or candidate capacity, but as an "agent" acting solely on behalf of his or her principal campaign committee. See 2 U.S.C. §432(e)(2); 11 C.F.R. §§101.2(a); 102.7(d). Thus as a matter of law, David Bonior is not a proper or necessary respondent in this matter because even if he played a role in the alleged violations of the Act - and he did not - his actions would be attributable entirely to his principal, Bonior for Congress.

Moreover, he is not a proper or necessary respondent as a matter of fact either.

As the FECA-required disclosure reports filed with the Commission by Bonior for Congress plainly reveal, the advertisements and mailings at issue were paid for in their entirety by Bonior for Congress not David Bonior personally. See also Bruley Affidavit ¶4. The advertisements and mailings were not, as the complaint insinuates, paid for by "anonymous benefactors" or "sources Bonior does not want the public to know about" - they were paid for by Bonior for Congress only. Therefore, even if, as the complaint alleges, the requirements of 2 U.S.C. §441d(a) and 11 C.F.R. §110.11 applied to those advertisements and mailings - and they did not for the reasons set forth below - the Committee and not David Bonior was the "person" which made the "expenditure" under the Act triggering its disclosure requirements.

Thus if any person violated the Act here - and no one did - it was the Committee, not David Bonior, and the file can and should be closed as to him. 2/

II. THERE IS NO REASON TO BELIEVE THAT BONIOR FOR CONGRESS VIOLATED THE ACT - 2 U.S.C. §441d(a) AND 11 C.F.R. §110.11 DO NOT APPLY TO THE ADVERTISEMENTS AND MAILINGS AT ISSUE BECAUSE THEY DID NOT CONSTITUTE "EXPRESS ADVOCACY."

The complaint's sole substantive allegation is that the advertisements and direct mail pieces at issue "did not . . . contain the statements of sponsorship and authorization prescribed by law," (Complaint at 1-3) citing 2 U.S.C. §441d(a) and 11 C.F.R. §110.11. This allegation is meritless.

Because the complaint's premise that §441d(a) and 11 C.F.R. §110.11 applied to the advertisements and mailings here is as erroneous as it is conclusory, the advertisements and mailings at issue did not have to "contain the statement of sponsorship and authorization" required by those provisions.

2 U.S.C. §441d(a) states in its entirety:

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication -

- (1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee,

2/ Even if the Commission does not close its file as to David Bonior for these reasons - and it should - it can be closed because there is no merit to the complaint in any event as set out infra in §II whose arguments apply equally to David Bonior.

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee; or

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

In this matter, while a "person," Bonior for Congress, made an expenditure for the purpose of financing communications through newspapers and direct mailing, those communications did not "expressly advocat[e] the election or defeat of a clearly identified candidate" within the meaning of §441d(a), and thus the disclosure requirements of §441d(a) and its companion regulation did not apply to the advertisements and mailings at issue. There was therefore no violation of the Act here.

The United States Supreme Court has repeatedly held that "[t]he starting point in every case involving construction of a [federal] statute is the language itself." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976). If that statutory language is clear, it is conclusive and the statute admits of no further construction. See, e.g., United States v. Clark, 454 U.S. 555, 560 (1982). The instant inquiry starts and ends with the language of §441d(a), language intentionally taken verbatim with full knowledge of its meaning by Congress from a United States Supreme Court case. Under the clear meaning of the language of §441d(a), as revealed by the United States Supreme Court opinion from which it was taken, the advertisements and mailings at issue did not violate §441d(a).

The language of §441d(a) requiring express advocacy of the defeat or election of a clearly identified candidate before the statute's requirements apply was taken verbatim from Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*). Generally, Congress is presumed to know the meaning of terms it uses in legislation. See, e.g., Blitz v. Donovan, 740 F.2d 1241, 1245 (D.C. Cir., 1984). Here, Congress actually knew the meaning of the terms it chose for §441d(a) and intentionally adopted the restrictive meaning given to those terms in Buckley as the Act's legislative history repeatedly reveals. See, e.g., S. Rep. No. 677, 94th Cong. 2d Sess. 6, 11 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 929, 934, 938-39; H. R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 38, 66 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 946, 953-54, 981.

Buckley could not have been clearer or stricter as to what the phrase "express advocacy of election or defeat," now found in §441d(a), means. The Court set out in a footnote precisely what the phrase very narrowly encompassed:

[E]xpress words of advocacy of election or defeat [are those] such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Re: MUR 2737; The Honorable David E. Bonior and Bonior for Congress
December 5, 1988
Page five

424 U.S. at 44 n.52; see also id. at 78-80 & n.108. The Court recently reiterated and employed Buckley's narrow definition of "express advocacy" in FEC v. Massachusetts Citizens for Life, 479 U.S. ___, ___, 107 S. Ct. ___, ___, 93 L.Ed.2d 539, 550-51 (1986).

No such express words of advocacy or similar Buckley-permitted express terms, e.g., "return," "re-elect," or "retain," are even remotely found anywhere in any of the advertisements and mailings at issue. ^{3/} Instead, they contain extensive issue discussion, precisely the type of discussion the Court in Buckley sought to protect and exclude from statutory coverage by its adoption of the "express advocacy" standard, even if such discussion could arguably have an incidental effect on an election. See 424 U.S. at 42-44 & nn. 50, 52. In adopting the Buckley standard, Congress has also declared that an incidental effect on an election is not enough to fall within the ambit of §441d(a) - only express words of advocacy trigger §441d(a)'s requirements.

If more be needed to demonstrate that the advertisements and mailings at issue are not covered by §441d(a), in FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir., 1980) (per curiam), the en banc Second Circuit held, in an analysis equally applicable here, that a leaflet which criticized a Congressman's record did not constitute "express advocacy" under §441d(a) and rejected the addition of the word "implied" to Buckley's strict "express advocacy" standard:

The history of §§424(e) and 441d thus clearly establish that . . . the words "expressly advocating" mean exactly what they say. . . . [T]he [plaintiff] would apparently have us read "expressly advocating the election or defeat" to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in Buckley v. Valeo and adopted by Congress in the 1976 amendments. The position is totally meritless.

The [communication at issue] contains nothing which could rationally be termed express advocacy There is no reference anywhere in the [communication at issue] to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election;

^{3/} The Commission long ago ruled under similar circumstances the mere use of the committee name, Bonior for Congress, as part of the information necessary to indicate the committee's mailing address on the two direct mail pieces at issue "would under no circumstances be considered a communication that needed to include . . . the statement of authorization" AO 1978-38, Federal Election Campaign Finance Guide (CCH) ¶5336 (August 28, 1978).

616 F.2d at 53 (emphasis original). As in CLITRIM, so, too, here - "express advocacy" is missing. 4/

Finally, Commission precedent also supports closing of the file here.

For the reasons previously stated these advertisements and mailers are similar to testimonials where the Commission has found a disclaimer not required by law on the tickets to such events. See MUR 1139 (March 5, 1980); see also, e.g., AO 1980-67, Federal Election Campaign Guide (CCH) ¶5527 (August 12, 1980). The communications at issue are also analogous to those communications from congressional candidates to voters about ballot questions which will appear on the same election ballot as the candidate. In those instances, no disclaimer was required. See, e.g., AO 1980-25, Federal Election Campaign Finance Guide (CCH) §5481 (April 20, 1980); MUR 1337 (March 24, 1981). In fact, the communication in AO 1980-25 went further than those at issue

4/ FEC v. Furgatch, 807 F.2d 857 (9th Cir., 1987), cert. denied, ___ U.S. ___, ___ S. Ct. ___, 98 L.Ed.2d 106 (1987), - even if it represented a correct interpretation of "express advocacy" and it does not because it improperly deviates from the strict Buckley, MCFL, and congressionally adopted interpretation - does not change the result here. Even under Furgatch's less stringent (than Buckley) test of "express advocacy," the advertisements and mailings at issue were not "express advocacy."

The advertisements and mailings are not "express advocacy" under Furgatch because they fail all parts of its three-part test:

First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the readers to take some other kind of action.

807 F.2d at 864 (emphasis added). The advertisement at issue in Furgatch contained clear express words advocating action by its readers - "don't let him" according to the court constituted a direct, simple command to the voters to act by voting against the candidate.

There is no such clear command or plea to vote for or against any candidate in the advertisements and mailings at issue - indeed there is no call for any action by the readers whatsoever - the advertisements and mailings are "merely informative" and issues-oriented under Furgatch and therefore do not constitute "express advocacy" thereunder.

Re: MUR 2737; The Honorable David E. Bonior and Bonior for Congress
December 5, 1988
Page seven

here because it contained statements of the candidacy and party affiliation of the congressional candidate who wrote and distributed it to the general public. No such statements appear in the communications here at issue which are otherwise like those in AO 1980-25 - they are informational and relate to issues, not candidacy. Thus, no disclaimer should be required here under the reasoning of AO 1980-25 and the other FEC authorities cited.

Thus, under Commission precedent, the advertisements and mailers at issue need not have included the §441d(a) disclaimer.

In opposition to all of this Supreme Court, federal appellate court and FEC authority and the manifest intentions of Congress which plainly demonstrate that the advertisements and mailings at issue are not "express advocacy" under §441d(a), the complaint can muster but a single advisory opinion, AO 1978-33, allegedly supporting its position, but it does not.

AO 1978-33 is plainly distinguishable from the instant case - "express advocacy" was not even an issue there because the advertisement involved contained the words "Beat Stark!" and the opinion requestor conceded that the advertisement was "express advocacy." The only issue presented in the AO was whether a one-line, 16-word advertisement came within the "small item" exemption from the disclosure requirements, then found in 11 C.F.R. §110.11(a)(1). As such the AO is simply inapplicable in the circumstances here presented. See 2 U.S.C. §437f(c)(1); 11 C.F.R. §112.5(a).

Ignoring all of that, the complaint absurdly yanks the words "terse or cryptic" out of context from the opinion and alleges that those words somehow render the advertisements and mailers at issue violative of the Act. Plainly, there is no inherent conflict between "terse" and the Buckley standard of "express advocacy" - under that standard the "advocacy" phrase can be as short as one word, see Buckley 424 U.S. at 44 n.52, and it is impossible to be more terse than that. If, however, by the use of "terse or cryptic" the complaint seeks to create a standard less strict than Buckley, that is an untenable standard in the face of Buckley, MCFL, CLITRIM, (even Furgatch) and the clear language and history of the statute, and should be rejected by the Commission.

For all of these reasons, §441d(a) and 11 C.F.R. §110.11 do not apply to the advertisements and mailings at issue because they did not constitute "express advocacy," and the file in this matter should be closed.

CONCLUSION

For the reasons set forth, the General Counsel should recommend to the Commission that it find no reason to believe that the complaint sets forth

Re: MUR 2737; The Honorable David E. Bonior and Bonior for Congress
December 5, 1988
Page eight

a possible violation of the Act and that the Commission should close its file
in this matter.

