



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 1438

DATE FILMED 6/1/90 CAMERA NO. 4

CAMERAMAN AS

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● SENSITIVE ●

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

DATE AND TIME OF TRANSMITTAL

MUR# Pre-MUR 84

BY OGC TO THE COMMISSION _____

STAFF MEMBER(S)
Maura White
(202) 523-4057

SOURCE OF MUR: I N T E R N A L L Y G E N E R A T E D

RESPONDENTS' NAMES: Harvey Furgatch and J. David Dominelli

RELEVANT STATUTE: 2 U.S.C. §§ 431(17), 434(c), 441d

INTERNAL REPORTS CHECKED: Public Records

FEDERAL AGENCIES CHECKED: None

GENERATION OF THE MATTER

On February 8, 1982, the District Attorney provided the Office of General Counsel with a copy of the news article which appeared in the San Diego Tribune on October 29, 1980, and from which the District

82 APR 21 P 1: 56

RECEIVED
OFFICE OF THE
CLERK OF THE
U.S. SUPREME COURT

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Attorney's Office obtained the information that Mr. Furgatch placed political advertisements (Attachment 1).

FACTUAL AND LEGAL ANALYSIS

The San Diego Tribune news article states that Mr. Furgatch placed a full page advertisement, entitled "Don't Let Him Do It," in the New York Times on October 28, 1980, at a cost of \$16,800. According to the Tribune, the advertisement charges President Carter with degrading the electoral process and lessening the prestige of the office, as well as engaging in campaign tactics which are designed to "hide his record." The Tribune reported further that while the New York Times advertisement "does not recommend voting for Republican nominee Reagan or any other candidate, ... [Mr.] Furgatch said its purpose was not to campaign for another candidate but to help defeat Carter" (emphasis added). In addition, it was reported that Mr. Furgatch planned to run the ad in the Boston Globe on November 1, 1980, at a cost of \$8,200, and that "[a]nother San Diegan, who requested anonymity," paid \$8,400 for the ad to run in the Chicago Tribune on November 1, 1980.

The Office of General Counsel has obtained copies of the advertisements paid for by Mr. Furgatch which appeared

in the New York Times and Boston Globe (Attachment 2). The ads are identical in content. The ads both state that they were paid for by Mr. Furgatch, but only the New York Times ad says that it was not authorized by any candidate.

This office has also obtained a copy of the advertisement which appeared in the Chicago Tribune on November 1, 1980. The ad states that it was paid for by J. David Dominelli and is not authorized by any candidate or candidate's committee. ^{1/} The ad is identical in content to those which were published in the New York Times and Boston Globe and paid for by Mr. Furgatch (Attachment 3).

A review of the advertisements at issue reveals that the ads make unambiguous reference to President Carter by referring to the "President of the United States" and "Carter" (see Buckley v. Valeo, 424 U.S. 1, 43 n.51 (1976)) ("Buckley"), and are entitled "Don't Let Him Do It," an appeal repeated within the ads. Furthermore, the ads criticize the leadership and campaign practices of the President, and refer to the President's primary and general election opponents, specifically, Senator Edward Kennedy and Ronald Reagan. Importantly, the ads refer to the "electoral process," the "voting public," and "campaigning."

^{1/} J. David Dominelli did not file any reports of independent expenditures during 1980.

The term "independent expenditure" is defined at 2 U.S.C. § 431(17) 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 or suggestion of, any candidate, or any authorized committee or agent of such candidate.

The term "expressly advocating" is defined at 11 C.F.R. § 109.1(b)(2) to mean any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Congress," or "vote against," "defeat," or "reject." Pursuant to 11 C.F.R. § 109.1(b)(3), "clearly identified candidate" means that the name of the candidate appears, a photograph of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

As set forth at 2 U.S.C. § 434(c)(1), every person who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement containing certain information. In addition, every person is required to file within 24 hours after an independent expenditure is made, a report of any

independent expenditure aggregating in excess of \$1,000 or more made after the 20th day but more than 24 hours before any election. 2 U.S.C. § 434(c).

Section 441d of Title 2, United States Code, states that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall, if not authorized by a candidate, an authorized political committee, or its agents, clearly state the name of the person who paid for the communication and that the communication is not authorized by any candidate or candidate's committee.

It is the view of this office that the ads involved in the instant matter expressly advocate the defeat of President Carter in the 1980 general election. Express advocacy is evidenced in the ads' appeal, "Don't Let Him Do It" within the context of the President's reelection. While the terms "vote against," "defeat," or "reject" are not present in the instant ads, such terms are only examples of communications which constitute express advocacy. See Buckley at 44 n.52 and 11 C.F.R. § 109.1(b)(2).

The court in Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d

45, 53 (2d Cir. 1980) ("C.L.I.T.R.I.M."), noted that reference within a communication to candidacy was an indicium of express advocacy. ^{2/} The ads involved herein contain such a reference as they refer to the President's "campaigning" and "running mate." Additionally, the ads focus on the reelection campaign and do not discuss any issues widely debated outside the campaign context. ^{3/}

The ads' appeal, "Don't Let Him Do It," combined with their criticisms of the President and the language, "[i]f he succeeds, the country will be burdened with four more years of incoherencies, ineptness and illusion" (emphasis added), clearly implores the reader not to reelect the President, in the view of this office. This view is supported by the fact that the ads were published less than one week prior to the 1980 general election. Moreover, Mr. Furgatch himself stated, according to the San Diego Tribune, that the ads' purpose was to defeat President Carter.

^{2/} Other indicia so noted were: reference to the subject's political affiliation, the existence of an election, and the act of voting in an election. C.L.I.T.R.I.M. at 53.

^{3/} For this reason, among others, this matter is distinguishable from the activity at issue in F.E.C. v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979). In AFSCME, the court determined that a poster depicting President Ford hugging President Nixon while wearing a button stating "Pardon Me" was more an expression on a public issue than a statement of advocacy for or against the election of an individual, and so the cost of the poster was not a reportable independent expenditure.

Since Mr. Furgatch's and Mr. Dominelli's expenditures apparently total approximately \$25,000 and \$8,400, respectively, and the subject ads were published after the 20th day prior to the 1980 general election, it is the recommendation of the General Counsel that there is reason to believe Messrs. Furgatch and Dominelli violated 2 U.S.C. § 434(c). In addition, as the ad placed by Mr. Furgatch in the Boston Globe on November 1, 1980, did not state whether the communication was authorized by any candidate or candidate's committee, it is recommended that the Commission find reason to believe Mr. Furgatch violated 2 U.S.C. § 441d as well.

There is no concrete evidence at this juncture which indicates that Messrs. Furgatch and Dominelli constitute a "political committee" within the meaning of the Act. However, because the ads are identical it is possible that at least the ads' production costs were shared and, therefore, we propose to send the attached interrogatories.

RECOMMENDATIONS

1. Open a MUR
2. Find reason to believe Harvey Furgatch violated 2 U.S.C. §§ 434(c) and 441d.
3. Find reason to believe J. David Dominelli violated 2 U.S.C. § 434(c).

4. Send the attached letters and questions.

April 21, 1982
Date

Charles N. Steele
General Counsel

BY:

Kenneth A. Gross
Associate General Counsel

Attachments

1. Letter from Steckman (2 pages)
2. Furgatch ads (2 pages)
3. Dominelli ad (1 page)
4. Proposed letters (2) and questions (20 pages)

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COUNTY COURTHOUSE

SAN DIEGO, CALIFORNIA 92101

(714) 236-2329

LRF 76

Oliphant
FYI

WILLIAM H. KENNEDY
1ST DISTRICT ATTORNEY
RICHARD D. HUFFMAN
CHIEF DEPUTY DISTRICT ATTORNEY
WAYNE A. BURGESS
CHIEF INVESTIGATOR

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO
EDWIN L. MILLER, JR.
DISTRICT ATTORNEY

February 4, 1982

General Counsel's Office
Federal Election Commission
1325 "B" Street, N.W.
Washington, D.C., 20463

Attention: Lynn Oliphant

Dear Ms. Oliphant,

Pursuant to your telephone conversation with Jim Hamilton, Deputy District Attorney, please see enclosed San Diego Tribune article of October 29, 1980.

We trust the article will be of assistance to you.

Yours truly,

Ed Steckman
Ed Steckman
Investigator

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WILLIAM H. KENNEDY
DEPUTY DISTRICT ATTORNEY
RICHARD D. HUFFMAN
DEPUTY DISTRICT ATTORNEY
WAYNE A. BURCELL
DEPUTY DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO
EDWIN L. MILLER, JR.
DISTRICT ATTORNEY

6cc# 7134 ①
82 FEB 8 P2:10
COUNTY COURTHOUSE
SAN DIEGO, CALIFORNIA 92101
(714) 236-2329

LR 76

Oliphant
FYI

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Ed Steckman
Investigator

ES:va

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FEB 8 P4:29

Attachment 1 p.1

DEMO CONTRIBUTOR SWITCHES TO REAGAN

By STEVE WIEGAND

TRIBUNE Press Writer

Harvey Furgatch has always put his money where his political convictions are, and next Tuesday, he says, he'll put his vote there as well.

But the placement is going to surprise a lot of people.

"I'm going to vote for Ronald Reagan," the well-known San Diego contributor to Democratic political causes said in a press conference yesterday.

"... I'm not really in love with Ronald Reagan, but it came down to performance and demeanor in office. Ronald Reagan as governor — even his most vocal critics never accused him of being divisive and mean."

But that's what Furgatch accused President Carter of in a \$16,800, full-page advertisement that appeared on Page 29 of the New York Times yesterday.

The ad, headlined "Don't Let Him Do It," charges Carter with "degrading the electoral process and lessening the prestige of the office."

Criticizing Carter for his campaign tactics against both Reagan and Sen. Edward Kennedy in the primaries, Furgatch said Carter's "meanness of spirit is divisive and reckless McCarthyism at its worst."

The ad also says Carter's campaign tactics are designed to hide his record, and that his reelection would mean "four more years of incoherencies, ineptness and illusion."

The ad does not recommend voting for Republican nominee Reagan or any other candidate, and Furgatch said its purpose was not to campaign for another candidate but to help defeat Carter.

Furgatch is a longtime friend of Gov. Brown and was Brown's campaign manager during part of the governor's abortive presidential try this year.

He said he is running the ad in the Boston Globe (for \$12,000) on Saturday. Another San Diegoan, who requested anonymity, paid \$8,400 for the ad to run in the Chicago Tribune, also on Saturday.

Furgatch said he had already received several calls from people who saw the ad and agreed with it. He also said anyone else wishing to pay for the ad in other newspapers could do so.

A wealthy developer, Furgatch is a former San Diego port



HARVEY FURGATCH

commissioner and a member of the California Horse Racing Board, and has bought ads before to express his political feelings. He is known as a generous contributor to Democratic candidates.

Asked whether he thought the ad would make him unwelcome in Democratic circles, Furgatch said, "If it does, that's their problem. That's a shame, just because someone speaks out their mind. It's a shame that other Democrats haven't been speaking out, because I know that's the way a lot of them feel."

Furgatch said that he objected to Carter's performance in office and his campaign tactics, but that the ad concentrated on the campaign "because his record would take up 10 pages."

"This will be the first presidential election that I will not have voted for a Democrat ...," he said, "but I just decided one night that I was going to try and do something — what I didn't know — so I just panned that out."

Sources said last week that California Democratic leaders — including Brown and state Carter campaign chairman Mickey Kantor — tried to talk Furgatch out of running the ad.

Kantor said in a telephone interview yesterday that he was saddened that Furgatch had bought the ad, but that he didn't think it would have a great effect on Carter's campaign.

"Harvey is a great guy, and a friend," said Kantor, "and I'm sorry he feels the way he does, but I think he's wrong on this one, and that's all any of us (in the Carter campaign) can say."

LAT 10 29-80

Attachment 1 p 2.

New York Times 11/29/80

Don't let him do it.

The President of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And we let him

It continued when the President himself accused Ronald Reagan of being unpatriotic.

We let him do it again.

In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others, with public funds.

We are letting him do it.

He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between "peace or war," "black or white," "north or south," and "Jew vs. Christian." His meanness of spirit is divisive and reckless. McCarthyism at its worst. And from a man who once asked, "Why Not The Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low level campaigning.