Respectfully submitted,

SACHS, NUNN, KATES, KADUSHIN,
O'HARE, HELVESTON & WALDMAN, P.C.

BY:

Mark Brewer
MARK BREWER

MB/plm
opeiu42afl-cio
cc: Theodore Sachs, Esq.
Honorable David E. Bonior
Bonior for Congress

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EXHIBIT A

NEWSPAPER ADVERTISEMENTS

1. The Armada Times

Cost of ad to Bonior for Congress: \$57.75
Cost of newspaper to public: Subscription \$9.00/year or \$.25/issue
Circulation: 1,500

2. The Voice

Cost of ad to Bonior for Congress: \$309.75
Cost of newspaper to public: Free
Circulation: 35,000

3. Richmond Publishing Co.

Cost of ads to Bonior for Congress (three combined): \$330.00
Cost of newspaper to public: Subscription \$15.49/year or \$.25/issue

a. The Richmond Review

Circulation: 5,461

b. The Courier Journal

Circulation: 2,239

c. The Independent Press

Circulation: 3,222

4. The St. Clair Shores Herald

Cost of ad to Bonior for Congress: \$147.20
Cost of newspaper to public: Subscription \$6.00/year or \$.15/issue
Circulation: less than 16,300*

DIRECT MAIL PIECES

1. "Bonior Tried and True"

Printing cost to Bonior for Congress: \$21,867.47
Mailing cost to Bonior for Congress: \$12,951.73
Number mailed by Bonior for Congress: 126,900

2. "Social Security"

Printing cost to Bonior for Congress: \$1,576.33
Mailing cost to Bonior for Congress: \$2,917.52
Number mailed by Bonior for Congress: 12,876

*This figure is for all three papers published by the publisher of the St. Clair Shores Herald which is the only paper of the three in which Bonior for Congress purchased an ad. See Bruley Affidavit ¶4. The publisher does not keep separate circulation figures for each newspaper and therefore this is the best estimate available of the circulation of the St. Clair Shores Herald.

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FEDERAL ELECTION COMMISSION

In the Matter of:

JOSEPH R. GAYLORD,

Complainant,

and

MUR 2737

DAVID E. BONIOR and
BONIOR FOR CONGRESS,

Respondents.

AFFIDAVIT OF EDWARD BRULEY

STATE OF MICHIGAN)

)ss.

COUNTY OF WAYNE)

EDWARD BRULEY, being first duly sworn, deposes and says that:

1. He makes this affidavit based upon his personal knowledge in support of the letter response of RESPONDENTS in this matter.
2. If sworn as a witness, he can competently testify to the facts stated herein.
3. He is and at all material times herein has been an agent of Bonior for Congress in charge of the 1988 reelection campaign of Congressman David Bonior. He is knowledgeable about the reelection campaign conducted by Bonior for Congress on behalf of Congressman David Bonior in 1988 and is knowledgeable about the design, language, placement, expenditures for, and all other relevant matters concerning the advertisements and direct mail pieces at issue in this matter.
4. Bonior for Congress, acting through agents other than David Bonior, made all of the expenditures for the advertisements and direct mail pieces at issue in this matter except for the Harper Woods Herald and Northeast Detroiter. No advertisements were purchased in those newspapers. David Bonior expended no funds of his own or on behalf of Bonior for Congress for the advertisements and direct mail pieces at issues in this matter.
5. A review of the records of Bonior for Congress conducted under my supervision indicates that no contributions were received by Bonior for


Congress as a result of the advertisements and direct mail pieces at issue in this matter.

6. The information contained in Exhibit A attached to the letter response was collected by agents of Bonior for Congress under my supervision and is true to the best of my information and belief.

FURTHER DEPONENT SAYETH NOT.


EDWARD BRULEY

Subscribed and sworn to before me
this 5th day of December, 1988.


Notary Public
County of Wayne, Michigan
My Commission Expires: 1/22/90

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS / JOSHUA MCFADDEN
COMMISSION SECRETARY

DATE: FEBRUARY 27, 1989

SUBJECT: OBJECTION TO MUR 2737 - General Counsel's Report
Signed February 22, 1989

The above-captioned document was circulated to the
Commission on Thursday, February 23, 1989 at 4:00 p.m.

Objection(s) have been received from the Commissioner(s)
as indicated by the name(s) checked below:

Commissioner Aikens	<u>X</u>
Commissioner Elliott	<u>X</u>
Commissioner Josefiak	<u>X</u>
Commissioner McDonald	<u>X</u>
Commissioner McGarry	<u> </u>
Commissioner Thomas	<u>X</u>

This matter will be placed on the meeting agenda
for March 7, 1989.

Please notify us who will represent your Division before the
Commission on this matter.

33040742572

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Bonior for Congress Committee and)
David M. Diegel as treasurer)
The Honorable David Bonior)

MUR 2737

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

A. The Complaint

On October 24, 1988, this Office received a complaint from Joseph R. Gaylord, the executive director of the National Republican Congressional Committee. The complaint alleges that the incumbent Democratic Congressman from Michigan's 12th Congressional District and his principal campaign committee, the Bonior for Congress Committee ("the Committee") and David M. Diegel, as treasurer, were engaging in activity that violated the Federal Election Campaign Act of 1971, as amended ("the Act"). Specifically, the complaint asserts that the respondents violated 2 U.S.C § 441d(a) by failing to disclose the sponsorship and authorization of several newspaper advertisements and direct mailings that express support for Congressman David Bonior's re-election bid. The newspaper advertisements are stated to have appeared from October 19 to October 20, 1988, in eight local Michigan papers. They are: The Armada Times, The Voice, The Review, The Courier Journal, The Independent Press, The Northeast Detroiter, The St. Clair Shores Herald, and Harper Woods Herald.

B. The Response

Respondents replied to the complaint in a letter received by this Office on December 7, 1988.

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Respondents admit that the advertisements and direct mailings were prepared by the Committee. The reply by respondents included an affidavit of Edward Bruley, an agent of the campaign who worked on the advertisements and direct mailings at issue in the complaint, and a fact sheet on the cost of these materials. According to the information provided, the newspaper advertisements together cost \$844.7 while the combined cost of the direct mailings was \$39,313.05. The respondents state that the total circulation of the newspapers containing the advertisements was less than 63,000 and the total number of direct mailings prepared was 139,776.

Respondents also state that there were no advertisements in the Harper Woods Herald and Northeast Detroiter. According to respondents, the St. Clair Shores Herald shares a common page heading with the other two papers leading to the impression that the advertisements in question appeared in all three papers rather just the St. Clair Shores Herald.

Respondents do not deny that the advertisements and direct mailings failed to disclose sponsorship or authorship. They assert, however, that this failure does not violate the Act because no such disclosure was required in this case. Respondents note that Section 441d(a) requires disclaimers on communications either soliciting contributions or expressly advocating the defeat or election of a clearly identifiable candidate. Here, respondents argue, the direct mailings and advertisements did not solicit contributions. Further, under the line of cases interpreting Section 441d(a), respondents contend

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the materials could not be considered express advocacy since all they do is inform the public of candidate's record and his opponent's position.

Respondents also contend that Congressman David Bonior was not personally involved in the alleged violations contained in the complaint. However, if he had been involved, the respondents argue he would have been acting as agent of the Committee. Respondents conclude that his actions would have been attributable entirely to the his principal, the Bonior for Congress Committee.

II. FACTUAL AND LEGAL ANALYSIS

A. The Legal Standard

Under 2 U.S.C. § 441d(a), newspaper advertisements and direct mailings that expressly advocate the election or defeat of a clearly identified candidate or solicit contributions must disclose the sponsorship and authorization. If the candidate or his authorized committee paid for the advertisement or direct mailing, this must be disclosed on the literature.

Express advocacy has been explained in two Supreme Court cases. In Buckley v. Valeo, 424 U.S. 1, 42 (1976), the Court noted "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." Therefore, in order to provide adequate First Amendment protection for the discussion of issues, the Court defined express advocacy for purposes of the Act as requiring the "use of language such as 'vote for,' 'elect,' 'support,'." Id. at 44, n. 52. The Supreme Court

reaffirmed this standard in Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). The Court observed that in situations where the "message is marginally less direct than 'Vote for Smith'," the Court would still find the presence of express advocacy. Id. at 251.

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A further analysis of the Buckley standard was presented in Federal Election Commission v Harvey Furgatch, 807 F.2d 857 (9th Cir. 1987), the most recent appellate case discussing express advocacy. In Furgatch, the United States Court of Appeals for the Ninth Circuit specified that for express advocacy to exist, the speech in question need not have any of the words listed in Buckley. Id. at 864. However, the 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. The Court advanced the following three part test to determine whether express advocacy was, in fact, present:

First, even if it is not presented in the clearest most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. Id.

B. Application of the Law to the Facts

1. Description of the materials in question

Examples of the advertisements and direct mailings at issue in this matter were provided in the original complaint.

2. Analysis

Section 441d(a) requires that all solicitations contain a proper disclaimer. Since the direct mailings and the advertisements do not request contributions, they cannot be viewed as solicitations. In these situations, to place the materials within the scope of Section 441d(a), there must be both a clearly identifiable candidate and express advocacy of his election or defeat in a federal election. The campaign materials deal with clearly identifiable candidates, Congressman David Bonior and Doug Carl. Therefore, the question is whether they expressly advocate the election or defeat of either of these candidates.

The advertisements presented Congressman David Bonior's record in a positive light and appeared shortly before the general election. The direct mailings also present Bonior's record in a favorable light or criticize his opponent's record, but neither the complaint nor the response indicates the date the mailings were sent or the time payment was made for the production costs. Although these advertisements and direct mailings seem to suggest that a person should vote for Congressman David Bonior or against Doug Carl or were made for such purpose, none of the campaign materials complained of contain any explicit call for any specific action, voting or otherwise.

In MUR 2275, a complaint was received alleging that direct mailings prepared by the Geren for Congress Committee lacked the proper disclaimer required by Section 441d(a). These direct

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mailings contained characterizations of the positions taken on by respondent's opponent on issues such as toxic waste, social security and agricultural subsidies. The direct mailings asserted that while "Democrat Pete Geren wants to discuss these issues and their common sense solutions Republican Joe Barton would rather talk about anything else." See Attachment 2 at 24. The direct mailing concluded with the statement "He can't win an argument on these issues."

A Statement of Reasons joined by a majority of the Commissioners stated that after reviewing "prior Commission and court interpretations of 'express advocacy'," it was determined "the direct mail piece at issue in the complaint did not contain a clear call to action or an exhortation to vote for or against any candidate." The Statement of Reasons concluded "the majority decided, therefore, that the communication did not expressly advocate the election or defeat of a candidate, nor solicit contributions."