Don't let him do it.

Attachment 2 p.1

Boston Globe 11/1/80

Don't let him do it.

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It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And we let him.

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We let him do it again.

In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others, with public funds.

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He continues to cultivate the fears, not the hopes of the voting public by suggesting the choice is between "peace or war," "black or white," "north or south," and "Jew vs. Christian." His meanness of spirit is divisive and reckless. McCarthyism at its worst. And from a man who once asked "Why Not The Best?"

It is an attempt to hide his own record. If it succeeds the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low level campaigning.

Don't let him do it.

Attachment 2 p 2

Chicago Tribune 11/1/80

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And we let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

We let him do it again.

In recent weeks Carter has tried to buy entire steel mills, the auto industry, and others with public funds.

We are letting him do it.

He continues to insult the South, but the time is coming when public life supporting the choice of between "black" and "white" "North" or "South" and "Christian" "His" means of support is divisive and divisive. "McCarthyism" is his worst. And from a man who says "Why Not The Best?"

It is an attempt to buy the country and the country will be a divided one. "Protestants, Catholics, and others" will be in low level camps (just).

Don't let him do it.

Printed by J. David (Litho) Co., Inc. P.O. Box 1000, Los Angeles, CA 90001

Not Authorized by the Library of Congress or Copyright Clearance Center

Attachment 3

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Harvey Furgatch)
and)
J. David Dominelli)

Pre-MUR 84

CERTIFICATION

I, Marjorie W. Emons, Secretary of the Federal Election Commission, do hereby certify that on April 26, 1982, the Commission decided in a vote of 5-0 to take the following actions with regard to Pre-MUR 84:

1. Open a MUR.
2. Find reason to believe Harvey Furgatch violated 2 U.S.C. §§434(c) and 44ld.
3. Find reason to believe J. David Dominelli violated 2 U.S.C. §§434(c).
4. Send the letters and questions attached to the First General Counsel's Report signed April 21, 1982.

Commissioners Aikens, Elliott, Harris, McDonald, and Reiche voted affirmatively in this determination. Commissioner McGarry did not cast a vote in this matter.

Attest:

4-23-82
Date

Marjorie W. Emons
Marjorie W. Emons
Secretary of the Commission

00040765070



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

April 27, 1982

Harvey Furgatch
3246 Govenor Drive
San Diego, California 92122

Re: MUR 1438

Dear Mr. Furgatch:

On April 26, 1982, the Federal Election Commission determined that there is reason to believe that you violated 2 U.S.C. §§ 434(c) and 441d, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The General Counsel's factual and legal analysis, which formed a basis for the Commission's finding, is attached for your information.

Under the Act, you have an opportunity to demonstrate that no action should be taken against you. Please submit any factual or legal materials which you believe are relevant to the Commission's consideration of this matter. Additionally, please submit answers to the enclosed questions within ten days of your receipt of this letter. Statements should be submitted under oath.

In the absence of any additional information which demonstrates that no further action should be taken against you, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation. Of course, this does not preclude the settlement of this matter through conciliation prior to a finding of probable cause to believe if so desire. See 11 C.F.R. § 111.18(d).

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 a statement authorizing such counsel to receive any notifications and other communications from the Commission.

Letter to Harvey Furgatch
Page 2

The investigation now being conducted will be confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Maura White, the staff member assigned to this matter, at (202) 523-4057.

Sincerely,

Frank P. Reiche

Chairman
for the Federal Election Commission

Enclosures

General Counsel's Factual and Legal Analysis
Procedures
Designation of Counsel Statement

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Questions to: Harvey Furgatch

1. a. Please state both the printing and production costs of the advertisement entitled "Don't Let Him Do It" which appeared in the New York Times on October 28, 1980.

b. Please state whether you shared any of the production and printing costs associated with the placement of the ad in the New York Times on October 28, 1980, with any individual or entity. If the answer is yes, please state the name of the individual or entity and the amount each individual or entity contributed towards the ad's cost.

2. a. Please state both the printing and production costs of the advertisement entitled "Don't Let Him Do It" which appeared in the Boston Globe on November 1, 1980.

b. Please state whether you shared any of the production and printing costs associated with the placement of the ad in the Boston Globe on November 1, 1980, with any individual or entity. If the answer is yes, please state the name of the individual or entity and the amount each individual or entity contributed towards the ad's cost.

3. a. Please state the name of the individual or entity which designed the ad entitled "Don't Let Him Do It" which appeared in the New York Times and Boston Globe.

b. Please state the name of the individual or entity which arranged for the publication of the ad in the New York Times and Boston Globe.

4. Please describe how you came to place the same ad in the New York Times and Boston Globe as J. David Dominelli placed in the Chicago Tribune on November 1, 1980.

5. a. Other than the ad which appeared in the New York Times on October 28, 1980, and the Boston Globe on November 1, 1980, please state whether you made any other communications entitled "Don't Let Him Do It."

b. If the answer to question 5a is yes, please state the name of each newspaper, magazine, or other media in which the communication appeared and the date of each publication, the cost of each communication, and the names of all individuals or entities which paid for each communication.

c. If the answer to question 5a is yes, please provide copies or transcripts of all communications which were made.

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FEDERAL ELECTION COMMISSION
GENERAL COUNSEL'S FACTUAL AND LEGAL ANALYSIS

MUR NO. 1438
STAFF MEMBER & TEL. NO.
Maura White
RESPONDENT Harvey Furgatch (202) 523-4057

SOURCE OF MUR: INTERNALLY GENERATED

SUMMARY OF ALLEGATIONS

Harvey Furgatch placed an advertisement in the New York Times and Boston Globe on October 28, 1980, and November 1, 1980, respectively, which expressly advocated the defeat of President Carter and did not report such communications to the Federal Election Commission in violation of 2 U.S.C. § 434(c). Mr. Furgatch also failed to state on the ad which appeared in the Boston Globe whether the communication was authorized by any candidate or candidate's committee, in violation of 2 U.S.C. § 441d.

FACTUAL AND LEGAL ANALYSIS

According to a news article which appeared in the San Diego Tribune on October 29, 1980, Harvey Furgatch paid \$16,800 to run an ad in the New York Times on October 28, 1980, and \$8,200 to run an ad in the Boston Globe on November 1, 1980. The news article reported that the ads criticized President Carter. In addition, it was reported that the same ad as those placed by Mr. Furgatch appeared

in the Chicago Tribune on November 1, 1980. A review of the Chicago Tribune has revealed that the ad was paid for by J. David Dominelli.

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The San Diego Tribune news article states that the advertisement charges President Carter with degrading the electoral process and lessening the prestige of the office, as well as engaging in campaign tactics which are designed to "hide his record." The Tribune reported further that while the New York Times advertisement "does not recommend voting for Republican nominee Reagan or any other candidate, ... [Mr.] Furgatch said its purpose was not to campaign for another candidate but to help defeat Carter" (emphasis added). In addition, it was reported that "[a]nother San Diegan, who requested anonymity," paid \$8,400 for the ad to run in the Chicago Tribune on November 1, 1980.

A review of the October 28, 1980, and November 1, 1980, editions of the New York Times and Boston Globe has revealed that Harvey Furgatch placed full page ads in each newspaper on the above dates. The ads are identical in content and both state that they were paid for by Mr. Furgatch, but only the New York Times ad says that it was not authorized by any candidate. The ads are also identical to the ad placed by Mr. Dominelli in the Chicago Tribune.

The term "independent expenditure" is defined at 2 U.S.C. § 431(17) 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 or suggestion of, any candidate, or any authorized committee or agent of such candidate.

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for," "elect," "support," "cast your ballot for," and "Smith for Congress," or "vote against," "defeat," or "reject." Pursuant to 11 C.F.R. § 109.1(b)(3), "clearly identified candidate" means that the name of the candidate appears, a photograph of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

As set forth at 2 U.S.C. § 434(c)(1), every person who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement containing certain information. In addition, every person is required to file within 24 hours after an independent expenditure is made, a report of any independent expenditure aggregating in excess of \$1,000 or more made after the 20th day but more than 24 hours before any election. 2 U.S.C. § 434(c).

Section 441d of Title 2, United States Code, states that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall, if not authorized by a candidate, an authorized political committee, or its agents, clearly state the name of the person who paid for the communication and that the communication is not authorized by any candidate or candidate's committee.

It is the view of this office that the ads involved in the instant matter expressly advocate the defeat of President Carter in the 1980 general election. Express advocacy is evidenced in the ads' appeal, "Don't Let Him Do It" within the context of the President's reelection. While the terms "vote against," "defeat," or "reject" are not present in the instant ads, such terms are only examples of communications which constitute express advocacy. See Buckley at 44 n.52 and 11 C.F.R. § 109.1(b)(2).

The court in Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 53 (2d Cir. 1980) ("C.L.I.T.R.I.M."), noted that reference within a communication to candidacy was an indicium of express advocacy. 1/ The ads involved herein contain such a reference as they refer to the President's "campaigning" and "running mate." Additionally, the ads focus on the reelection campaign and do not discuss any issues widely debated outside the campaign context. 2/

1/ Other indicia so noted were: reference to the subject's political affiliation, the existence of an election, and the act of voting in an election. C.L.I.T.R.I.M. at 53.

2/ For this reason, among others, this matter is distinguishable from the activity at issue in F.E.C. v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979). In AFSCME, the court determined that a poster depicting President Ford hugging President Nixon while wearing a button stating "Pardon Me" was more an expression on a public issue than a statement of advocacy for or against the election of an individual, and so the cost of the poster was not a reportable independent expenditure.

Since Mr. Furgatch's expenditures apparently total approximately \$16,800 and \$8,200, respectively, and the subject ads were published after the 20th day prior to the 1980 general election, it is the recommendation of the General Counsel that there is reason to believe Mr. Furgatch violated 2 U.S.C. § 434(c). In addition, as the ad placed by Mr. Furgatch in the Boston Globe on November 1, 1980, did not state whether the communication was authorized by any candidate or candidate's committee, it is recommended that the Commission find reason to believe Mr. Furgatch violated 2 U.S.C. § 441d as well.

Find reason to believe Harvey Furgatch violated 2
U.S.C. § 434(c) and 441d.

Find reason to believe Harvey Furgatch violated 2
U.S.C. § 434(c) and 441d.



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

April 27, 1982

J. David Dominelli
1205 Prospect Street, #555
La Jolla, California 92037

Re: MUR 1438

Dear Mr. Dominelli:

On April 26, 1982, the Federal Election Commission determined that there is reason to believe that you violated 2 U.S.C. § 434(c), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The General Counsel's factual and legal analysis, which formed a basis for the Commission's finding, is attached for your information.

Under the Act, you have an opportunity to demonstrate that no action should be taken against you. Please submit any factual or legal materials which you believe are relevant to the Commission's consideration of this matter. Additionally, please submit answers to the enclosed questions within ten days of your receipt of this letter. Statements should be submitted under oath.

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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 a statement authorizing such counsel to receive any notifications and other communications from the Commission.

Letter to J. David Dominelli
Page 2

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Chairman
for the Federal Election Commission

Enclosures

General Counsel's Factual and Legal Analysis
Procedures
Designation of Counsel Statement

Questions to: J. David Dominelli

1. a. Please state both the printing and production costs of the advertisement entitled "Don't Let Him Do It" which appeared in the Chicago Tribune on November 1, 1980.

b. Please state whether you shared any of the production or printing costs associated with the placement of the ad in the Chicago Tribune on November 1, 1980, with any individual or entity. If the answer is yes, please state the name of the individual or entity and the amount each individual or entity contributed towards the ad's cost.

2. a. Please state the name of the individual or entity which designed the ad entitled "Don't Let Him Do It" which appeared in the Chicago Tribune on November 1, 1980.

b. Please state the name of the individual or entity which arranged for the publication of the ad in the Chicago Tribune on November 1, 1980.

3. Please describe how you came to place the same ad in the Chicago Tribune as Harvey Furgatch placed in the New York Times and Boston Globe.

4. a. Other than the ad which appeared in the Chicago Tribune on November 1, 1980, please state whether you made any other communications entitled "Don't Let Him Do It."

b. If the answer to question 4a is yes, please state the name of each newspaper, magazine, or other media in which the communication appeared and the date of each publication, the cost of each communication, and the names of all individuals or entities which paid for each communication.

c. If the answer to questions 4a is yes, please provide copies or transcripts of all communications which were made.