There are strong parallels between MUR 2275 and the present situation. In both cases, there is campaign literature critical of an opponent but not explicitly calling for his defeat. The only difference is that in the current matter there is also material praising a candidate but, again, not explicitly asking that anything specific should be done in his behalf. This differ not seem significant in determining the existence of express advocacy. Accordingly, based on the current case interpretation and recent Commission action, this Office concludes there is no express advocacy in the direct mailings and advertisements at

The advertisements state Congressman David Bonior's Congressional record on various issues such as health care and veteran's services. After citing his efforts in these areas, the advertisements assert, "it has paid off. The 12th District is a better place today because of Congressman David Bonior." The advertisements conclude with the slogan "Bonior Tried and True." See Attachment 1 at 8.

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The four examples of direct mailings are varied in composition. The first, characterizes and criticizes the views of Doug Carl, Congressman David Bonior's Republican opponent in the general election, on social security. It asserts "There are no free lunches" and then claims that Doug Carl's proposals would "completely bankrupt the Social Security Trust Fund." See Attachment 1 at 13. The second direct mailing contains a quote from Congressman Claude Pepper describing the support Congressman David Bonior has given on social security issues. The direct mailing cites a positive ranking Congressman David Bonior has received from a senior citizens group. Prominently placed on the mailing is the slogan "Congressmen Claude Pepper and David Bonior work together for you." See Attachment 1 at 14. The third type of direct mailing is simply a reproduction of the advertisements. See Attachment 1 at 15. The fourth and last example presents Congressman David Bonior's background including his educational accomplishments and the past offices he has held. The mailing concludes by describes him as a Democrat. See Attachment 1 at 18.

issue in this matter.

Therefore, the Office of the General Counsel recommends that the Commission find no reason to believe the Bonior for Congress Committee and David M. Diegel, as treasurer, violated 2 U.S.C. § 441d(a).

Since there is no evidence that the candidate was personally involved in any violation of the Act, this Office further recommends that the Commission find no reason to believe that Congressman David Bonior violated 2 U.S.C. §441d(a).

III. RECOMMENDATIONS

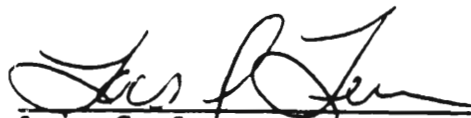
1. Find no reason to believe that the Honorable David Bonior violated 2 U.S.C. § 441d(a).
2. Find no reason to believe that the Bonior for Congress Committee and David M. Diegel, as treasurer, violated 2 U.S.C. § 441d(a).
3. Approve the attached letters
4. Close the file.

Lawrence M. Noble
General Counsel

2/22/89

Date

BY:



Lois G. Lerner
Associate General Counsel

Attachments

1. Complaint
2. Direct Mailing from MUR 2275
3. Response to Complaint
4. Proposed letters to Respondents
5. Proposed letter to Complainant

Staff person: Michael Marinelli

23040742680

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Bonior for Congress Committee and)
David M. Diegel, as treasurer) MUR 2737
)
The Honorable David Bonior)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of March 14, 1989, do hereby certify that the Commission took the following actions in MUR 2737:

1. Failed on a vote of 3-3 to pass a motion to find reason to believe the Bonior for Congress Committee and David M. Diegel, as treasurer, violated 2 U.S.C. § 441d(a) with respect to the mailings at issue in this matter.

Commissioners McDonald, McGarry, and Thomas voted affirmatively for the motion; Commissioners Aikens, Elliott, and Josefiak dissented.

2. Failed on a vote of 2-4 to pass a motion to find reason to believe the Bonior for Congress Committee and David M. Diegel, as treasurer, violated 2 U.S.C. § 441d(a) with respect to the newspaper advertisements at issue in this matter.

Commissioners McDonald and McGarry voted affirmatively for the motion; Commissioners Aikens, Elliott, Josefiak, and Thomas dissented.

(continued)

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3. Failed on a vote of 3-3 to pass a motion to -

- a) Find no reason to believe that the Honorable David Bonior violated 2 U.S.C. § 441d(a).
- b) Find no reason to believe that the Bonior for Congress Committee and David M. Diegel, as treasurer, violated 2 U.S.C. § 441d(a).
- c) Approve the letters attached to the General Counsel's report dated February 22, 1989.
- d) Close the file.

Commissioners Aikens, Elliott, and Josefiak voted affirmatively for the motion; Commissioners McDonald, McGarry, and Thomas dissented.

4. Decided by a vote of 6-0 to find no reason to believe that the Honorable David Bonior violated 2 U.S.C. § 441d(a).

Commissioners Aikens, Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision.

5. Decided by a vote of 4-2 to find no reason to believe that the Bonior for Congress Committee and David M. Diegel, as treasurer, violated 2 U.S.C. § 441d(a) with respect to the newspaper advertisements at issue.

Commissioners Aikens, Elliott, Josefiak, and Thomas voted affirmatively for the decision; Commissioners McDonald and McGarry dissented.

(continued)

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6. Failed on a vote of 3-3 to pass a motion to find no reason to believe that the Bonior for Congress Committee and David M. Diegel, as treasurer, violated 2 U.S.C. § 441d(a) with respect to the mailings at issue.

Commissioners Aikens, Elliott, and Josefiak voted affirmatively for the motion; Commissioners McDonald, McGarry, and Thomas dissented.

7. Decided by a vote of 6-0 to close the file and direct the Office of General Counsel to send appropriate letters.

Commissioners Aikens, Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision.

Attest:

3-16-89

Date

Marjorie W. Emmons

Marjorie W. Emmons
Secretary of the Commission

330040742633



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

March 27, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Joseph R. Gaylord, Executive Director
National Republican Congressional Committee
320 First Street, S.E.
Washington, D.C. 20003

RE: MUR 2737

Dear Mr. Gaylord:

The Federal Election Commission has reviewed the allegations contained in your complaint dated October 24, 1988. On March 14, 1989, the Commission considered your complaint, but was equally divided on whether the Bonior for Congress Committee violated 2 U.S.C. § 441d(a) by failing to include a disclaimer in the direct mailings described in your complaint. On the same day, the Commission determined that the failure to include a disclaimer on the advertisements described in your complaint did not violate 2 U.S.C. § 441d(a). The Commission also found that the Honorable David Bonior did not violate 2 U.S.C. § 441d(a).

Accordingly, on March 14, 1989, the Commission closed the file in this matter. The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Joseph R. Gaylord, Executive Director
page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel

Lois G. Lerner
BY: Lois G. Lerner *by HLR*
Associate General Counsel

Enclosure
General Counsel's Report
and Certification

33040742595



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 27, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Joseph R. Gaylord, Executive Director
National Republican Congressional Committee
320 First Street, S.E.
Washington, D.C. 20003

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Accordingly, on March 14, 1989, the Commission closed the file in this matter. The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Joseph R. Gaylord, Executive Director
page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel

Lois G. Lerner

BY: Lois G. Lerner *by HLR*
Associate General Counsel

Enclosure
General Counsel's Report
and Certification

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 2737

DATE FILMED 4/6/89 CAMERA NO. 4

CAMERAMAN AS

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

426 April 1989

THE FOLLOWING MATERIAL IS BEING ADDED TO THE FILE IN

MUR 2737

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06C 2 359

SACHS, NUNN, KATES, KADUSHIN, O'HARE, HELVESTON & WALDMAN, P.C.

ATTORNEYS AND COUNSELORS AT LAW

1000 FARMER

DETROIT, MICHIGAN 48226

(313) 965-3464

FAX NO. (313) 965-0268

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BARRY P. WALDMAN
ROBERT G. HODGES
DAVID K. BARNES JR.
RONALD S. WEINER
JOHN L. ZORZA II
EILEEN NOWIKOWSKI
KATHLEEN L. BOGAS
ANN E. NEYDON
I. MARK STECKLOFF
JAMES MICHAEL MONDRO
GREGORY M. JANKS
GRANNER S. RIES
MARY ELLEN GUREWITZ
GEORGE H. KRUSZEWSKI
GEORGE T. FISHBACK
JOHN R. RUNYAN, JR.

JOHN C. MCINTOSH
JOSEPH P. BUTTIGLIERI
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ALISON L. PATON
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JOY A. TURNER
JOYCE M. OPPENHEIM
THOMAS HUGH PETERSON III
KAREN RUBENFAER
MARY KATHERINE NORTON
PHILLIP D. FREDERICK
JOHN S. MISCH
MICHAEL D. McFERRIN
JIM D. EDGAR
ALMA Y. HENLEY

D. CHARLES MARSTON
RETIRED
JEANNE NUNN
RETIRED

PONTIAC OFFICE
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FLINT OFFICE
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SUITE 105
BRISTOL WEST CENTER
FLINT, MICHIGAN 48507
(313) 233-4202

LANSING OFFICE
419 S. WASHINGTON
LANSING, MICHIGAN 48933
(517) 482-4183

March 30, 1989

Lois G. Lerner, Esq.
Federal Election Commission
Washington, D.C. 20463


Re: MUR 2737; The Honorable David E. Bonior for Congress

Dear Ms. Lerner:

This is to acknowledge receipt of your letter of March 27, 1989 advising that the FEC has decided to close its file in the above-referenced matter.

I understand that the public record in such matters generally includes a certificate of the secretary of the Commission as to the Commission's action and a copy of the notification to the respondent, and sometimes includes the General Counsel's report. This is to request that the full General Counsel's report with all attachments be included in the public record and, if it is not included with that report, that a separate copy of Respondent's December 5, 1988 letter response and supporting attachment and affidavit be placed in the public record.

Sincerely,


Mark Brewer

MB/nd

cc: Theodore Sachs, Esq.
Honorable David E. Bonior
Bonior for Congress

RECEIVED
FEDERAL ELECTION COMMISSION
ADMINISTRATIVE DIVISION
89 APR -3 AM 11:04

89 APR -3 PM 3:24

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FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

THE FOLLOWING MATERIAL IS BEING ADDED TO THE
PUBLIC FILE OF CLOSED MUR 2737 .

89040752203



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

June 20, 1989

Mark Brewer, Esquire
Sachs, Nunn, Kates, Kadushin,
O'Hare, Helveston & Waldman, P.C.
1000 Farmer
Detroit, Michigan 48226

RE: MUR 2737
Bonior for Congress
Committee and
David M. Diegel, as
treasurer

The Honorable
David Bonior

Dear Mr. Brewer:

By letter dated March 27, 1989, the Office of the General Counsel informed you of determinations made with respect to the complaint filed against the Honorable David Bonior and the Bonior for Congress Committee and David M. Diegel, as treasurer. Enclosed with that letter were the First General Counsel's Report and Certification.

Enclosed please find a Statement of Reasons from Chairman Danny L. McDonald and Commissioner John Warren McGarry explaining their vote. This document will be placed on the public record as part of the file of MUR 2737.

89040752204

Mark Brewer, Esquire
Page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel


By: Lois G. Lerner
Associate General Counsel

Enclosure
Statement of Reasons

89040752205



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 20, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Joseph R. Gaylord, Executive Director
National Republican Congressional Committee
320 First Street, S.E.
Washington, D.C. 20003

RE: MUR 2737

Dear Mr. Gaylord:

By letter dated March 27, 1989, the Office of the General Counsel informed you of determinations made with respect to the complaint filed by you against the Honorable David Bonior and the Bonior for Congress Committee and David M. Diegel, as treasurer. Enclosed with that letter were the First General Counsel's Report and Certification.

Enclosed please find a Statement of Reasons from Chairman Danny L. McDonald and Commissioner John Warren McGarry explaining their vote. This document will be placed on the public record as part of the file of MUR 2737.

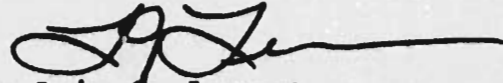
89040752206

Joseph R. Gaylord, Executive Director
page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel



By: Lois E. Lerner
Associate General Counsel

Enclosure
Statement of Reasons

89040752207



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 20, 1989

MEMORANDUM

TO: THE COMMISSION
FROM: MARJORIE W. EMMONS *MWE*
SUBJECT: STATEMENT OF REASONS - MUR 2737

Transmitted herewith is a copy of the Statement of Reasons for MUR 2737 signed by Chairman Danny L. McDonald and Commissioner John Warren McGarry.

This was received in the Secretariat at 2:31 p.m. on June 20, 1989.

Attachedment as noted

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The stakes in this disclaimer case may not seem particularly high. But, considering that the "express advocacy" standard in Section 441d is identical to the "express advocacy" standard that must be satisfied in order to make independent expenditures without limit, the Commission's failure to find express advocacy here will have a profound negative impact on the Commission's ability to prevent independent expenditures from being used as a vehicle to escape the contribution limits of the Act.

What we have in this case is nothing more than a basic political ad orchestrated and distributed by an incumbent to his voting district immediately before a general election. By finding no express advocacy under these circumstances, the Commission has raised the standard of express advocacy to a height few communications, including purported independent expenditures, can attain. It would appear that by its failure to obtain four votes to find express advocacy in this simple disclaimer case, the Commission has greatly increased the stakes and severely limited the Commission's ability to enforce the Federal Election Campaign Act.

* * * * *

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In the landmark election law decision Buckley v. Valeo, the Supreme Court stated that the term "express advocacy" referred to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 44(1976). In a footnote, the Court explained that words or phrases such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress", "vote against," "defeat," "reject," if present in a communication would constitute "express advocacy" for purposes of determining whether expenditures constituted independent expenditures. Buckley at 44.

In a recent case in the 9th Circuit, the United States Court of Appeals provided further guidance on the correct legal interpretation and application of the express advocacy standard and specifically focussed on the application of that standard to cases involving Section 441d. FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 108 S. Ct. 151 (1987). The Court stated that its task was to "apply 434(c) and 441d consistently with the constitutional requirements set out in Buckley." Furgatch at 860. The Court of Appeals decision in Furgatch has direct relevance to the Commission's deliberations in this matter.

89040752211
Having placed the Buckley magic words in proper context, the Court of Appeals then describes the elements of express advocacy. First, the Court counseled against considering a message line by line or phrase by phrase. "A proper understanding of the speaker's message can best be obtained by considering the speech as a whole." Furgatch at 863. Second, the Court indicated that although the subjective intent of the speaker is not determinative of the presence of express advocacy, it is a factor that may be considered. "Words derive their meaning from what the speaker intends and what the reader understands." Furgatch at 863. Third, the court concluded that the context of political speech is "relevant to a determination of express advocacy." Furgatch at 863. "A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated or supply necessary premises that are unexpressed but widely understood by readers or viewers." Furgatch at 863. The Court further warned against ignoring "external factors that contribute to a complete understanding of speech, especially where they are factors that the audience must consider in evaluating the words before it." Furgatch at 864.

communications, were, quite simply, campaign puff pieces --
litany of the accomplishments of a Member of Congress during
his term of office. They promoted the incumbent and implicitly
conveyed a negative message about his opponent. The
communications were distributed to reach the very individuals who
would vote in the general election. Even more compelling is the
timing of the communications three weeks before the 1988 general
election.

In our view, the communications described above, without
more, constitute express advocacy. But add to these factors,
that the communications were paid for by the candidate's campaign
committee, and calculated to place in the mind of the voters of
that district the specific accomplishments of the candidate. The
message may be subtle -- but it is unambiguous -- reelect
Congressman Bonior.

The Furgatch analysis is not difficult to apply to the
communications in this case. Taken as a whole, the message to
voters is to vote for Bonior if his performance in the past has
been acceptable. The subjective intent of the speaker, in this
case, the candidate, is not determinative, but it is a factor to

is an exhortation to vote for Congressman Bonior, it constitutes express advocacy, and should have included a proper disclaimer pursuant to 2 U.S.C. §441d.

Some would argue that express advocacy is not present unless the "call to action", the "exhortation" is explicit. In effect, they argue that a new set of "magic" words, different from the Buckley words, is required. This approach misses the critical point made by the Furgatch court that a combination of message and context, rather than the presence of certain "fixed indicators" of express advocacy, can produce an implicit exhortation to vote for or against a candidate amounting to "express advocacy." The Court of Appeals acknowledged that the ad in the Furgatch case failed to state with specificity the action required, but the failure of specificity did not remove the communication from coverage of the Act "when it is clearly the kind of advocacy of the defeat of an identified candidate that Congress intended to regulate." Furgatch at 865.

The voters who received the Bonior communications received them with an understanding and insight not present in the context of the Furgatch newspaper ads. The pre-existing relationship

There will never be a clearer example of express advocacy,
or of political campaign material intended by Congress to include
a disclaimer pursuant to Section 441d.

6-2-89
Date

Danny L. McDonald
Danny L. McDonald
Chairman

6/2/89
Date

John Warren McGarry
John Warren McGarry
Commissioner

Wed 7 June 1989



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THE FOLLOWING MATERIAL IS BEING ADDED TO THE
PUBLIC RECORD IN (CLOSED) MUR 2737



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Bonior for Congress Committee and)
David M. Diegel as treasurer)

MUR 2737

The Honorable David Bonior)
)
)

Statement of Reasons

**Chairman Danny L. McDonald
Commissioner John Warren McGarry**

We submit this Statement of Reasons out of a deep concern for the Commission's future ability to enforce not just the Section 441d disclaimer requirement, but every other section of the law that requires a showing of "express advocacy" to establish a violation. The Commission's failure to conclude in this case that a simple political ad promoting an incumbent, paid for by that incumbent, and distributed exclusively to voters in his Congressional district three weeks before the general election, contains "express advocacy," bodes ill for the Commission's ability to enforce, for example, the independent expenditure provision of the law, a provision based on the same legal standard of "express advocacy."

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The stakes in this disclaimer case may not seem particularly high. But, considering that the "express advocacy" standard in Section 441d is identical to the "express advocacy" standard that must be satisfied in order to make independent expenditures without limit, the Commission's failure to find express advocacy here will have a profound negative impact on the Commission's ability to prevent independent expenditures from being used as a vehicle to escape the contribution limits of the Act.

What we have in this case is nothing more than a basic political ad orchestrated and distributed by an incumbent to his voting district immediately before a general election. By finding no express advocacy under these circumstances, the Commission has raised the standard of express advocacy to a height few communications, including purported independent expenditures, can attain. It would appear that by its failure to obtain four votes to find express advocacy in this simple disclaimer case, the Commission has greatly increased the stakes and severely limited the Commission's ability to enforce the Federal Election Campaign Act.

* * * * *

89040752927

In this matter, we voted against the General Counsel's recommendation to find No Reason to Believe that the Bonior Committee violated Section 441d by failing to include a disclaimer on campaign material paid for and distributed by the Committee on behalf of Congressman Bonior. In our opinion, all of the communications in this matter contained "express advocacy" and should have included a disclaimer stating who paid for and who authorized them.

The Federal Election Campaign Act requires a disclaimer to be placed on any communication that expressly advocates the election or defeat of a clearly identified candidate, or which solicits a contribution. 2 U.S.C. §441d. Since the communications in question did not solicit contributions to the Bonior Committee, the only legal basis on which to find a violation of Section 441d is the presence of "express advocacy." In its consideration of the General Counsel's recommendations in this case, the Commission had only to apply the legal standard of "express advocacy" to the campaign literature paid for by the Bonior for Congress Committee.

89040752928
In the landmark election law decision Buckley v. Valeo, the Supreme Court stated that the term "express advocacy" referred to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 44(1976). In a footnote, the Court explained that words or phrases such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress", "vote against," "defeat," "reject," if present in a communication would constitute "express advocacy" for purposes of determining whether expenditures constituted independent expenditures. Buckley at 44.

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The issue raised in Furgatch was whether an advertisement in a general circulation newspaper, paid for by an individual and run two days before the 1980 Presidential election, which communication denigrated Jimmy Carter's candidacy, constituted an independent expenditure requiring disclosure of the expenditure pursuant to the Act's reporting requirements. The heart of the matter was whether the newspaper ad constituted "express advocacy."

In explaining its determination that the communication did, in fact, constitute express advocacy, the Court stated:

We begin with the proposition that "express advocacy" is not strictly limited to communications using certain key phrases. The short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words . . . or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. Furgatch at 862. (Emphasis added.)

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Having placed the Buckley magic words in proper context, the Court of Appeals then describes the elements of express advocacy. First, the Court counseled against considering a message line by line or phrase by phrase. "A proper understanding of the speaker's message can best be obtained by considering the speech as a whole." Furgatch at 863. Second, the Court indicated that although the subjective intent of the speaker is not determinative of the presence of express advocacy, it is a factor that may be considered. "Words derive their meaning from what the speaker intends and what the reader understands." Furgatch at 863. Third, the court concluded that the context of political speech is "relevant to a determination of express advocacy." Furgatch at 863. "A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated or supply necessary premises that are unexpressed but widely understood by readers or viewers." Furgatch at 863. The Court further warned against ignoring "external factors that contribute to a complete understanding of speech, especially where they are factors that the audience must consider in evaluating the words before it." Furgatch at 864.

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litany of the accomplishments of a Member of Congress during
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In our view, the communications described above, without
more, constitute express advocacy. But add to these factors,
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committee, and calculated to place in the mind of the voters of
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message may be subtle -- but it is unambiguous -- reelect
Congressman Bonior.