9004070308/

FEDERAL ELECTION COMMISSION

GENERAL COUNSEL'S FACTUAL AND LEGAL ANALYSIS

MUR NO. 1438
STAFF MEMBER & TEL. NO.
Maura White
(202) 523-4057

RESPONDENT J. David Dominelli

SOURCE OF MUR: INTERNALLY GENERATED

SUMMARY OF ALLEGATIONS

J. David Dominelli placed an advertisement in the Chicago Tribune on November 1, 1980, which expressly advocated the defeat of President Carter and did not report such communication to the Federal Election Commission in violation of 2 U.S.C. § 434(c).

FACTUAL BASIS AND LEGAL ANALYSIS

According to a news article which appeared in the San Diego Tribune on October 29, 1980, a "San Diegan, who requested anonymity," paid \$8,400 to run an ad in the Chicago Tribune on November 1, 1980. The news article reported that the ad criticized President Carter and is the same one which Harvey Furgatch placed in the New York Times and Boston Globe on October 28, 1980, and November 1, 1980, respectively.

The San Diego Tribune news article states that the advertisement charges President Carter with degrading the electoral process and lessening the prestige of the office,

as well as engaging in campaign tactics which are designed to "hide his record." The Tribune reported further that while the New York Times advertisement "does not recommend voting for Republican nominee Reagan or any other candidate, ... [Mr.] Furgatch said its purpose was not to campaign for another candidate but to help defeat Carter" (emphasis added).

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A review of the November 1, 1980, edition of the Chicago Tribune has revealed that J. David Dominelli placed a full page ad on such date. The ad states that it was paid for by Mr. Dominelli and is not authorized by any candidate or candidate's committee. The ad is identical in content to those which were placed in the New York Times and Boston Globe by Mr. Furgatch.

A review of the advertisement at issue further reveals that the ad makes unambiguous reference to President Carter by referring to the "President of the United States" and "Carter" (see Buckley v. Valeo, 424 U.S. 1, 43 n.51 (1976)) ("Buckley"), and is entitled "Don't Let Him Do It," an appeal repeated within the ad. Furthermore, the ad criticizes the leadership and campaign practices of the President and refers to the President's primary and general election opponents, specifically, Senator Edward Kennedy and Ronald Reagan. Importantly, the ad refers to the

"electoral process," the "voting public," and "campaigning."

The term "independent expenditure" is defined at 2 U.S.C. § 431(17) 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 or suggestion of, any candidate, or any authorized committee or agent of such candidate.

The term "expressly advocating" is defined at 11 C.F.R. § 109.1(b)(2) to mean any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Congress," or "vote against," "defeat," or "reject." Pursuant to 11 C.F.R. § 109.1(b)(3), "clearly identified candidate" means that the name of the candidate appears, a photograph of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

As set forth at 2 U.S.C. § 434(c)(1), every person who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement containing certain information. In addition, every person is required to file within 24 hours after an independent expenditure is made, a report of any independent

expenditure aggregating in excess of \$1,000 or more made after the 20th day but more than 24 hours before any election. 2 U.S.C. § 434(c).

Section 441d of Title 2, United States Code, states that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall, if not authorized by a candidate, an authorized political committee, or its agents, clearly state the name of the person who paid for the communication and that the communication is not authorized by any candidate or candidate's committee.

It is the view of this office that the ad involved in the instant matter expressly advocates the defeat of President Carter in the 1980 general election. Express advocacy is evidenced in the ad's appeal, "Don't Let Him Do It" within the context of the President's reelection. While the terms "vote against," "defeat," or "reject" are not present in the instant ad, such terms are only examples of communications which constitute express advocacy. See Buckley at 44 n.52 and 11 C.F.R. § 109.1(b)(2).

The court in Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d

45, 53 (2d Cir. 1980) ("C.L.I.T.R.I.M."), noted that reference within a communication to candidacy was an indicium of express advocacy. ^{1/} The ad involved herein contains such a reference as it refers to the President's "campaigning" and "running mate." Additionally, the ad focuses on the reelection campaign and does not discuss any issues widely debated outside the campaign context. ^{2/}

The ad's appeal, "Don't Let Him Do It," combined with its criticisms of the President and the language, "[i]f he succeeds, the country will be burdened with four more years of incoherencies, ineptness and illusion" (emphasis added), clearly implores the reader not to reelect the President, in the view of this office. This view is supported by the fact that the ad was published less than one week prior to the 1980 general election.

^{1/} Other indicia so noted were: reference to the subject's political affiliation, the existence of an election, and the act of voting in an election. C.L.I.T.R.I.M. at 53.

^{2/} For this reason, among others, this matter is distinguishable from the activity at issue in F.E.C. v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979). In AFSCME, the court determined that a poster depicting President Ford hugging President Nixon while wearing a button stating "Pardon Me" was more an expression on a public issue than a statement of advocacy for or against the election of an individual, and so the cost of the poster was not a reportable independent expenditure.

Since Mr. Dominelli's expenditure apparently totals approximately \$8,400 and the subject ad was published after the 20th day prior to the 1980 general election, it is the recommendation of the General Counsel that there is reason to believe J. David Dominelli violated 2 U.S.C. § 434(c).

Recommendation

Find reason to believe J. David Dominelli violated 2 U.S.C. § 434(c).

90040705090

OF COUNSEL
JOHN C. ARMOR
SUITE 108
RUXTON TOWERS
BALTIMORE, MARYLAND 21204

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 980
1232 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
AREA 202 822-9622

May 14, 1982

MAY 14 3:48

Maura White
Office of General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

HAND DELIVERED

Re: MUR 1438
Representation by Counsel and
Request for Enlargement of Time
for Respondent's Reply

Dear Maura:

This office has been retained to represent Harvey Furgatch in the above-referenced matter. In accordance with 11 C.F.R. § 111.23, we request all contact from the Commission in regards to this matter be made directly with myself or John C. Armor, Esquire.

In followup to my telephone conversation with you today, I respectfully request an enlargement of the period of time to submit answers to the questions enclosed with the "reason to believe" letter transmitted to Mr. Furgatch. This firm requires additional time to familiarize ourselves with the facts in this matter, advise our client, and respond to your letter.

Although your letter is dated April 27, 1982, Mr. Furgatch has represented to us that it was not received until 5:00 P.M. on May 5, 1982. In accordance with Commission rules and the text of your letter, the reply would not be due until May 17, 1982 (May 15 being a Saturday).

Accordingly, in order to fully respond to your questions on behalf of our client, who is residing in California, we request an three-week enlargement of time from May 17 until June 7 to submit answers and other factual and legal materials we believe relevant to your further consideration of this matter.

Thank you for your anticipated cooperation in the enlargement of time to respond.

Sincerely yours,

Richard Mayberry Jr.
H. Richard Mayberry, Jr.

HRM/cc



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 19, 1982

H. Richard Mayberry
Suite 960
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: MUR 1438

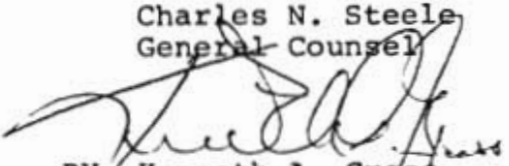
Dear Mr. Mayberry:

This is in response to your letter dated May 14, 1982, in which you request on behalf of your client, Harvey Furgatch, a three week extension of time in which to respond to the reason to believe finding in the above-captioned matter. Considering the Commission's responsibility to act expeditiously in the conduct of investigations, I cannot agree to a three week extension. A 15 day extension, however, is granted. The response of your client is due, therefore, on June 1, 1982.

If you have any questions please contact Maura White, the staff member assigned to this matter, at 202-523-4057.

Sincerely,

Charles N. Steele
General Counsel


BY: Kenneth A. Gross
Associate General Counsel

201548
6cc# 1789
02 MAY 20 09:34

LAW OFFICES OF
KAUFMAN, LORBER & GRADY
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

JACK H. KAUFMAN, A.P.C.
BRUCE W. LORBER, A.P.C.
THOMAS GRADY
JAMES S. FARLEY

GLENDAL FEDERAL PLAZA
11838 BERNARDO PLAZA CT., STE. 201A
SAN DIEGO, CA 92128
NORTH COUNTY PH. (714) 485-8137
SAN DIEGO PH. (714) 578-3510

May 17, 1982

FILE # _____

Federal Election Commission
Washington, D.C. 20463

Attn: Maura White

Re: MUR 1438/J. David Dominelli

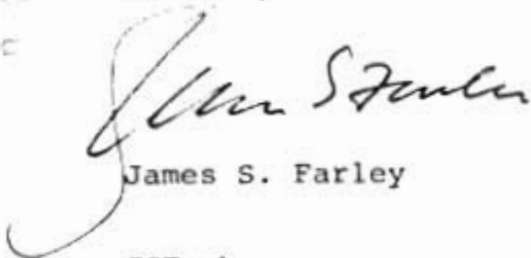
Dear Ms. White:

Enclosed herewith is the "Statement of Designation of Counsel" as executed by my client, J. David Dominelli. Pursuant to 11 CFR Section 8111.23(b), it is my understanding that upon receipt of this Statement, all further commission contact as it relates to this matter shall be through either Jack H. Kaufman or myself.

Please let me know if you have any questions in connection with this matter.

Very truly yours,

KAUFMAN, LORBER & GRADY


James S. Farley

JSF:pk

cc: Jack H. Kaufman, Esq. w/enclosures
Thomas Grady, Esq. w/enclosures
J. David Dominelli w/enclosures
Enclosure

STATEMENT OF DESIGNATION OF COUNSEL

NAME OF COUNSEL: Jack H. Kaufman and/or James S. Farley of
KAUFMAN, LORBER & GRADY
ADDRESS: 11838 Bernardo Plaza Ct., Suite 201A
San Diego, California 92128
TELEPHONE: (714) 485-8137

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.

00040735097
DATE

5-12-82

J. David Dominelli

J. DAVID DOMINELLI - SIGNATURE

NAME: J. DAVID DOMINELLI
ADDRESS: 1205 Prospect Street, Suite 555
La Jolla, California 92037
TELEPHONE: (Home)
(Business) (714) 459-5771

Gcc#7850

LAW OFFICES

H. RICHARD MAYBERRY, JR.

SUITE 800

1333 NEW HAMPSHIRE AVENUE, N.W.

WASHINGTON, D.C. 20005

AREA 202 822-8622

May 28, 1982

OF COUNSEL
JOHN C. ARMOR
SUITE 108
RUXTON TOWERS
BALTIMORE, MARYLAND 21204

Maura White
Office of General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

HAND DELIVERED

Re: Furgatch Response to FEC
Reason to Believe Finding
and Answers to Questions

Dear Maura:

Please find enclosed Mr. Furgatch's response to the Commission's "reason to believe" determination, and his answers which were given under oath.

By submitting these documents four days before they were due, Mr. Furgatch demonstrates his appreciation of the enlargement of time you granted.

You have represented to me that the complaint against Mr. Furgatch was internally generated in response to a letter from the District Attorney's office in San Diego. We are currently evaluating and will shortly state a position on the Section 437g(a) procedures followed by the Commission.

Accordingly, by submitting the enclosed documents, we are in no way waiving any procedural or substantive defenses which may be asserted at a later time in regards to the actual bringing and prosecution of this complaint. Instead, recognizing the expedited time schedule in FEC compliance matters, we comply with the Commission rules in regards to the enclosed response and answers.

Sincerely yours,

Richard Mayberry

H. Richard Mayberry, Jr.

HRM/cc
Enclosures

LAW OFFICES

H. RICHARD MAYBERRY, JR.

SUITE 900

1333 NEW HAMPSHIRE AVENUE, N.W.

WASHINGTON, D.C. 20006

AREA 202 822-9622

May 28, 1982

OF COUNSEL
JOHN C. ARMOR
SUITE 106
RUXTON TOWERS
BALTIMORE, MARYLAND 21204

HAND DELIVERED

The Honorable Frank Reiche
Chairman
The Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: Factual and Legal Materials
Relevant to the Commission's
Further Consideration of MUR 1438

Dear Chairman Reiche:

Pursuant to 2 U.S.C. § 437g, the following information is provided to the Federal Election Commission in order to assist the Commission with its determination in this matter. We believe the information provided clearly demonstrates that no further action should be taken against Mr. Furgatch on the basis of the complaint.

Relevant Facts

Mr. Furgatch placed advertisements in the New York Times (28 October 1980), and in the Boston Globe (1 November 1980), which stated his personal opinion relative to a public official -- then President of the United States, Jimmy Carter.

Mr. Furgatch wrote and designed these ads, and paid for them entirely by himself. No other person or organization joined with him in any way in connection with these advertisements. The ads were placed with the newspapers through Jack Canaan.

The advertisement discusses the public issue of Mr. Carter's campaign practices in the American electoral process and its subsequent effect on the prestige of the office of the Presidency. It is critical of certain statements by President Carter in relation to Ted Kennedy and Ronald Reagan, and carries Mr. Furgatch's personal observations concerning resulting divisiveness in American society.

A third advertisement, which copied and repeated the Times ad, was placed by Mr. J. David Dominelli. This ad was placed at the sole discretion of and at the sole expense

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MAY 28 P 3:

of Mr. Dominelli. Prior to Mr. Dominelli's decision to run his own ad, Mr. Furgatch had not known Mr. Dominelli.

On 29 October 1980, the San Diego Tribune ran a news article about the advertisements. As all newspaper articles, the copy reflected the views and observations of the reporter writing the article. The General Counsel report makes clear on page two in quoting the Tribune to support the Commission's reason to believe determination in this compliance action, that this article is viewed with importance. The General Counsel's excerpt of the article does not contain direct quotes from Mr. Furgatch but instead the reporter's interpretation of what he thought Mr. Furgatch may have said. The credibility, and propriety of the use of this article to support a compliance action is highly questionable.

While there is no question that the advertisements refer to the President of the United States, and that Mr. Furgatch is critical of specific actions and statements by President Carter, it is far from clear that these advertisements constitute independent expenditures.

Legal Analysis

The threshold question is whether Mr. Furgatch's advertisements constitute an "independent expenditure" in accordance with 2 U.S.C. § 431(17).¹ If all the elements of an independent expenditure as defined in relevant provisions of the Federal Election Campaign Act of 1971 as amended are not met, the communication is outside the jurisdiction of the Federal Election Commission and consequently § 434(c) disclosure requirements and § 441d notice requirements would not be triggered.

For the reasons discussed herein, we believe Mr. Furgatch's communication is constitutionally protected and not subject to FEC regulation and control, since the ads involved in the instant matter do not expressly advocate the defeat of President Carter in the 1980 general election. Instead, they constitute protected public debate, and criticism of campaign activities of the President.

1

The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identifiable 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 or suggestion of, any candidate or any authorized committee or agent of such candidate. Since the complaint does not reference candidate collusion, this element is not discussed herein.

The proper and necessary starting point in evaluating the advertisements in question must be the watershed election law opinion Buckley v. Valeo, 424 U.S. 1 (1976) ("Buckley"), which provides the basis for the present statutory and regulatory framework in connection with independent expenditures.

It is clear from a reading of Buckley, and subsequent judicial decisions, that expenditures "relative" to a clearly identifiable candidate may not constitutionally be regulated by the Federal Election Commission unless they include "express" advocacy of the election or defeat of clearly identifiable candidates.

This distinction provides the touchstone for constitutional and statutory analysis in regards to the Furgatch matter, for a distinction exists between discussion of "issues and candidates" and "advocacy of the election or defeat of candidates". As the Buckley court stated, "(n)ot only do candidates campaign on the basis of their position on various public issues, but campaigns themselves generate issues of public interest." Buckley at 42. (emphasis added) Discussions of those issues, admittedly, will "tend naturally and inexorably to exert some influence on voting at elections", Id. at n. 50, but do not necessarily constitute "express" advocacy.

In a relevant and controlling independent expenditure case, FEC v. CLITRIM, 616 F.2d 45 (2nd Circuit 1980) ("CLITRIM"), the distinction between communications "relative to" a public official, and communications "expressly" advocating the election or defeat of that public official who may also be a candidate, was thoroughly examined. The Court reasserted that in accord with the constitutional parameters set forth in Buckley, general public discussion of political issues must expressly advocate a particular election result to come within the independent expenditure ambit, and "...the words 'expressly advocating' means (sic) exactly what they say." CLITRIM at 53. (emphasis added)

As the CLITRIM Court unanimously found, Congress amended the law in 1976 to add the phrase "expressly advocating" to eliminate the constitutional problems which the Supreme Court had found in Buckley with the former broader language that may have applied to the ads in this matter.

The 2nd Circuit determined in CLITRIM that a publication of interpretation of voting records of incumbent Congressmen during an election year did not constitute "express" advocacy -- because the definition of "express" cannot subsume advocacy "by implication" which encourages election or defeat results.

The statement "Don't let him do it" is made within the Furgatch ad, and is made several times. Only through adding a clause such as "Vote against Carter" or "Vote for Reagan (or any of the other three nationwide candidates)", can express advocacy of the defeat of Carter be found by the Commission. Obviously, the ad presented the strong opinion of one citizen. Obviously, the ad wanted the reader to consider this opinion and decide if they agreed or disagreed. However, whether any reader actually draws the conclusion he was being asked to vote against Carter is precisely the type of interpretation of a variable which the Buckley court forbade.

The only express purpose which can be gleaned from the Furgatch statement is his desire that the public "think" about and "fully consider" the Carter actions. The only self-evident purpose of the ad was Mr. Furgatch's attempt to heighten public sensitivity toward the public issues of Mr. Carter's performance in office and ethicality in campaigning. "(C)ourts have consistently struck down not only government attempts to restrain or punish expression, but also government regulation of speech designed to make information available to the public." CLITRIM at 54 (emphasis added).

The Commission, through its General Counsel's office, on pages 5 and 6 of its brief, appears to suggest that a presumption arises that public issues arising in the context of an election campaign are not and cannot be considered other than a statutory independent expenditure, and are consequently somehow less worthy of First Amendment protection. The General Counsel suggests a distinction because, "The ads focus on the reelection campaign and do not discuss any issues widely debated outside the campaign context." This is a distinction, without a constitutional difference in the eyes of the Buckley court.

It is axiomatic that public debate on public issues is protected, regardless of the historical event generating the issue, and especially issues subject to historical debate such as the propriety of campaign tactics or high taxes. The Furgatch ad attacks charges by Carter that other candidates were "unpatriotic". Charges of a lack of patriotism have been a part of American public discourse since our nation's beginning. In fact, George Washington, being the first President under the present Constitution, was the first accused in print of being a "traitor". Public pronouncements like this tend to be made during election campaigns. However, "...citizens of this nation should not be required to account for engaging in debate of political issues." CLITRIM at 54.

The Federal District Court for the District of Columbia dismissal of an independent expenditure case against the American Federation of State, County & Municipal Employees

Page Five

("AFSCME") reaffirms this analysis. In FEC v. AFSCME, 471 F.Supp. 315 (1979) the communication at issue clearly identified then President Gerald Ford and former President Nixon in a highly derogatory and critical poster. However, the court in dismissing that matter made clear that a political communication without express advocacy or one "primarily devoted to subjects other than express advocacy of the election or defeat of a candidate" would not trigger reporting requirements under the Campaign Act. Id. at 316.

The voting pronouncements in CLITRIM, and the AFSCME cartoon are clearly critical of a public official who is also a candidate. Just like the other two cases, the Furgatch communication was made during an election. When the Ford poster was published, most knew that Ford and Carter were running for President. Similarly, when the tax bulletin was distributed in central Long Island, most would know or have reason to know that Congressman Ambro was running against various opponents in a congressional campaign. Mere reference to the obvious candidacies of public officials, when they are necessary to fulfill the goal of robust debate on public issues of campaign practices, can in no way affect the nature of these communications as speech protected by the First Amendment. The step from what the Commission may consider implied advocacy by Mr. Furgatch to the point of express advocacy triggering disclosure and notice requirements is indeed a long one which, consistent with the Buckley, CLITRIM, and AFSCME cases, should not and cannot be made in the instant matter.

* * *

For the above stated reasons, we urge the final recommendation of the Counsel to the Commission be that "probable cause" does not exist that a violation of the Campaign Act occurred. Instead, this complaint and compliance action should be immediately dismissed.

Sincerely yours,

H. Richard Mayberry, Jr.

H. Richard Mayberry, Jr.

John C. Armor
John C. Armor

Counsel for Harvey Furgatch

HRM/cc

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of)
Harvey Furgatch,) MUR 1438
Respondent)
RESPONDENT'S ANSWERS TO
FEC QUESTIONS

Respondent, Harvey Furgatch, answers the Federal Election Commission's April 27, 1982 Questions as follows:

Answer #1a. The printing cost of the advertisement entitled "Don't Let Him Do It", which appeared in the New York Times on October 28, 1980, was \$14,280 - The production cost of the advertisement entitled "Don't Let Him Do It" which appeared in the New York Times on October 28, 1980, was \$2520 -

Answer #1b. I did not share with any other individual or entity any of the production and printing costs associated with the placement of the ad in the New York Times on October 28, 1980.

Answer #2a. The printing cost of the advertisement entitled "Don't Let Him Do It", which appeared in the Boston Globe on November 1, 1980 was \$6837.26 The production cost of the advertisement entitled "Don't Let Him Do It", which appeared in the Boston Globe on November 1, 1980, was \$1370.74

Answer #2b. I did not share with any other individual or entity any of the production and printing costs associated

with placement of the ad in the Boston Globe on November 1, 1980.

Answer #3a. I designed the ad entitled "Don't Let Him Do It" which appeared in the New York Times and Boston Globe.

Answer #3b. Jack Canaan.

Answer #4. Objection. The question is confusing, ambiguous and cannot be answered in its present form. Nevertheless, I alone placed the New York Times and Boston Globe ads without consultation with Mr. Dominelli or any other person. After the first ad appeared in the Times, and the second was under contract to the Globe, Mr. Dominelli contacted me. I had not copyrighted my ad and it was in the public domain. I advised Mr. Dominelli he could do what he chose in his sole discretion. Mr. Dominelli could best speak as to his subsequent actions in regards to the Chicago Tribune ad placed on November 1, 1980.

Answer #5a. Other than the October 28, 1980, New York Times and the November 1, 1980, Boston Globe ads, I did not make any other communications entitled "Don't Let Him Do It".

Answer #5b. Not applicable.

Answer #5c. Not applicable.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of

Harvey Furgatch,

Respondent

MUR 1438

AFFIDAVIT

I, Harvey Furgatch, first being duly sworn on oath,
say to my personal knowledge, information and belief, the
answers to the FEC questions are true and correct.

Harvey Furgatch
Harvey Furgatch

STATE OF CALIFORNIA)
) SS
COUNTY OF SAN DIEGO)

Subscribed and sworn before me this 26th day of
May, 1982.

Carolynn J. Hinton
Notary Public

My Commission Expires:

April 8, 1983



Gcc# 7871

JUN 2 P12:28

OF COUNSEL
JOHN C. ARMOR
SUITE 108
RUXTON TOWERS
BALTIMORE, MARYLAND 21204

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 960
1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036

AREA 202 822-9622
June 2, 1982

Maura White
Office of the General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

HAND DELIVERED

Re: Designation of Counsel in
Dominelli, MUR 1438

Dear Maura:

Please find enclosed designation of this law firm as
counsel in the above-referenced matter.

You will note that the designation is by Mr. Dominelli's
San Diego counsel. Due to time constraints in this matter,
we hope you will find this satisfactory.

As we discussed on May 27, 1982, we shall file a response
and answers on behalf of Mr. Dominelli on or before June 7,
1982. You stated the answers need not be notarized, or
otherwise sworn to by Mr. Dominelli. Furthermore, you stated,
and I concurred, that the matters under review involving Mr.
Furgatch and Mr. Dominelli are to be treated separately and
not consolidated.

In accordance with the applicable provisions of the
Campaign Act, this matter shall be confidential, and please
transmit all communications to this law firm.

Sincerely,

Richard Mayberry
H. Richard Mayberry, Jr.