The Furgatch analysis is not difficult to apply to the
communications in this case. Taken as a whole, the message to
voters is to vote for Bonior if his performance in the past has
been acceptable. The subjective intent of the speaker, in this
case, the candidate, is not determinative, but it is a factor to

89040752931

Finally, the Court summarized its interpretation of the express advocacy standard, based on the Supreme Court's decision in Buckley.

We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it 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. Furgatch at 864.

Having outlined the factors that it considered in its determination of express advocacy in Furgatch, the Court confirmed that express advocacy would not be present when "reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action . . . If any reasonable alternative reading of speech can be suggested, it cannot be express advocacy..." Furgatch at 864.

The communications in question in this case more than satisfy the Furgatch standard of express advocacy. These

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be considered. The candidate is speaking and the recipient of his message is a voter who may go to the polls on election day. The context of the message is significant. Three weeks before the general election, the voting public receives a message from an incumbent Congressman listing his accomplishments. In this context, the words of this communication amount to an exhortation to vote for Congressman Bonior. The exhortation is implicit from the language of the communication, and the context in which the communication is made.

The Commission had before it campaign literature created by, paid for by and distributed by the campaign committee of an incumbent Member of Congress. Considering the litany of accomplishments, the promoting of the incumbent, the negative inference about his opponent, the targetting of his voting district, and the timing of the communication three weeks before the election, one question remains -- is there other reasonable alternative reading of this speech -- as anything other than a plea to vote for this candidate? Could reasonable minds differ as to whether it encourages a vote for or against a specific candidate? In our opinion, there is no other reasonable interpretation that can be offered to explain the message -- this

is an exhortation to vote for Congressman Bonior, it constitutes express advocacy, and should have included a proper disclaimer pursuant to 2 U.S.C. §441d.

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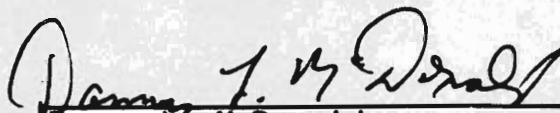
between an incumbent Congressman and the voters of his district gives the communications meaning. "Words derive their meaning from what the speaker intends and what the reader understands." Furgatch at 863.

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The communications in this case avoid the use of Buckley magic words, but three weeks before an election, there is no doubt that they successfully conveyed the intended message to voters to reelect Congressman Bonior. What other reasonable alternative message can a reader draw from these communications? we submit there is no other alternative interpretation except that the reader should vote for Congressman Bonior in the general election and that reasonable minds would not differ as to whether it encourages the reader to vote for or against a candidate.

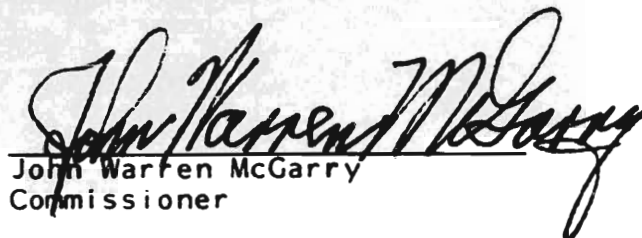
This kind of communication is precisely the kind of campaign literature that Congress intended should contain a disclaimer to inform the public who paid for and who authorized the communication. "The Commission's failure to take action requiring a disclaimer on these communications in light of all the facts and circumstances, creates unnecessary doubt about when express advocacy would ever be found by this Commission.

There will never be a clearer example of express advocacy,
or of political campaign material intended by Congress to include
a disclaimer pursuant to Section 441d.

6-2-89
Date


Danny L. McDonald
Chairman

6/2/89
Date


John Warren McGarry
Commissioner



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

THE FOLLOWING MATERIAL IS BEING ADDED TO THE
PUBLIC FILE OF CLOSED MUR 2737.

89040753798



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 20, 1989

Mark Brewer, Esquire
Sachs, Nunn, Kates, Kadushin,
O'Hare, Helveston & Waldman, P.C.
1000 Farmer
Detroit, Michigan 48226

RE: MUR 2737
Bonior for Congress
Committee and
David M. Diegel, as
treasurer

The Honorable
David Bonior

Dear Mr. Brewer:

By letter dated March 27, 1989, the Office of the General Counsel informed you of determinations made with respect to the complaint filed against the Honorable David Bonior and the Bonior for Congress Committee and David M. Diegel, as treasurer. Enclosed with that letter were the First General Counsel's Report and Certification.

Enclosed please find a Statement of Reasons from Chairman Danny L. McDonald and Commissioner John Warren McGarry explaining their vote. This document will be placed on the public record as part of the file of MUR 2737.

89040753799

Mark Brewer, Esquire
Page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel


By: Lois G. Lerner
Associate General Counsel

Enclosure
Statement of Reasons

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

June 20, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Joseph R. Gaylord, Executive Director
National Republican Congressional Committee
320 First Street, S.E.
Washington, D.C. 20003

RE: MUR 2737

Dear Mr. Gaylord:

By letter dated March 27, 1989, the Office of the General Counsel informed you of determinations made with respect to the complaint filed by you against the Honorable David Bonior and the Bonior for Congress Committee and David M. Diegel, as treasurer. Enclosed with that letter were the First General Counsel's Report and Certification.

Enclosed please find a Statement of Reasons from Chairman Danny L. McDonald and Commissioner John Warren McGarry explaining their vote. This document will be placed on the public record as part of the file of MUR 2737.

Joseph R. Gaylord, Executive Director
page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel



By: Lois G. Lerner
Associate General Counsel

Enclosure
Statement of Reasons

89040753802



Vinnie JR

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 20, 1989

MEMORANDUM

TO: THE COMMISSION

FROM: MARJORIE W. EMMONS *MWE*

SUBJECT: STATEMENT OF REASONS - MUR 2737

Transmitted herewith is a copy of the Statement of Reasons for MUR 2737 signed by Chairman Danny L. McDonald and Commissioner John Warren McGarry.

This was received in the Secretariat at 2:31 p.m. on June 20, 1989.

Attachedment as noted

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Bonior for Congress Committee and)
David M. Diegel as treasurer)

MUR 2737

The Honorable David Bonior)
)

Statement of Reasons

Chairman Danny L. McDonald
Commissioner John Warren McGarry

We submit this Statement of Reasons out of a deep concern for the Commission's future ability to enforce not just the Section 441d disclaimer requirement, but every other section of the law that requires a showing of "express advocacy" to establish a violation. The Commission's failure to conclude in this case that a simple political ad promoting an incumbent, paid for by that incumbent, and distributed exclusively to voters in his Congressional district three weeks before the general election, contains "express advocacy," bodes ill for the Commission's ability to enforce, for example, the independent expenditure provision of the law, a provision based on the same legal standard of "express advocacy."

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The stakes in this disclaimer case may not seem particularly high. But, considering that the "express advocacy" standard in Section 441d is identical to the "express advocacy" standard that must be satisfied in order to make independent expenditures without limit, the Commission's failure to find express advocacy here will have a profound negative impact on the Commission's ability to prevent independent expenditures from being used as a vehicle to escape the contribution limits of the Act.

What we have in this case is nothing more than a basic political ad orchestrated and distributed by an incumbent to his voting district immediately before a general election. By finding no express advocacy under these circumstances, the Commission has raised the standard of express advocacy to a height few communications, including purported independent expenditures, can attain. It would appear that by its failure to obtain four votes to find express advocacy in this simple disclaimer case, the Commission has greatly increased the stakes and severely limited the Commission's ability to enforce the Federal Election Campaign Act.

* * * * *

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In this matter, we voted against the General Counsel's recommendation to find No Reason to Believe that the Bonior Committee violated Section 441d by failing to include a disclaimer on campaign material paid for and distributed by the Committee on behalf of Congressman Bonior. In our opinion, all of the communications in this matter contained "express advocacy" and should have included a disclaimer stating who paid for and who authorized them.

The Federal Election Campaign Act requires a disclaimer to be placed on any communication that expressly advocates the election or defeat of a clearly identified candidate, or which solicits a contribution. 2 U.S.C. §441d. Since the communications in question did not solicit contributions to the Bonior Committee, the only legal basis on which to find a violation of Section 441d is the presence of "express advocacy." In its consideration of the General Counsel's recommendations in this case, the Commission had only to apply the legal standard of "express advocacy" to the campaign literature paid for by the Bonior for Congress Committee.

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In the landmark election law decision Buckley v. Valeo, the Supreme Court stated that the term "express advocacy" referred to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 44(1976). In a footnote, the Court explained that words or phrases such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress", "vote against," "defeat," "reject," if present in a communication would constitute "express advocacy" for purposes of determining whether expenditures constituted independent expenditures. Buckley at 44.

In a recent case in the 9th Circuit, the United States Court of Appeals provided further guidance on the correct legal interpretation and application of the express advocacy standard and specifically focussed on the application of that standard to cases involving Section 441d. FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 108 S. Ct. 151 (1987). The Court stated that its task was to "apply 434(c) and 441d consistently with the constitutional requirements set out in Buckley." Furgatch at 860. The Court of Appeals decision in Furgatch has direct relevance to the Commission's deliberations in this matter.

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The issue raised in Furgatch was whether an advertisement in a general circulation newspaper, paid for by an individual and run two days before the 1980 Presidential election, which communication denigrated Jimmy Carter's candidacy, constituted an independent expenditure requiring disclosure of the expenditure pursuant to the Act's reporting requirements. The heart of the matter was whether the newspaper ad constituted "express advocacy."

In explaining its determination that the communication did, in fact, constitute express advocacy, the Court stated:

We begin with the proposition that "express advocacy" is not strictly limited to communications using certain key phrases. The short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words . . . or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. Furgatch at 862. (Emphasis added.)

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Having placed the Buckley magic words in proper context, the Court of Appeals then describes the elements of express advocacy. First, the Court counseled against considering a message line by line or phrase by phrase. "A proper understanding of the speaker's message can best be obtained by considering the speech as a whole." Furgatch at 863. Second, the Court indicated that although the subjective intent of the speaker is not determinative of the presence of express advocacy, it is a factor that may be considered. "Words derive their meaning from what the speaker intends and what the reader understands." Furgatch at 863. Third, the court concluded that the context of political speech is "relevant to a determination of express advocacy." Furgatch at 863. "A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated or supply necessary premises that are unexpressed but widely understood by readers or viewers." Furgatch at 863. The Court further warned against ignoring "external factors that contribute to a complete understanding of speech, especially where they are factors that the audience must consider in evaluating the words before it." Furgatch at 864.

Finally, the Court summarized its interpretation of the express advocacy standard, based on the Supreme Court's decision in Buckley.

We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it 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. Furgatch at 864.

Having outlined the factors that it considered in its determination of express advocacy in Furgatch, the Court confirmed that express advocacy would not be present when "reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action . . . If any reasonable alternative reading of speech can be suggested, it cannot be express advocacy..." Furgatch at 864.

The communications in question in this case more than satisfy the Furgatch standard of express advocacy. These

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communications, were, quite simply, campaign puff pieces -- litanies of the accomplishments of a Member of Congress during his term of office. They promoted the incumbent and implicitly conveyed a negative message about his opponent. The communications were distributed to reach the very individuals who would vote in the general election. Even more compelling is the timing of the communications three weeks before the 1988 general election.

In our view, the communications described above, without more, constitute express advocacy. But add to these factors, that the communications were paid for by the candidate's campaign committee, and calculated to place in the mind of the voters of that district the specific accomplishments of the candidate. The message may be subtle -- but it is unambiguous -- reelect Congressman Bonior.

The Furgatch analysis is not difficult to apply to the communications in this case. Taken as a whole, the message to voters is to vote for Bonior if his performance in the past has been acceptable. The subjective intent of the speaker, in this case, the candidate, is not determinative, but it is a factor to

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be considered. The candidate is speaking and the recipient of his message is a voter who may go to the polls on election day. The context of the message is significant. Three weeks before the general election, the voting public receives a message from an incumbent Congressman listing his accomplishments. In this context, the words of this communication amount to an exhortation to vote for Congressman Bonior. The exhortation is implicit from the language of the communication, and the context in which the communication is made.

The Commission had before it campaign literature created by, paid for by and distributed by the campaign committee of an incumbent Member of Congress. Considering the litany of accomplishments, the promoting of the incumbent, the negative inference about his opponent, the targetting of his voting district, and the timing of the communication three weeks before the election, one question remains -- is there other reasonable alternative reading of this speech -- as anything other than a plea to vote for this candidate? Could reasonable minds differ as to whether it encourages a vote for or against a specific candidate? In our opinion, there is no other reasonable interpretation that can be offered to explain the message -- this

is an exhortation to vote for Congressman Bonior, it constitutes express advocacy, and should have included a proper disclaimer pursuant to 2 U.S.C. §441d.

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Some would argue that express advocacy is not present unless the "call to action", the "exhortation" is explicit. In effect, they argue that a new set of "magic" words, different from the Buckley words, is required. This approach misses the critical point made by the Furgatch court that a combination of message and context, rather than the presence of certain "fixed indicators" of express advocacy, can produce an implicit exhortation to vote for or against a candidate amounting to "express advocacy." The Court of Appeals acknowledged that the ad in the Furgatch case failed to state with specificity the action required, but the failure of specificity did not remove the communication from coverage of the Act "when it is clearly the kind of advocacy of the defeat of an identified candidate that Congress intended to regulate." Furgatch at 865.

The voters who received the Bonior communications received them with an understanding and insight not present in the context of the Furgatch newspaper ads. The pre-existing relationship

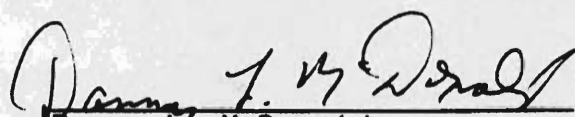
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between an incumbent Congressman and the voters of his district gives the communications meaning. "Words derive their meaning from what the speaker intends and what the reader understands." Furgatch at 863.

The communications in this case avoid the use of Buckley magic words, but three weeks before an election, there is no doubt that they successfully conveyed the intended message to voters to reelect Congressman Bonior. What other reasonable alternative message can a reader draw from these communications? we submit there is no other alternative interpretation except that the reader should vote for Congressman Bonior in the general election and that reasonable minds would not differ as to whether it encourages the reader to vote for or against a candidate.

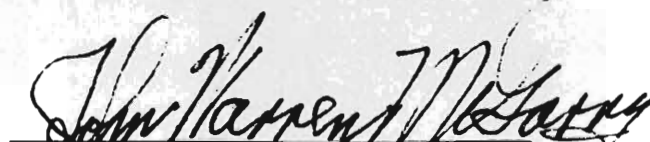
This kind of communication is precisely the kind of campaign literature that Congress intended should contain a disclaimer to inform the public who paid for and who authorized the communication. The Commission's failure to take action requiring a disclaimer on these communications in light of all the facts and circumstances, creates unnecessary doubt about when express advocacy would ever be found by this Commission.

There will never be a clearer example of express advocacy,
or of political campaign material intended by Congress to include
a disclaimer pursuant to Section 441d.

6-2-89
Date


Danny L. McDonald
Chairman

6/2/89
Date


John Warren McGarry
Commissioner



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THE FOLLOWING MATERIAL IS BEING ADDED TO THE
PUBLIC RECORD IN (CLOSED) MUR 2737

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FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

MEMORANDUM

TO: COMMISSIONERS
STAFF DIRECTOR
GENERAL COUNSEL

FROM: *MJE* MARJORIE W. EMMONS/DELORES R. HARRIS *DRN*

DATE: AUGUST 31, 1989

SUBJECT: STATEMENT OF REASONS FOR MUR 2737

Attached is a copy of Commissioners Josefiak, Elliott,
and Aikens Statement of Reasons in MUR 2737 received in
the Commission Secretary's Office on August 30, 1989, at
4:00 p.m.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Bonior for Congress Committee and) MUR 2737
David M. Diegel, as treasurer)
)
The Honorable David Bonior)

STATEMENT OF REASONS

Commissioner Thomas J. Josefiak

Vice Chairman Lee Ann Elliott

Commissioner Joan D. Aikens

On March 14, 1989, we voted to approve the recommendations of the Office of the General Counsel to find no reason to believe Congressman David Bonior and his campaign committee violated 2 U.S.C. §441d(a) by not including a statement of sponsorship on certain mailings and newspaper advertisements financed by Bonior's campaign. As a policy matter, we support the view that disclaimers should be included on all public communications paid for by a candidate's campaign committee, and we would favor amending the Act to so require. As an enforcement matter under the FECA as presently written, however, we agreed with the General Counsel's legal interpretation and factual assessment in this case, and concluded that these campaign materials did not violate the Act.

Section 441d(a) requires a communication contain a statement regarding its sponsorship and candidate authorization if it solicits contributions or "expressly advocates" the election or defeat of a clearly identified candidate. Applying the "express advocacy" standard necessarily involves a different and more narrow focus than

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens

Page Two

merely deciding whether a particular communication is 'campaign-related' or financed "for the purpose of influencing a Federal election." (Compare the Act's definitions of "contribution" and "expenditure" at 2 U.S.C. §§431(8)(A)(i) and 431(9)(A)(i) with §441d.)

No one would dispute that these materials were produced by the Bonior campaign to benefit the candidate and influence the election. Expenses involved in producing such materials were clearly reportable as expenditures by Bonior's campaign. This matter did not, therefore, present any question as to the intended or recognizable 'purpose' of the campaign materials, nor as to FEC jurisdiction. Instead, this case posed the separate question of whether the materials' content and message constituted "express advocacy" so as to require a disclaimer under the specific language of §441d(a).

The General Counsel's Report in this matter reviewed judicial interpretation of "express advocacy," particularly the landmark case of Buckley v. Valeo, 424 U.S. 1 (1976), and the recent Ninth Circuit case of FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 108 S. Ct. 151 (1987). Statements of Reasons submitted in this matter by other members of the Commission also discussed and cited these cases at length. We reiterate, however, the "express advocacy" test set forth in Furgatch:

First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens
Page Three

what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. (emphasis added)

807 F.2d at 864.

In following the approach recommended in the Furgatch decision, we believe the Commission does not reach a point of inquiry into the third element (the nature of the action advocated) without a prior finding of "a clear plea for action" pursuant to the second element. We cannot determine what a "reasonable" reader or listener was being asked to do unless they were clearly being asked to do something. Whether an 'exhortation to act' "encourages a vote for or against a candidate... or some other kind of action" may be subject to interpretation, but whether there is advocacy of action at all cannot be a matter of mere implication. Advocacy must be clearly present for it to be capable of being "express advocacy." Id.

The Statement of Reasons submitted by Commissioners McDonald and McGarry in this matter acknowledged no requirement for a "clear plea for action" in order to find "express advocacy," and omitted any reference to the second part of the Furgatch standard. Their analysis relied upon the court's discussion of the first and third elements of "express advocacy" as the basis for implying an exhortation, rather than for interpreting one already present. We would view their arguments to be appropriate for interpreting the message contained in the Bonior campaign's materials only if those communications had included an identifiable call to action.

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens
Page Four

We particularly express our disagreement with their observation as to the "critical point" of Furgatch, found in their Statement at page 10:

Some would argue that express advocacy is not present unless the "call to action," the "exhortation" is explicit. In effect, they argue that a new set of "magic" words, different from the Buckley words, is required. This approach misses the critical point made by the Furgatch court that a combination of message and context, rather than the presence of certain "fixed indicators" of express advocacy, can produce an implicit exhortation to vote for or against a candidate amounting to "express advocacy." The Court of Appeals acknowledged that the ad in the Furgatch case failed to state with specificity the action required, but the failure of specificity did not remove the communication from coverage of the Act "when it is clearly the kind of advocacy of the defeat of an identified candidate that Congress intended to regulate." Furgatch at 865.

In our view, however, the Furgatch decision did not sanction the Commission to imply advocacy at the outset of interpretation of a communication. Reliance upon the Furgatch court's analysis to find an "implicit" exhortation in the communications involved in this matter ignores the court's requirement for "a clear plea for action" and the emphasis the court placed upon the words "Don't let him do it." The court stressed the significance of such words of advocacy, which are essential to trigger interpretation and further inquiry of contextual factors:

The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it. The words we focus on are "don't let him." They are simple and direct. "Don't let him" is a command. The words "expressly advocate" action of some kind. If the action that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the [Federal Election] Campaign Act...

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens
Page Five

Our conclusion is reinforced by consideration of the timing of the ad. The ad is bold in calling for action, but fails to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in. It refers repeatedly to the election campaign and Carter's campaign tactics. Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

Furgatch at 864-5.

Those who favor finding implied exhortations to action would apparently have found "express advocacy" in the Furgatch circumstances even without those words upon which the court itself focused, since criticism of President Carter within the context and timing of the Presidential election would certainly imply to a reader that he or she should vote against Carter. Under Furgatch, however, advocacy is not implicit whenever a communication's message contains criticism or praise of someone seeking public office. Without some recognizable call to action, such ads may be fairly read to encourage no response from the reader other than to form an opinion. An "express advocacy" communication must call for action beyond the implied response of merely agreeing with the point of view presented.

The question raised under the Furgatch "express advocacy" analysis is not whether the speaker's point of view is obvious, or whether an election-related action by the recipient would generally be consistent with the speaker's point of view. The inquiry is not whether the person receiving a communication can easily identify the course of action that would be favored by the speaker if the speaker were to advocate one. Rather, under Furgatch, implicit meanings must

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens
Page Six

attach to an explicit call to action. Drawing reasonable conclusions as to what a speaker is implying may be legitimate in order to interpret an exhortation to act, but not to invent one.