HRM/cc
Enclosure

101507040000

LAW OFFICES OF
KAUFMAN, LORBER & GRADY
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

JACK H. KAUFMAN, A.P.C.
BRUCE W. LORBER, A.P.C.
THOMAS GRADY
JAMES S. FARLEY

GLENDAL FEDERAL PLAZA
11838 BERNARDO PLAZA CT., STE. 201A
SAN DIEGO, CA 92128
NORTH COUNTY PH. (714) 485-8137
SAN DIEGO PH. (714) 578-3510

May 27, 1982

FILE # 12600

Richard Mayberry, Esq.
Mayberry & Armor
133 New Hampshire N.W., Suite 960
Washington, D.C. 20036

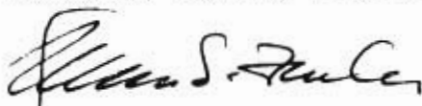
Re: J. DAVID DOMINELLI/FEDERAL ELECTION COMMISSION MATTER
UNDER REVIEW NO. 1438

Dear Mr. Mayberry:

This letter will serve to confirm to all parties interested in the above referenced matter that, pursuant to the "Statement of Designation of Counsel" on file with the Federal Election Commission in the above referenced matter, you are hereby designated as counsel and further authorized to receive any notification and other communications from the Federal Election Commission and to act on behalf of Mr. J. David Dominelli before the Commission.

Very truly yours,

KAUFMAN, LORBER & GRADY



James S. Farley

JSF:pk

cc: Jack H. Kaufman, Esq.
J. David Dominelli

Gcc# 7907

OF COUNSEL
JOHN C. ARMOR
SUITE 108
RUXTON TOWERS
BALTIMORE, MARYLAND 21204

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 980
1325 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036

AREA 202 822-9622
June 7, 1982

Ms. Maura White
Office of the General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C 20463

HAND DELIVERED

Re: MUR 1438, re J. David Dominelli

Dear Maura:

Please find enclosed the brief in support of Mr. Dominelli,
and Mr. Dominelli's answers to FEC questions.

Sincerely,



H. Richard Mayberry, Jr.

HRM/cc
Enlclosures

00040735109

OF COUNSEL
JOHN C. ARMOR
SUITE 108
RUXTON TOWERS
BALTIMORE, MARYLAND 21204

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 960
1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036

AREA 202 822-9822

June 7, 1982

Frank P. Reiche
Chairman
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

HAND DELIVERED

Re: Factual and Legal Analysis
Relevant to the Commission's
Further Consideration of
MUR 1438 in Connection with
J. David Dominelli

Dear Chairman Reiche:

On behalf of Mr. J. David Dominelli, the following information is provided, pursuant to 2 U.S.C. § 437g, in order to assist the Federal Election Commission with its determination in this matter. We believe the factual and legal analysis provided clearly demonstrates that no further action should be taken against Mr. Dominelli on the basis of this internally generated complaint.

Relevant Facts

Mr. Dominelli represents that he became aware of an advertisement in the October 28, 1980, New York Times which discussed the campaign practices of Jimmy Carter, then the President of the United States. The ad stated it was paid for by Mr. Furgatch, not authorized by any candidate, and spoke of the adverse effect Carter's campaign practices had on the American electoral process and ultimately on the prestige of the office of the President.

Mr. Dominelli then contacted Mr. Furgatch, and requested his permission to reprint the advertisement. Mr. Furgatch replied that no permission was required since Mr. Furgatch had not retained any copyright interest in the ad. Mr. Dominelli requested, and Mr. Furgatch provided, the name and telephone number of the ad agency which had placed the ad for Mr. Furgatch.

The Chicago Tribune ad was placed at the sole discretion and expense of Mr. Dominelli alone. Mr. Dominelli had not known Mr. Furgatch before making contact in connection with the Times ad.

While the Dominelli advertisement scrutinizes certain actions and statements of the President of the United States, it does not constitute an independent expenditure.

Legal Analysis

Communication of a political belief or attitude is constitutionally protected speech under the First Amendment. The Federal Election Campaign Act of 1971, as amended and codified in 2 U.S.C. § 431 et seq., consequently grants to the Federal Election Commission a particularly limited jurisdiction in regulating political advertisements.

Accordingly, if the Commission fails to establish that Mr. Dominelli's ad was an independent expenditure under the terms of 2 U.S.C. 431 (17),¹ the jurisdictional prerequisite has not been met and any subsequent compliance action is unlawful. We believe Mr. Dominelli's ad is constitutionally protected and outside the FEC ambit of regulation because it does not expressly advocate the election or defeat of a candidate.

The United States Supreme Court, in Buckley v. Valeo, 424 U.S. 1 (1976), found that the regulation of independent expenditures made for the purpose of influencing the election or defeat of a candidate was unconstitutionally vague:

We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1)² must be construed to apply only to expenditures...that in express terms advocate the election or defeat of a clearly identified candidate for federal office. Id at 44 (emphasis added).

¹ The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identifiable 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 or suggestion of, any candidate or any authorized committee or agent of such candidate. Since the complaint does not reference candidate collusion, this element is not discussed herein.

² 18 U.S.C. 608(e)(1) provided a ceiling on independent expenditures and was found unconstitutional in Buckley and subsequently repealed.

Implicit in this restrictive finding is the Court's conclusion that "advocacy" in its generic sense could subsume every facet of political speech and expression, "(f)or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." Id at 42.

According to the strictures in Buckley, the Dominelli ad is not amenable to FEC regulation because express advocacy is lacking.

In FEC v. CLITRIM, 616 F.2d 45 (2d Cir. 1980), this all important distinction between "express" and "implied or general" advocacy concerning a political candidate was addressed. The Second Circuit noted that Congress amended the Campaign Act in 1976 by adding the words "express advocacy" in the § 431(17) definition of independent expenditures as applying to § 434(c) disclosure requirements in order to conform to the constitutional mandate set forth in Buckley. CLITRIM at 52. After reasserting the proposition stated in Buckley that only express advocacy is subject to regulation, the Court of Appeals went on to state the only permissible interpretation of the term: "(T)he words 'expressly advocating' means (sic) exactly what they say". CLITRIM at 53.

Buckley restricted express advocacy to mean terms such as "vote for", "elect", "support", "cast your ballot for", "Smith for Congress", "vote against", "defeat", "reject", or words which contain a specific direction to the voter in casting his ballot. See 424 U.S. at 44, n. 52. Following this narrow interpretation required by Buckley of "express advocacy" as precedent, the CLITRIM court found that a publication of a statement illustrating the voting records of a certain Congressman did not constitute express advocacy, regardless of the consequences of the statement. CLITRIM at 53.

Accordingly, the statement "Don't let him do it", made by Mr. Dominelli in his ad, fails to meet the strict definition of express advocacy. This statement is general issue advocacy in the purest sense, to heighten the sensitivity of the reader to an issue considered important by Mr. Dominelli. It requires the reader of the ad to infer or not infer on his own volition what action, if any, is to be taken.

The Court in Buckley specifically forbids regulation of statements which would require this additional inference. This "forbidden inference" notion is indeed no accident for the regulation of implied assertions (i.e., that Carter

should be defeated) would result directly in the regulation of political ideas -- so obviously prohibited by the First Amendment.

The Commission would impute Mr. Dominelli's intent to influence an election through a reading of an interview with Mr. Furgatch appearing in the San Diego Tribune on October 29, 1980, which does not name Mr. Dominelli. Such information contained in an interview with Mr. Furgatch is laden with hazards of inaccurate perception, memory, communication and perspective concerning the source, and is not relevant in the instant matter. The use of this article in a compliance action against Mr. Dominelli is of no probative value and is highly prejudicial.

Mr. Dominelli, in his ad, attacked not a particular candidate but rather a particular practice concerning the American Presidential campaign. The words "Don't let him do it" reflected a concern with the American political process. To regulate this statement would be to regulate the dissemination of ideas throughout society; it would be to regulate readers of this article and all similar articles in drawing their conclusions concerning propriety in political competition. Because general issue advocacy is vested in an abstract idea or belief, it cannot be regulated by the Commission under the Constitution.

The Commission appears to suggest that because "the ads focus on the re-election campaign and do not discuss any issues widely debated outside the campaign context", that the ideas are somehow less worthy of First Amendment protection. This argument is totally meritless. Justice Stone once aptly explained that the defenders of the Constitution are much quicker to protect rights and privileges that are tangibly related to the political process.³ Accordingly, "...the right to speak out at election time is one of the most zealously protected under the Constitution." CLITRIM at 53.

The fact that the ad may speak to a clearly identifiable candidate has no bearing on the subject matter of the article or the ideas implicated therein. In FEC v. AFSCME, 471 F. Supp. 315 (1979), the U.S. District Court of the District of Columbia held that a direct identification of a candidate (here Gerald Ford) is not sufficient by itself to constitute express advocacy. "(A)lthough the poster includes a clearly identified candidate and may have tended to influence voting, it contains communication on a public issue widely debated during the campaign." AFSCME at 317. Some respected political

See U.S. v. Carolene Products Co., 304 U.S. 144, 150 n.3 (1938).

scientists have suggested that the Ford pardon of Nixon cost Ford the election of 1976. Whether or not the issue was that critical, it was clearly among the most important issues of the 1976 campaign. Moreover, it was an issue that, for fear of backlash, candidate Carter could not raise by himself.

This background is given to demonstrate that the "pardon me poster" involved in FEC v. AFSCME injected itself more into the heart of the 1976 campaign than did the Dominelli ad in the 1980 campaign. Since the poster was protected by the First Amendment, a fortiorari, so is the Dominelli ad.

Procedural Defects

Commission staff have advised counsel that MUR 1438, which is designated as internally generated, originated from a letter transmitted from the District Attorney's office of San Diego, California. Counsel requested a copy of the letter, but was advised that it would not be made available.

The fact that such a letter from the District Attorney led to generation of this complaint raises a substantial procedural question whether the Commission has complied with 2 U.S.C. § 437g(a). This section concerning Commission enforcement provides two distinct procedural avenues for initiation of a complaint against an individual. The avenue chosen has a dramatic effect upon the due process rights of the complainant to have the opportunity to respond to a complaint prior to the Commission's determination of reason to believe a Campaign Act violation has occurred.

In accordance with 437g(a)(1), any "person" who believes a violation of the Campaign Act has occurred may file a complaint. However, the complaint "shall be in writing, signed and sworn to by the person filing such a complaint, (and) shall be notarized, and shall be made under penalty of perjury." The target of the complaint shall have an opportunity to respond prior to the Commission conducting any vote on the complaint, other than a vote to dismiss.

Section 437g(a)(2), in distinction, provides that the Commission on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, may make a reason to believe determination without a sworn complaint and without substantial due process rights otherwise afforded by § 437g(a)(1).

The District Attorney clearly is a "person" under the

Page Six

Campaign Act. See 2 U.S.C. § 431(11). Counsel, although denied access to the District Attorney's complaint, must assume that the procedural requirements of § 437g(a)(1), were not complied with by the District Attorney or the Commission in regards to Mr. Dominelli. Accordingly, the Commission's initiation of this complaint pursuant to § 437g(a)(2) as opposed to § 437g(a)(1) of the Act circumvents the letter and spirit of the Campaign Act, which was meant to prevent the commencement of a government investigation of a citizen based on unsworn third-party allegations.

Conclusion

Due to the procedural defects in this compliance matter, and the absence of "express advocacy", in the Dominelli advertisement, we urge the General Counsel to recommend to the Commission immediate dismissal of this action.

Respectfully submitted,

H. Richard Mayberry, Jr.
H. Richard Mayberry, Jr.

John C. Armor
John C. Armor

Counsel for J. David Dominelli

HRM/cc

cc: Commissioner Danny Lee McDonald
Commissioner Joan D. Aikens
Commissioner Lee Ann Elliott
Commissioner Thomas E. Harris
Commissioner John Warren McGarry

00040705112

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ELECTION COMMISSION

In Re the Matter of)
J. David Dominelli) MUR 1438
Respondent)
_____)

Respondent, J. David Dominelli, answers the Federal Election Commission's April 27, 1982, questions as follows:

Answer 1a. The printing cost of the advertisement entitled "Don't Let Him Do It", which appeared in the Chicago Tribune on November 1, 1980, was \$7056.34. The production cost of the advertisement entitled "Don't Let Him Do It", which appeared in the Chicago Tribune on November 1, 1980, was \$1414.66.