An objective approach to "express advocacy" requires an explicit call for action in a communication, even when we are sure we know the intended purpose of the communication. Although requiring the presence of an exhortation to trigger the process of interpretation may seem mechanical, it is precisely the line drawn by the Furgatch court to separate advocacy from speech that is "merely informative" (even though, perhaps, clearly election-related).

As an effort to introduce objectivity into an area in which it is difficult to draw lines, the Furgatch approach, if correctly applied, is workable and fair. This approach is certainly less mechanical than the standard attributed to the U.S. Supreme Court's 1976 decision in Buckley, supra, which has often been interpreted to require particular "magic" words of exhortation, such as "vote for" or "elect." 424 U.S. at 44 (footnote 52). Our colleagues' Statement of Reasons seemed to argue that any objective, content-based standard is a throwback to the "magic words" of Buckley. The Furgatch court's analysis requires no specific or "magic" words to constitute advocacy, however, but does require the essential element of advocacy itself.

The Furgatch decision recognized that circumstantial factors are relevant to interpreting the meaning, and the impact on a recipient, of action advocated within a communication. The Commission is certainly entitled to consider the context and timing of a

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens

Page Seven

communication related to candidates and elections in interpreting the nature or type of action advocated. Although the proposed action need not be explicit or specific in order to be "express," some exhortation must clearly be present in order to be "advocacy." Context and timing are no substitute for words of advocacy, but only serve to give meaning to a vague exhortation. Furgatch at 863-4.

It has been suggested that the Commission could decide that all communications financed by a candidate committee inherently allow for no other reasonable interpretation than "express advocacy," since such advertising would clearly seem intended to generate support among voters. That approach is appealing from a regulatory standpoint, but cannot be reconciled with the "express advocacy" standard as interpreted in Furgatch and by other federal circuit courts. 1/ A finding of "express advocacy" should not depend upon the speaker's presumed motive, intent or purpose, but must be reached from an objective review of the message communicated.

It has also been suggested that the Commission could determine "express advocacy" to be present when a communication makes reference

1/ In FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2nd. Cir. 1980), a federal appeals court stated, at 53:

The history of §§ 434(e) and 441d thus clearly establish that, contrary to the position of the FEC, the words "expressly advocating" mean exactly what they say... [T]he FEC would apparently have us read "expressly advocating the election or defeat" to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in Buckley v. Valeo and adopted by Congress in the 1976 amendments. The position is totally meritless.

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens

Page Eight

to a candidate committee's sponsorship of it. Any "plea for action" would still only be implied, however, based upon an assumption as to how the recipient of the message would perceive the sponsor's identity and intent. Moreover, that approach has the ironic consequence of finding express advocacy when the candidate's committee has disclosed its sponsorship, so as to suggest to the recipient the communication's apparent purpose, but not when the maker of the communication is undisclosed. In the context of §441d(a), it would only require a disclaimer where sponsorship was already indicated and would not require a disclaimer where a reference to sponsorship was omitted. 2/

2/ A similar problem arises with Commissioner Thomas' analysis. Commissioner Thomas joined us in finding no "express advocacy" within the newspaper advertisements financed by the Bonior campaign. But he considered the mailing envelope's return address for the committee, "Bonior for Congress," and use of the outdated disclaimer "A copy of our report is filed with the Federal Election Commission... " as drawing the entire mailing piece within the "express advocacy" standard. While more content-focused than just imputing the speaker's purpose, this argument relies upon a fairly insignificant, and truly mechanical, 'hook' for finding advocacy when a communication's content otherwise lacks any genuine call for action.

Our rejection of an "express advocacy" determination based solely upon a mailing's return address is supported by the Commission's decision in Advisory Opinion 1978-38. In that case, also involving a committee with "for Congress" in its name, the Commission concluded that "[i]nformation required for the committee's mailing address would under no circumstances be considered a communication that needed to include... the statement of authorization... " but that, "on the other hand," such a statement would be required "... if the envelopes have on their front or back a communication expressly advocating the election or defeat of a clearly identified candidate ...". Based upon that opinion, we could not determine that the Bonior campaign had engaged in "express advocacy," nor could we hold the Bonior committee in violation of the Act, for merely including the committee's name on its mailers.

STATEMENT OF REASONS -- MUR 2737

Commissioners Josefiak, Elliott and Aikens
Page Nine

We also address one point to avoid misinterpretation or exaggeration of the significance of this disclaimer case. Contrary to the characterization of our position contained in the Statement of Reasons submitted by Commissioners McDonald and McGarry in this matter, our standard for "express advocacy" does not have any ominous consequences for enforcement of the Act in the area of "independent expenditures." Our interpretation of that standard would not affect how the 'independence' of such activity is judged, nor encourage or permit candidate-coordinated activity posing as independent expenditures, nor in any way jeopardize the integrity of contribution limits under the Act. Any effect that our "express advocacy" analysis would have upon "independent expenditures" only extends to the particular, potential reporting obligations for such expenditures, not the permissibility of such activity. 3/

3/ The term "independent expenditure" is defined by the Act to mean "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17). See also: 11 CFR 100.16 and 109.1(a) & (b). Expenditures made on behalf of candidates that are undertaken in coordination with those candidates or candidates' campaigns are generally held to constitute in-kind contributions to that candidate. 11 CFR 109.1(c). Political committees are required to report to the Commission the recipient candidate of any "independent expenditure" disbursement of over \$200; persons other than political committees are required to file statements regarding their "independent expenditures" that aggregate over \$250 in a calendar year. 2 U.S.C. §§434(b)(6)(B)(iii) and (c)(1) & (2).

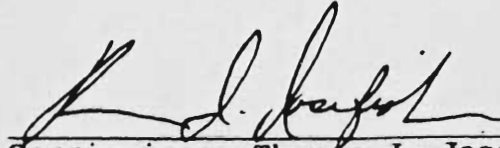
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In conclusion, we acknowledge that not requiring a disclaimer on these types of candidate's campaign materials may seem inconsistent with the general purposes of §441d(a). But the language of §441d(a) is quite clear, and judicial precedent interpreting the "express advocacy" standard provides no distinction between that standard's application in the disclaimer area and its application in other parts of the Act where significant First Amendment concerns are more clearly implicated.

The Commission cannot rely upon standardless, subjective, 'we know what they're up to' decision-making in sensitive areas of free speech and political expression. The courts have identified certain broad elements as essential for finding "express advocacy" in a political message. We consider the Furgatch court to have instructed the Commission that it may not infer advocacy when the content of a communication contains no exhortation to action. We were guided by that direction in reaching our conclusion in this case.

STATEMENT OF REASONS -- MUR 2737
Commissioners Josefiak, Elliott and Aikens
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August 24, 1989


Commissioner Thomas J. Josefiak


Vice Chairman Lee Ann Elliott


Commissioner Joan D. Aikens

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FEDERAL ELECTION COMMISSION

WASHINGTON D C 20463

THE FOLLOWING MATERIAL IS BEING ADDED TO THE

PUBLIC RECORD IN (CLOSED) MUR 2737

890407/1725



FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20461

CLOSED

September 8, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Joseph R. Gaylord, Executive Director
National Republican Congressional Committee
320 First Street, S.E.
Washington, D.C. 20003

RE: MUR 2737

Dear Mr. Gaylord:

By letter dated March 27, 1989, the Office of the General Counsel informed you of determinations made with respect to the complaint filed by you against the Honorable David Bonior and the Bonior for Congress Committee and David M. Diegel, as treasurer. Enclosed with that letter were the First General Counsel's Report and Certification.

Enclosed please find a Statement of Reasons from Vice Chairman Lee Ann Elliott, Commissioner Thomas J. Josefiak and Commissioner Joan D. Aikens explaining their vote. This document will be placed on the public record as part of the file of MUR 2737.

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Joseph R. Gaylord, Executive Director
page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel



By: Lois G. Lerner
Associate General Counsel

Enclosure
Statement of Reasons

890407 / 1727



FEDERAL ELECTION COMMISSION

WASHINGTON D.C. 20461

September 8, 1989

Mark Brewer, Esquire
Sachs, Nunn, Kates, Kadushin,
O'Hare, Helveston & Waldman, P.C.
1000 Farmer
Detroit, Michigan 48226

RE: MUR 2737
Bonior for Congress
Committee and
David M. Diegel, as
treasurer

The Honorable
David Bonior

Dear Mr. Brewer:

By letter dated March 27, 1989, the Office of the General Counsel informed you of determinations made with respect to the complaint filed against the Honorable David Bonior and the Bonior for Congress Committee and David M. Diegel, as treasurer. Enclosed with that letter were the First General Counsel's Report and Certification.

Enclosed please find a Statement of Reasons from Vice Chairman Lee Ann Elliott, Commissioner Thomas J. Josefiak and Commissioner Joan D. Aikens explaining their vote. This document will be placed on the public record as part of the file of MUR 2737.

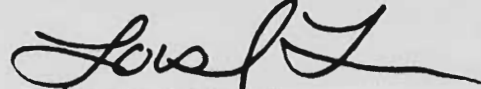
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Mark Brewer, Esquire
Page 2

If you have any questions, please contact Michael Marinelli,
the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel



By: Lois G. Lerner
Associate General Counsel

Enclosure
Statement of Reasons

390407 / 1724

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Bonior for Congress Committee and) MUR-2737
David M. Diegel, as treasurer)
)
The Honorable David Bonior)

STATEMENT OF REASONS

Commissioner Thomas J. Josefiak

Vice Chairman Lee Ann Elliott

Commissioner Joan D. Aikens

On March 14, 1989, we voted to approve the recommendations of the Office of the General Counsel to find no reason to believe Congressman David Bonior and his campaign committee violated 2 U.S.C. §441d(a) by not including a statement of sponsorship on certain mailings and newspaper advertisements financed by Bonior's campaign. As a policy matter, we support the view that disclaimers should be included on all public communications paid for by a candidate's campaign committee, and we would favor amending the Act to so require. As an enforcement matter under the FECA as presently written, however, we agreed with the General Counsel's legal interpretation and factual assessment in this case, and concluded that these campaign materials did not violate the Act.

Section 441d(a) requires a communication contain a statement regarding its sponsorship and candidate authorization if it solicits contributions or "expressly advocates" the election or defeat of a clearly identified candidate. Applying the "express advocacy" standard necessarily involves a different and more narrow focus than

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merely deciding whether a particular communication is 'campaign-related' or financed "for the purpose of influencing a Federal election." (Compare the Act's definitions of "contribution" and "expenditure" at 2 U.S.C. §§431(8)(A)(i) and 431(9)(A)(i) with §441d.)