Answer 1b. I did not share with any other individual or entity any of the production or printing costs associated with the placement of the ad in the Chicago Tribune on November 1, 1980.

Answer 2a. I designated the ad entitled "Don't Let Him Do It", which appeared in the Chicago Tribune on November 1, 1980.

Answer 2b. Jack Canaan.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

82 JUL 8 P 2: 20

July 8, 1982

MEMORANDUM

TO: The Commission

FROM: Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel *KAG*

SUBJECT: MUR 1438-- Briefs to Harvey Furgatch and
J. David Dominelli

Attached for the Commission's review are two briefs which state the position of the General Counsel on the legal and factual issues of the above-captioned matter. A copy of each brief and a letter notifying the respondents' counsel of the General Counsel's intent to recommend to the Commission a finding of probable cause to believe was mailed on July 8, 1982. Following receipt of the respondents' replies to these notices, this office will make a further report to the Commission.

Attachments

1. Briefs (2)
2. Letter to Mayberry

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

July 8, 1982

H. Richard Mayberry
Suite 960
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: MUR 1438

Dear Mr. Mayberry:

Based upon information ascertained in the normal course of carrying out its supervisory responsibilities, the Federal Election Commission, on April 26, 1982, found reason to believe that your client, Harvey Furgatch, violated 2 U.S.C. §§ 434(c) and 441d, and that your client, J. David Dominelli, violated 2 U.S.C. § 434(c), and an investigation in this matter was instituted.

After considering all the evidence available to the Commission, the Office of General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred with respect to each of your clients. Submitted for your review are two briefs stating the position of the General Counsel on the legal and factual issues of the case. Within fifteen days of your receipt of this notice, you may file with the Secretary of the Commission a brief (10 copies if possible) on behalf of each client stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of General Counsel, if possible.) The General Counsel's brief and any brief and which you may submit will be considered by the Commission before proceeding to a vote of probable cause to believe a violation has occurred with respect to each of your clients.

Letter to H. Richard Mayberry
Page 2

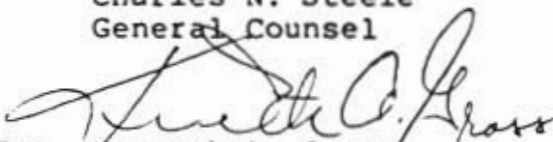
If you are unable to file responsive briefs within 15 days, you may submit a written request to the Commission for an extension of time in which to file the briefs. The Commission will not grant any extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of General Counsel attempt for a period of not less than thirty, but not more than ninety days to settle this matter through a conciliation agreement.

Should you have any questions, please contact Maura White at (202) 523-4057.

Sincerely,

Charles N. Steele
General Counsel


By: Kenneth A. Gross
Associate General Counsel

Enclosure
Brief (2)

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Harvey Furgatch) MUR 1438

GENERAL COUNSEL'S BRIEF

I. Statement of the Case

On April 26, 1982, the Commission determined that there is reason to believe that Harvey Furgatch violated 2 U.S.C. §§ 434(c) and 441d. Notification of the Commission's finding was mailed to Mr. Furgatch on April 27, 1982, and a response was filed on his behalf on May 28, 1982.

This matter involves the failure of Harvey Furgatch to report two identical independent expenditures he made just prior to the November 4, 1980, general election which expressly advocated the defeat of President Carter. Also involved herein is a failure to state on one communication, dated November 1, 1980, whether the communication was authorized by any candidate or candidate's committee.

The response submitted by Harvey Furgatch admits that he placed advertisements entitled "Don't Let Him Do It" in the New York Times and Boston Globe on October 28, 1980, and November 1, 1980, respectively, and that the advertisements cost \$16,800 and

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\$8,208, respectively. 1/ The response asserts that "Mr. Furgatch wrote and designed these ads, and paid for them entirely by himself," and that "[n]o other person or organization joined with him in any way in connection with these advertisements." Mr.

1/ The ad at issue states:

DON'T LET HIM DO IT.

The President of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And WE let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

WE let him do it again.

In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others, with public funds.

WE are letting him do it.

He continues to cultivate the fears, not the hopes, of the voting public by suggesting that the choice is between "peace or war," "black or white," "north or south," and Jew vs. Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT.

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Furgatch, the response maintains, did not place any other advertisements entitled "Don't Let Him Do It" other than the two ads at issue herein.

According to the response filed, after Mr. Furgatch's first ad appeared in the New York Times and the second ad was under contract to the Boston Globe, J. David Dominelli contacted Mr. Furgatch. 2/ As Mr. Furgatch had not copyrighted his ad and "it was in the public domain," he apparently advised Mr. Dominelli that "he could do what he chose in his sole discretion" about placing the same ad. The response states that although Mr. Dominelli "copied and repeated the Times ad," he did so at his own expense.

The advertisement placed by Mr. Furgatch is characterized as "personal observations concerning resulting devisiveness in American society" and described as a discussion of "the public issue of Mr. Carter's campaign practices in the American electoral process and its subsequent effect on the prestige of the office of the Presidency." It is argued that "[w]hile there is no question that the advertisements refer to the President of the United States, and that Mr. Furgatch is critical of specific actions and statements by President Carter, it is

2/ J. David Dominelli placed an ad in the Chicago Tribune on November 1, 1980, which was identical to the ads placed by Mr. Furgatch.

far from clear that these advertisements constitute independent expenditures." Hence, the respondent contends that the instant ads "do not expressly advocate the defeat of President Carter in the 1980 general election," but, instead "constitute protected public debate, and criticism of campaign activities of the President."

Relying on Buckley v. Valeo, 424 U.S. 1 (1976) ("Buckley"), and "subsequent judicial decisions," the response asserts that "expenditures 'relative' to a clearly identifiable candidate may not constitutionally be regulated ... unless they include 'express' advocacy of the election or defeat of clearly identifiable candidates." A "distinction," it is argued, exists between "discussion of 'issues and candidates' and 'advocacy of the election or defeat of candidates.'" Citing to Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2nd Cir. 1980) ("FEC v. CLITRIM"), the response maintains that "general public discussion of political issues must expressly advocate a particular election result to come within the independent expenditure ambit and '... the words "expressly advocating" means [sic] exactly what they say.'" It is further argued that the "definition of 'express' cannot subsume advocacy 'by implication' which encourages election or defeat results."

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With respect to the ads' appeal "Don't Let Him Do It," the response admits that the "ad presented the strong opinion of one citizen," and "wanted the reader to consider this opinion and decide if they agreed or disagreed." It is argued, however, that "[o]nly through adding a clause such as 'Vote against Carter' or 'Vote for Reagan (or any of the other three nationwide candidates)', can express advocacy of the defeat of Carter be found by the Commission." Thus, the respondent contends that "whether any reader actually draws the conclusion he was being asked to vote against Carter is precisely the type of interpretation of a variable which the Buckley court forbade." The response insists that the only express purpose which can be "gleaned from the Furgatch statement is his desire that the public 'think' about and 'fully consider' the Carter actions." Moreover, the only "self-evident purpose of the ad was Mr. Furgatch's attempt to heighten public sensitivity toward the public issues of Mr. Carter's performance in office and ethicality in campaigning," according to the response filed.

In addition, the response analogizes the instant matter to the voting pronouncements in FEC v. CLITRIM and to the cartoon at issue in Federal Election Commission v. American Federation of State, County and Municipal Employees, 471 F.

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Supp. 315 (D.D.C. 1979), ("FEC v. AFSCME"). 3/ While the response explains that "[j]ust like the [above] two cases, the Furgatch communication was made during an election," it is maintained that "[m]ere reference to the obvious candidacies of public officials, when they are necessary to fulfill the goal of robust debate on public issues of campaign practices, can in no way effect the nature of these communications as speech protected by the First Amendment." In conclusion, the response states that the "step from what the Commission may consider implied advocacy by Mr. Furgatch to the point of express advocacy ... is indeed a long one which, consistent with the Buckley, CLITRIM, and AFSCME cases, should not and cannot be made in the instant matter."

II. Legal Analysis

(a) The law applicable

The term "independent expenditure" is defined at 2 U.S.C. § 431(17) 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 or suggestion of, any candidate, or

3/ The response states that the court in FEC v. AFSCME "made clear that a political communication without express advocacy or one 'primarily devoted to subjects other than express advocacy of the election or defeat of a candidate' would not trigger reporting requirements under the Campaign Act."

any authorized committee or agent of such candidate.

The term "expressly advocating" is defined at 11 C.F.R. § 109.1(b)(2) to mean any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Congress," or "vote against," "defeat," or "reject." Pursuant to 11 C.F.R. § 109.1(b)(3), "clearly identified candidate" means that the name of the candidate appears, a photograph of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

As set forth at 2 U.S.C. § 434(c)(1), every person who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement containing certain information. In addition, every person is required to file within 24 hours after an independent expenditure is made, a report of any independent expenditure aggregating in excess of \$1,000 or more made after the 20th day but more than 24 hours before any election. 2 U.S.C. § 434(c).

Section 441d of Title 2, United States Code, states that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such

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

(b) Application of the law to the facts

It is the view of the General Counsel that the ad at issue herein constitutes an "independent expenditure" within the meaning of the Federal Election Campaign Act of 1971, as amended. Both of the essential components of an "independent expenditure" are present therein -- the ad refers to a "clearly identified candidate," President Carter, and "expressly advocates" the defeat of the President. That the ad includes Mr. Furgatch's personal observations and criticisms cannot insulate it from constituting an independent expenditure because the ad's appeal to defeat President Carter is in express terms.

The ad makes unambiguous reference to President Carter by referring to the "President of the United States" and "Carter." See Buckley at 43 n.51 and 11 C.F.R. § 100.17. In addition, the ad does not contain a discussion of a "public issue widely debated during the campaign," AFSCME at 317, other than the President's "low-level" campaigning and "ineptness." Clearly, the entire focus of the ad is the

1980 reelection campaign; the ad criticizes the President, refers to the "electoral process," the "voting public," campaigning," and the President's opponents, Ted Kennedy and Ronald Reagan. Indeed, the respondent conceded that the ad focuses on the "issues of Mr. Carter's performance in office and ethicality in campaigning."

While the respondent argues that the ad does not expressly advocate the defeat of President Carter because it does not contain the precise words of advocacy suggested by the Supreme Court in Buckley, it is the position of the General Counsel that the ad's appeal, "Don't Let Him Do It," is in express terms and is the type of communication which the Supreme Court contemplated when it defined express advocacy to be "words ... such as 'vote for,' ... 'defeat,' 'reject'" (emphasis added). See Buckley at 44 n.52 and 11 C.F.R. § 109.1(b)(2). It is clear that the terms noted by the Court are only examples of communications which constitute express advocacy. The appeal, combined with the language, "[i]f he succeeds, the country will be burdened with four more years of incoherencies, ineptness and illusion" (emphasis added) clearly implores the reader not to reelect the President. The fact that the ad was placed in two newspapers less than one week prior to the 1980 general election reinforces this view. The respondent's

claim that the ad's only express purpose is to have the public "think about" and "fully consider" the President's actions ignores the clear language of the ad. Interspersed between the ad's criticisms of the President is the progression of statements, "WE let him," "WE let him do it again," "WE are letting him do it," "DON'T let him do it" (emphasis added). Such language is neither implied nor thought provoking -- it is express direction to defeat President Carter.

Finally, contrary to the respondent's assertions, the instant communication is distinguishable from the communications at issue in FEC v. CLITRIM and FEC v. AFSCME. The decision of the Second Circuit in FEC v. CLITRIM stressed that the CLITRIM bulletin made no mention of Congressman Ambro's "candidacy, or to any electoral opponent of the Congressman." FEC v. CLITRIM at 51. The ads placed by Mr. Furgatch, however, refer to both the President's candidacy and his general election opponent, Ronald Reagan. The instant ad also calls for the President's defeat, while "[t]he nearest [the CLITRIM bulletin] comes to expressly calling for action of any sort is its exhortation that '[i]f your Representative consistently votes for measures that increase taxes, let him know how you feel'" (emphasis added), FEC v. CLITRIM at 53, and the poster at issue in

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FEC v. AFSCME, depicting President Ford wearing a button reading "Pardon Me" and embracing former President Nixon, stated only "I can say from the bottom of my heart -- the President of the United States is innocent, and he is right." Furthermore, the district court in rendering its decision that the "Nixon-Ford" poster was not a reportable independent expenditure, noted that the poster "contains a communication on a public issue widely debated during the campaign." FEC v. AFSCME at 316. Importantly, the sole subject of the instant ad is the defeat of President Carter.

As discussed above, the two advertisements placed by Mr. Furgatch constitute independent expenditures, in the view of the General Counsel. Hence, as the ads cost in excess of the \$250 reporting threshold, and Mr. Furgatch did not file reports with respect to each ad within 24 hours after the expenditures were made, it is the position of the General Counsel that there is probable cause to believe Harvey Furgatch violated 2 U.S.C. § 434(c). In addition, as the ad placed by Mr. Furgatch in the Boston Globe on November 1, 1980, did not state whether the communication was authorized by any candidate or candidate's committee, it is the position of the General Counsel that there is probable cause to believe Harvey Furgatch violated 2 U.S.C. § 441d.

III. General Counsel's Recommendation

Find probable cause to believe Harvey Furgatch violated
2 U.S.C. §§ 434(c) and 441d.

Date

July 8, 1982

Charles N. Steele
General Counsel

By:


Kenneth A. Gross
Associate General Counsel

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 1438
J. David Dominelli)

GENERAL COUNSEL'S BRIEF

I. Statement of the Case

On April 26, 1982, the Commission determined that there is reason to believe that J. David Dominelli violated 2 U.S.C. § 434(c) by failing to report an independent expenditure made on November 1, 1980, which expressly advocated the defeat of President Carter in the 1980 general election. Notification of the Commission's finding was mailed to Mr. Dominelli on April 27, 1982, and a response was filed on his behalf on June 7, 1982.

The response submitted by J. David Dominelli admits that he placed an advertisement entitled "Don't Let Him Do It" in the Chicago Tribune on November 1, 1980, and that the advertisement cost \$8,471. 1/ The response asserts that

1/ The instant ad states:

DON'T LET HIM DO IT.

The President of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And WE let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

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Mr. Dominelli "did not share with any other individual or entity any of the production or printing costs" associated with the placement of the instant ad. In explanation of the fact that Mr. Dominelli placed the same newspaper ad as those placed by Harvey Furgatch in the New York Times and Boston Globe, Mr. Dominelli states that he contacted Mr. Furgatch and requested his permission to reprint the advertisement which he saw in the New York Times. The response states that "Mr.

1/ (cont'd.)

WE let him do it again.

In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others, with public funds.

WE are letting him do it.

He continues to cultivate the fears, not the hopes of the voting public by suggesting that the choice is between "peace or war," "black or white," "north or south," and Jew vs. Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT.

The ad also stated that it was paid for by J. David Dominelli and not authorized by any candidate or candidate's committee.

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Furgatch replied that no permission was required since Mr. Furgatch had not retained any copyright interest in the ad," and at Mr. Dominelli's request he provided him with the name of the ad agency which had placed the ad for Mr. Furgatch. Mr. Dominelli, the response maintains, did not place any other advertisements entitled "Don't Let Him Do It" other than the ad at issue herein.

It is the position of the respondent that while the instant ad "scrutinizes certain actions and statements of the President of the United States, it does not constitute an independent expenditure." Citing Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2nd Cir. 1980) ("FEC v. CLITRIM"), the response argues that there is an "all important distinction" between 'express' and 'implied or general' advocacy concerning a political candidate" and that the "words 'expressly advocating' means [sic] exactly what they say." According to the reply submitted, the Court in Buckley v. Valeo, 424 U.S. 1 (1976) ("Buckley"), "restricted express advocacy to mean terms such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,' or words which contain a specific direction to the voter in casting his ballot." The response

notes that "[f]ollowing this narrow interpretation required by Buckley of 'express advocacy' as precedent, the CLITRIM court found that a publication of a statement illustrating the voting records of a certain Congressman did not constitute express advocacy, regardless of the consequences of the statement."

The appeal "Don't Let Him Do It" is characterized by the respondent as "general issue advocacy in the purest sense." It is asserted that the statement "requires the reader of the ad to infer or not infer on his own volition what action, if any, is to be taken." The Court in Buckley, the response avers, "specifically forbids regulation of statements which would require this additional inference." The response maintains further that "Mr. Dominelli, in his ad, attacked not a particular candidate but rather a particular practice concerning the American Presidential campaign." According to the respondent, "[t]he words 'Don't let him do it' reflected a concern with the American political process," and to "regulate this statement would be to regulate the dissemination of ideas throughout society; it would be to regulate readers of this article and all similar articles in drawing their conclusions concerning propriety in political

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competition." The response contends that "[t]he fact that the ad may speak to a clearly identifiable candidate has no bearing on the subject matter of the article or the ideas implicated therein." Finally, the respondent asserts that "the 'pardon me poster' involved in FEC v. AFSCME [471 F. Supp. 315 (D.D.C. 1979)] injected itself more into the heart of the 1976 campaign than did the Dominelli ad in the 1980 campaign" and that "[s]ince the poster was protected by the First Amendment, a fortiorari, so is the Dominelli ad."

II. Legal Analysis

(a) The law applicable

The term "independent expenditure" is defined at 2 U.S.C. § 431(17) 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 or suggestion of, any candidate, or any authorized committee or agent of such candidate.

The term "expressly advocating" is defined at 11 C.F.R. § 109.1(b)(2) to mean any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith

for Congress," or "vote against," "defeat," or "reject." Pursuant to 11 C.F.R. § 109.1(b)(3), "clearly identified candidate" means that the name of the candidate appears, a photograph of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

As set forth at 2 U.S.C. § 434(c)(1), every person who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement containing certain information. In addition, every person is required to file within 24 hours after an independent expenditure is made, a report of any independent expenditure aggregating in excess of \$1,000 or more made after the 20th day but more than 24 hours before any election. 2 U.S.C. § 434(c).

Section 441d of Title 2, United States Code, states that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall, if not authorized by a candidate, an authorized political committee, or its agents, clearly state the name of the person who paid for the communication and that the communication is not authorized by any candidate or candidate's committee.

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(b) Application of the law of the facts

It is the view of the General Counsel that the ad at issue herein constitutes an "independent expenditure" within the meaning of the Federal Election Campaign Act of 1971, as amended. 2/ Both of the essential components of an "independent expenditure" are present therein -- the ad refers to a "clearly identified candidate," President Carter, and "expressly advocates" the defeat of the President. That the ad includes Mr. Dominelli's personal observations and criticisms cannot insulate it from constituting an independent expenditure because the ad's appeal to defeat President Carter is in express terms.

The ad makes unambiguous reference to President Carter by referring to the "President of the United States" and "Carter." See Buckley at 43 n.51 and 11 C.F.R. § 100.17. In addition, the ad does not contain a discussion of a "public issue widely debated during the campaign," FEC v. AFSCME at 317, other than the President's "low-level" campaigning and "ineptness." Clearly, the entire focus of the ad is the 1980 reelection campaign; the ad criticizes the President and refers to the "electoral process," the

2/ The respondent's argument that the instant compliance matter is procedurally defective because the respondent was not given an opportunity to respond to the "complaint" filed by the San Diego District Attorney is unfounded. The instant matter was not generated by a complaint but rather from information ascertained by the Commission from the San Diego District Attorney in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2). As this is an internally generated matter, the provisions of 2 U.S.C. § 437g(a)(2) are applicable herein.

"voting public," "campaigning," and the President's opponents, Ted Kennedy and Ronald Reagan. Indeed, the respondent concedes that the ad "scrutinizes certain actions and statements" of President Carter.

While the respondent argues that the ad does not expressly advocate the defeat of President Carter because it does not contain the precise words of advocacy suggested by the Supreme Court in Buckley, it is the opinion of the General Counsel that the ad's appeal, "Don't Let Him Do It," is in express terms and is the type of communication which the Supreme Court contemplated when it defined express advocacy to be "words ... such as 'vote for,' ... 'defeat,' 'reject'" (emphasis added). See Buckley at 44 n.52 and 11 C.F.R. § 109.1(b)(2). It is clear that the terms noted by the Court are only examples of communications which constitute express advocacy. The appeal, combined with the language, "[i]f he succeeds, the country will be burdened with four more years of incoherencies, ineptness and illusion" (emphasis added) clearly implores the reader not to reelect the President. The fact that the ad was placed in the Chicago Tribune less than one week prior to the 1980 general election reinforces this view. Furthermore, the respondent's claim that the ad requires the reader to "infer ... what action, if any, is to be taken," ignores the clear language of the ad. Interspersed between the ad's criticisms

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of the President is the progression of statements, "WE let him," "WE let him do it again," "WE are letting him do it," "DON'T let him do it" (emphasis added). Such language is neither implied nor thought provoking -- it is express direction to defeat President Carter.

Finally, contrary to the respondent's assertions, the instant communication is distinguishable from the communications at issue in FEC v. CLITRIM and FEC v. AFSCME. The decision of the Second Circuit in FEC v. CLITRIM stressed that the CLITRIM bulletin made no mention of Congressman Ambro's "candidacy, or to any electoral opponent of the Congressman." FEC v. CLITRIM at 51. The ad placed by Mr. Dominelli, however, refers to both the President's candidacy and his general election opponent, Ronald Reagan. The instant ad also calls for the President's defeat, while "[t]he nearest [the CLITRIM bulletin] comes to expressly calling for action of any sort is its exhortation that '[i]f your Representative consistently votes for measures that increase taxes, let him know how you feel'" (emphasis added), FEC v. CLITRIM at 53, and the poster at issue in FEC v. AFSCME, depicting President Ford wearing a button reading "Pardon Me" and embracing former President Nixon, stated only "I can say from the bottom of my heart -- the President of the United States is innocent, and he is right." Furthermore, the district court in rendering its decision that the "Nixon-Ford" poster was not a reportable independent expenditure, noted that the poster "contains

communication on a public issue widely debated during the campaign." FEC v. AFSCME at 316. Importantly, the sole subject of the instant ad is the defeat of President Carter.

As discussed above, the advertisement placed by Mr. Dominelli constitutes an independent expenditure, in the view of the General Counsel. Hence, as the ad cost in excess of the \$250 reporting threshold, and Mr. Dominelli did not report the expenditure within 24 hours after it was made, there is probable cause to believe Mr. Dominelli violated 2 U.S.C. § 434(c).

III. General Counsel's Recommendation

Find probable cause to believe J. David Dominelli violated 2 U.S.C. § 434(c).

Date

July 8, 1982

Charles N. Steele
General Counsel

By: Kenneth A. Gross
Associate General Counsel

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Acc# 8098

JUL 12 PM 4:00

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 960
1338 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
AREA 202 822-0622

July 12, 1982

Charles N. Steele, Esq.
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

BY HAND

Attention: Maura White

In Re MUR 1438: J. David Dominelli

Dear Mr. Steele:

On behalf of J. David Dominelli, I hereby request a 20-day extension of time until August 16, 1982 in which to file a brief responding to the General Counsel's recommendation in regards to a probable cause determination in the above-referenced matter. This request is predicated on the fact that my client is located in California, and the orderly exchange of relevant information concerning his brief will require additional time. Moreover, I am currently involved in preparation of a brief to be filed with the United States Supreme Court. Coupled with being previously scheduled to be out of town for part of the response time, such extension would be just and equitable, and should be granted.

Please be advised that John C. Armor, formerly of counsel to my firm, is no longer associated in any way with me or this law firm. All communications, written and oral, from the Commission, in the J. David Dominelli matter shall continue to be directed to me, and to no other person.

Sincerely yours,

Richard Mayberry
H. Richard Mayberry, Jr.

HRM/cc

8102

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 960
1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20006
AREA 202 822-9822

July 13, 1982

Charles N. Steele, Esq.
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

BY HAND

Attention: Maura White

In Re MUR 1438: Harvey Furgatch

Dear Mr. Steele:

On behalf of Harvey Furgatch, I hereby request a 20-day extension of time until August 16, 1982 in which to file a brief responding to the General Counsel's recommendation in regards to a probable cause determination in the above-referenced matter. This request is predicated on the fact that my client is located in California, and the orderly exchange of relevant information concerning his brief will require additional time. Moreover, I am currently involved in preparation of a brief to be filed with the United States Supreme Court. Coupled with being previously scheduled to be out of town for part of the response time, such extension would be just and equitable, and should be granted.