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No one would dispute that these materials were produced by the Bonior campaign to benefit the candidate and influence the election. Expenses involved in producing such materials were clearly reportable as expenditures by Bonior's campaign. This matter did not, therefore, present any question as to the intended or recognizable 'purpose' of the campaign materials, nor as to FEC jurisdiction. Instead, this case posed the separate question of whether the materials' content and message constituted "express advocacy" so as to require a disclaimer under the specific language of §441d(a).

The General Counsel's Report in this matter reviewed judicial interpretation of "express advocacy," particularly the landmark case of Buckley v. Valeo, 424 U.S. 1 (1976), and the recent Ninth Circuit case of FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 108 S. Ct. 151 (1987). Statements of Reasons submitted in this matter by other members of the Commission also discussed and cited these cases at length. We reiterate, however, the "express advocacy" test set forth in Furgatch:

First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear

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what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. (emphasis added)

807 F.2d at 864.

8 2 0 4 0 7 7 1 7 3 2
In following the approach recommended in the Furgatch decision, we believe the Commission does not reach a point of inquiry into the third element (the nature of the action advocated) without a prior finding of "a clear plea for action" pursuant to the second element. We cannot determine what a "reasonable" reader or listener was being asked to do unless they were clearly being asked to do something. Whether an 'exhortation to act' "encourages a vote for or against a candidate... or some other kind of action" may be subject to interpretation, but whether there is advocacy of action at all cannot be a matter of mere implication. Advocacy must be clearly present for it to be capable of being "express advocacy." Id.

The Statement of Reasons submitted by Commissioners McDonald and McGarry in this matter acknowledged no requirement for a "clear plea for action" in order to find "express advocacy," and omitted any reference to the second part of the Furgatch standard. Their analysis relied upon the court's discussion of the first and third elements of "express advocacy" as the basis for implying an exhortation, rather than for interpreting one already present. We would view their arguments to be appropriate for interpreting the message contained in the Bonior campaign's materials only if those communications had included an identifiable call to action.

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We particularly express our disagreement with their observation as to the "critical point" of Furgatch, found in their Statement at page 10:

Some would argue that express advocacy is not present unless the "call to action," the "exhortation" is explicit. In effect, they argue that a new set of "magic" words, different from the Buckley words, is required. This approach misses the critical point made by the Furgatch court that a combination of message and context, rather than the presence of certain "fixed indicators" of express advocacy, can produce an implicit exhortation to vote for or against a candidate amounting to "express advocacy." The Court of Appeals acknowledged that the ad in the Furgatch case failed to state with specificity the action required, but the failure of specificity did not remove the communication from coverage of the Act "when it is clearly the kind of advocacy of the defeat of an identified candidate that Congress intended to regulate." Furgatch at 865.

In our view, however, the Furgatch decision did not sanction the Commission to imply advocacy at the outset of interpretation of a communication. Reliance upon the Furgatch court's analysis to find an "implicit" exhortation in the communications involved in this matter ignores the court's requirement for "a clear plea for action" and the emphasis the court placed upon the words "Don't let him do it." The court stressed the significance of such words of advocacy, which are essential to trigger interpretation and further inquiry of contextual factors:

The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it. The words we focus on are "don't let him." They are simple and direct. "Don't let him" is a command. The words "expressly advocate" action of some kind. If the action that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the [Federal Election] Campaign Act...

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Our conclusion is reinforced by consideration of the timing of the ad. The ad is bold in calling for action, but fails to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in. It refers repeatedly to the election campaign and Carter's campaign tactics. Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

Furgatch at 864-5.

Those who favor finding implied exhortations to action would apparently have found "express advocacy" in the Furgatch circumstances even without those words upon which the court itself focused, since criticism of President Carter within the context and timing of the Presidential election would certainly imply to a reader that he or she should vote against Carter. Under Furgatch, however, advocacy is not implicit whenever a communication's message contains criticism or praise of someone seeking public office. Without some recognizable call to action, such ads may be fairly read to encourage no response from the reader other than to form an opinion. An "express advocacy" communication must call for action beyond the implied response of merely agreeing with the point of view presented.

The question raised under the Furgatch "express advocacy" analysis is not whether the speaker's point of view is obvious, or whether an election-related action by the recipient would generally be consistent with the speaker's point of view. The inquiry is not whether the person receiving a communication can easily identify the course of action that would be favored by the speaker if the speaker were to advocate one. Rather, under Furgatch, implicit meanings must

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attach to an explicit call to action. Drawing reasonable conclusions as to what a speaker is implying may be legitimate in order to interpret an exhortation to act, but not to invent one.

An objective approach to "express advocacy" requires an explicit call for action in a communication, even when we are sure we know the intended purpose of the communication. Although requiring the presence of an exhortation to trigger the process of interpretation may seem mechanical, it is precisely the line drawn by the Furgatch court to separate advocacy from speech that is "merely informative" (even though, perhaps, clearly election-related).

As an effort to introduce objectivity into an area in which it is difficult to draw lines, the Furgatch approach, if correctly applied, is workable and fair. This approach is certainly less mechanical than the standard attributed to the U.S. Supreme Court's 1976 decision in Buckley, supra, which has often been interpreted to require particular "magic" words of exhortation, such as "vote for" or "elect." 424 U.S. at 44 (footnote 52). Our colleagues' Statement of Reasons seemed to argue that any objective, content-based standard is a throwback to the "magic words" of Buckley. The Furgatch court's analysis requires no specific or "magic" words to constitute advocacy, however, but does require the essential element of advocacy itself.

The Furgatch decision recognized that circumstantial factors are relevant to interpreting the meaning, and the impact on a recipient, of action advocated within a communication. The Commission is certainly entitled to consider the context and timing of a

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communication related to candidates and elections in interpreting the nature or type of action advocated. Although the proposed action need not be explicit or specific in order to be "express," some exhortation must clearly be present in order to be "advocacy." Context and timing are no substitute for words of advocacy, but only serve to give meaning to a vague exhortation. Furgatch at 863-4.

It has been suggested that the Commission could decide that all communications financed by a candidate committee inherently allow for no other reasonable interpretation than "express advocacy," since such advertising would clearly seem intended to generate support among voters. That approach is appealing from a regulatory standpoint, but cannot be reconciled with the "express advocacy" standard as interpreted in Furgatch and by other federal circuit courts. 1/ A finding of "express advocacy" should not depend upon the speaker's presumed motive, intent or purpose, but must be reached from an objective review of the message communicated.

It has also been suggested that the Commission could determine "express advocacy" to be present when a communication makes reference

1/ In FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2nd. Cir. 1980), a federal appeals court stated, at 53:

The history of §§ 434(e) and 441d thus clearly establish that, contrary to the position of the FEC, the words "expressly advocating" mean exactly what they say... [T]he FEC would apparently have us read "expressly advocating the election or defeat" to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in Buckley v. Valeo and adopted by Congress in the 1976 amendments. The position is totally meritless.

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to a candidate committee's sponsorship of it. Any "plea for action" would still only be implied, however, based upon an assumption as to how the recipient of the message would perceive the sponsor's identity and intent. Moreover, that approach has the ironic consequence of finding express advocacy when the candidate's committee has disclosed its sponsorship, so as to suggest to the recipient the communication's apparent purpose, but not when the maker of the communication is undisclosed. In the context of §441d(a), it would only require a disclaimer where sponsorship was already indicated and would not require a disclaimer where a reference to sponsorship was omitted. 2/

2/ A similar problem arises with Commissioner Thomas' analysis. Commissioner Thomas joined us in finding no "express advocacy" within the newspaper advertisements financed by the Bonior campaign. But he considered the mailing envelope's return address for the committee, "Bonior for Congress," and use of the outdated disclaimer "A copy of our report is filed with the Federal Election Commission..." as drawing the entire mailing piece within the "express advocacy" standard. While more content-focused than just imputing the speaker's purpose, this argument relies upon a fairly insignificant, and truly mechanical, 'hook' for finding advocacy when a communication's content otherwise lacks any genuine call for action.

Our rejection of an "express advocacy" determination based solely upon a mailing's return address is supported by the Commission's decision in Advisory Opinion 1978-38. In that case, also involving a committee with "for Congress" in its name, the Commission concluded that "[i]nformation required for the committee's mailing address would under no circumstances be considered a communication that needed to include... the statement of authorization..." but that, "on the other hand," such a statement would be required "... if the envelopes have on their front or back a communication expressly advocating the election or defeat of a clearly identified candidate ..." Based upon that opinion, we could not determine that the Bonior campaign had engaged in "express advocacy," nor could we hold the Bonior committee in violation of the Act, for merely including the committee's name on its mailers.

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We also address one point to avoid misinterpretation or exaggeration of the significance of this disclaimer case. Contrary to the characterization of our position contained in the Statement of Reasons submitted by Commissioners McDonald and McGarry in this matter, our standard for "express advocacy" does not have any ominous consequences for enforcement of the Act in the area of "independent expenditures." Our interpretation of that standard would not affect how the 'independence' of such activity is judged, nor encourage or permit candidate-coordinated activity posing as independent expenditures, nor in any way jeopardize the integrity of contribution limits under the Act. Any effect that our "express advocacy" analysis would have upon "independent expenditures" only extends to the particular, potential reporting obligations for such expenditures, not the permissibility of such activity. 3/

3/ The term "independent expenditure" is defined by the Act to mean "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17). See also: 11 CFR 100.16 and 109.1(a) & (b). Expenditures made on behalf of candidates that are undertaken in coordination with those candidates or candidates' campaigns are generally held to constitute in-kind contributions to that candidate. 11 CFR 109.1(c). Political committees are required to report to the Commission the recipient candidate of any "independent expenditure" disbursement of over \$200; persons other than political committees are required to file statements regarding their "independent expenditures" that aggregate over \$250 in a calendar year. 2 U.S.C. §§434(b)(6)(B)(iii) and (c)(1) & (2).

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In conclusion, we acknowledge that not requiring a disclaimer on these types of candidate's campaign materials may seem inconsistent with the general purposes of §441d(a). But the language of §441d(a) is quite clear, and judicial precedent interpreting the "express advocacy" standard provides no distinction between that standard's application in the disclaimer area and its application in other parts of the Act where significant First Amendment concerns are more clearly implicated.

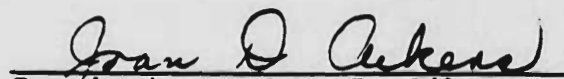
The Commission cannot rely upon standardless, subjective, 'we know what they're up to' decision-making in sensitive areas of free speech and political expression. The courts have identified certain broad elements as essential for finding "express advocacy" in a political message. We consider the Furgatch court to have instructed the Commission that it may not infer advocacy when the content of a communication contains no exhortation to action. We were guided by that direction in reaching our conclusion in this case.

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August 24, 1989


Commissioner Thomas J. Josefiak


Vice Chairman Lee Ann Elliott


Commissioner Joan D. Aikens

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