Please be advised that John C. Armor, formerly of counsel to my firm, is no longer associated in any way with me or this law firm. All communications, written and oral, from the Commission, in the Harvey Furgatch matter shall continue to be directed to me, and to no other person.

Sincerely yours,

Richard Mayberry
H. Richard Mayberry, Jr.

HRM/cc



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 19, 1982

H. Richard Mayberry
Suite 960
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: MUR 1438
J. David Dominelli
Harvey Furgatch

Dear Mr. Mayberry:

This is in response to your letters dated July 12, 1982, and July 13, 1982, in which you request on behalf of your clients, J. David Dominelli and Harvey Furgatch, respectively, a 20 day extension of time to respond to the General Counsel's Briefs. I have reviewed your request and agree to the extension. The responses of your clients are due, therefore, on August 16, 1982.

If you have any questions, please contact Maura White at 202-523-4057.

Sincerely,

Charles N. Steele
General Counsel

A handwritten signature in cursive script, appearing to read "Kenneth A. Gross", is written over the typed name.

By: Kenneth A. Gross
Associate General Counsel

00040735142

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 950
1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036

AREA 202 822-9822

August 12, 1982

Frank P. Reiche, Chairman
Federal Election Commission

and

Charles H. Steele
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: MUR 1438, Brief of J. David
Dominelli In Opposition To
The General Counsel's Probable
Cause Recommendation

Dear Sir:

On behalf of my client, I hereby file ten (10) copies of the above referenced document with the Secretary of the Commission, and three (3) copies with the Office of General Counsel.

Please advise me as to the Commission determination in this matter. Should there be any questions on the documents enclosed herein, please contact me.

Sincerely yours,

H. Richard Mayberry JR
H. Richard Mayberry, Jr.

HRM/cc
Encl: Dominelli Brief
(13 copies)

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ELECTION COMMISSION

IN THE MATTER OF)
J. DAVID DOMINELLI)

MUR 1438
RESPONDENT'S BRIEF

10/12/89 2:49 PM

Pursuant to 2 U.S.C. § 437g (a)(4), the Respondent J. David Dominelli, through and by his counsel, submits this brief on the factual and legal issues in this matter. For the reasons set forth below, Respondent Dominelli urges the Commission to find the communication at issue not an independent expenditure^{1/} and to hold that there is not probable cause to believe a violation of the Federal Election Campaign Act of 1971, as amended, occurred in publication of the communication.

STATEMENT OF THE CASE

An article placed in the New York Times in 1980, commenting on President Jimmy Carter, came to Mr. Dominelli's attention. The article stated it was paid for by Harvey Furgatch and not authorized by any candidate. Mr. Dominelli, after requesting permission from Mr. Furgatch, whom he had not known previously, to use the article, reprinted

^{1/}An independent expenditure is defined at 2 U.S.C. § 431(17) 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 or suggestion of, any candidate, or any authorized committee or agent of such candidate.

it in the Chicago Tribune. The Tribune advertisement was placed at Mr. Dominelli's own discretion, at his own expense, and the content of the ad can be found in the Appendix.

Almost two full years after running the article, Mr. Dominelli is subject to this compliance action.^{2/} On April 27, 1982, Mr. Dominelli was notified that the Commission found reason to believe he had violated 2 U.S.C. § 434 (c),^{3/} which requires reporting obligations for independent expenditures. Respondent filed his response to this finding on June 7, 1982.

SUMMARY OF REASONS WHY THIS COMMENTARY
IS NOT AN INDEPENDENT EXPENDITURE

- I. The communication at issue is not an independent expenditure as defined at 2 U.S.C. § 431(l7) for it discusses issues without expressly advocating the election or defeat of a clearly identifiable candidate.

^{2/} A letter from the San Diego District Attorney, which is withheld from counsel, triggered this investigation. Counsel asserts procedural defects may exist for if the letter was a complaint, § 437g (a)(1) would be the proper procedure herein.

^{3/} § 434(c) provides every person who makes independent expenditures in an aggregate amount or value of \$250 during a calendar year shall file a statement containing certain information. In addition, every person is required to file within 24 hours after an independent expenditure is made, a report of any independent expenditure aggregating in excess of \$1,000 or more made after the 20th day but more than 24 hours before any election.

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- A. Issue awareness advocacy does not meet the element of express candidate advocacy.
 - B. Discussion of campaign issues, without more, does not meet the element of a "clearly identifiable candidate."
- II. Due to the fact that the communication is imbued with First Amendment rights, the Commission must be solicitous and not regulate the advertisement unless the requisite elements are actually present.

ARGUMENT

- I. Communications which discuss and criticize public officeholders are not in themselves independent expenditures merely because a non-passive response is urged upon the reader.

Almost two years ago, Mr. Dominelli exercised his opinion as a citizen, criticizing the President for his action in and out of the executive office. Without more, this communication is the purest example of free speech fully protected by the First Amendment. The content of these personal observations should not be changed as the General Counsel suggests, merely because of a statement asking readers not to remain passive in light of these revelations. The phrase "Don't Let Him Do It" speaks out against societal passivity in the political scheme, encouraging the reader to react in some form or another.

As opposed to calling for a dispositive vote, the statement "Don't Let Him Do It" urges the reader to find his or her own means to the end abstractly stated in the ad. Nowhere does the commentary state, "vote for Reagan," or "defeat Carter." See 11 C.F.R. § 109.1 (b) (2).

The term "independent expenditure" does not automatically cover all political comments made during a campaign year. The court in Buckley v. Valeo went a step further to say that political debate during election years and campaigns is not only permissible but helpful and appropriate: "(C)ampaigns themselves generate issues of public interest." Moreover, criticism of public officials at campaign times does not make such comments independent expenditures notwithstanding the fact that they will necessarily "exert some influence on voting." 424 U.S. 1, 42, n. 50 (1976).

Some of the issues in the Dominelli commentary were widely debated during the campaign,^{4/} although perhaps

^{4/}The contrary conclusion reached by the General Counsel on this point implies a governmental interpretation that courts have universally condemned as being contrary to First Amendment protection. See, e.g., United States v. National Committee for Impeachment, 469 F.2d 1135 (2d Cir. 1972) which held that political viewpoints and ideas could not be swept into the realm of election concerns. Accordingly, a resolution for impeachment of President Nixon was not subject to the Commission's jurisdiction on the theory that allegations of unlawful acts concerning the war in Viet Nam were derogating President Nixon's stand on a principal campaign issue. The Court stated, "on this basis every position on any issue, major or minor...would be a campaign issue." Id. at 1142.

many persons had an entirely different opinion from that of Mr. Dominelli's. Dominelli raised the issue of Carter's ethicality as President -- an issue certainly as important to the public and as widely discussed as similar front page news. Furthermore, the focus on Carter's administrative ability as President; his "ineptness" and "lack of (a record)" were brought into front page controversy with the difficulties of the late 1970's, such as the Iranian hostage crisis and general economic instability. In FEC v. AFSCME, the district court noted a communication, whether or not it expressly advocates the election or defeat of a candidate, "must not be 'primarily devoted to subjects other than express advocacy of the election or defeat' of a candidate" in order to come within the reporting and disclosure requirements. 471 F. Supp. 315, 316 (D.D.C. 1979). It is clear from a reading of the Dominelli commentary that it addressed the national state of affairs rather than a secular election result.

- A. The political statement does not "expressly advocate" the election or defeat of a candidate within the meaning of 2 U.S.C. § 434(c).

In a democratic society, it is not only the right of the citizens but the duty of those same people to

keep abreast of the issues and events which may invoke public concern. The various sources of those issues and events are seemingly endless; they may be generated from any number of sources including, naturally, politicians, public officeholders and candidates. This is especially true in an election year when candidates and incumbents seek to represent the interest of the public majority. Open and honest scrutiny of these issues raised by various politicians is therefore the essence of a politically democratic system: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of the period." Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

It is therefore necessary to separate express advocacy^{5/} from "implied" or "issue awareness" advocacy which implicates a political issue and is therefore fully protected by the First Amendment. The Second Circuit Court of Appeals gave "express advocacy" a

^{5/}The term "expressly advocating" means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Congress," or "vote against," "defeat," or "reject." 11 C.F.R. § 109.1 (b) (2).

particularly restrictive meaning in pertaining to the independent expenditure provisions of the Campaign Act in holding, "(T)he words 'expressly advocating' means exactly what they say..." FEC v. CLITRIM, 616 F.2d 45, 53 (2d Cir. 1980).

Though the expression, "Don't Let Him Do It" calls for some citizen response, the type is totally left to the reader. To say that this statement solely and exclusively or even primarily conveyed the message to defeat Carter, the General Counsel would have to imply something completely apart from the words themselves. CLITRIM clearly stood for the proposition that such an inference was forbidden in bringing constitutionally protected speech within the ambit of FEC regulation; express advocacy cannot subsume advocacy by implication which may encourage candidate election. See also Buckley, 424 U.S. at 42, n. 50.

The facts in CLITRIM closely parallel the facts of the instant matter. An incumbent Congressman's voting record was the focus of the attack. In particular, the leaflet in CLITRIM depicted one Congressman as in favor of "Higher Taxes and More Government." CLITRIM at 51. Additionally, the front and back page of the CLITRIM bulletin was clearly worded: "And don't ever let your representative forget it!" Id. at 50-51, n. 6.

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The bulletins, moreover, were distributed directly to between 5000 and 10,000 persons, a number which probably exceeded the readers who actually encountered the Dominelli article in the pages of the newspaper.

Most importantly, the bulletin stated, "(i)f your Representative consistently votes for measures that increase taxes, let him know how you feel." Id. at 53 (emphasis supplied). It is inescapable that the phrase "let him know how you feel" is indistinguishable from the phrase "Don't Let Him Do It" in the instant matter. As the court of appeals in CLITRIM found decisively against FEC regulation of that communication, it appears from the facts of the instant matter and the unambiguous mandate of Buckley V. Valeo that a similar result must be reached.

- B. Reference to election-related terms, given the context of discussion of campaign related issues, is not what "clearly identified candidate" means in 2 U.S.C. § 434(e) and 441d.

The second requirement of independent expenditure regulation requires the communication advocacy to be made "relative to a clearly identified candidate." 2 U.S.C. § 431(17). While the Dominelli commentary focuses on Mr. Carter on the personal and presidential levels, there is clearly no express reference to Carter as a

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candidate.^{6/} The reference to "Carter" and "President" are relative to the issues raised in the political statement as opposed to being relative to a candidate.

The Court aptly recognized the relationship between "candidates" and "issues" in Buckley: "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." 424 U.S. at 42. Because "Candidates, especially incumbents are intimately tied to public issues," the terms of candidacy such as "electoral process," "voting public" and "campaign" may be necessary to describe the political idea involved. Accordingly, the Court has stated that campaigns themselves tend to identify issues rather than candidates, "(I)t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

Because the President was not specifically mentioned as a candidate and because the words identifying the President are used in conjunction with public issues as opposed to election results, it must be concluded

^{6/} While the General Counsel, in his brief on page 8, states that the ads refer to the President's candidacy, the word "candidate" does not appear in the text of the commentary. There is reference to the President in his capacity as a leader and politician.

that the expenditure was not made relative to a clearly identified candidate as required by the statute.

II. The First Amendment dictates the Commission exercise great prudence in its determination in this matter, and if probable cause is lacking, not subject the communication to regulation.

In accordance with 2 U.S.C. § 437g, the Commission must consider the recommendation of the General Counsel, and this brief in opposition to the recommendation, and decide if there is probable cause to believe the Dominelli communication is an independent expenditure.

It cannot be denied that the commentary at issue is clearly protected First Amendment speech. While the Commission has the power to regulate speech constituting independent expenditures, application of § 434(c) must be made with great solicitude of the constitutional interests at stake. In N.A.A.C.P. v. Button, 371 U.S. 415 (1963), the Court recognized that "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Id. at 433.

Given that regulation of political communications in situations such as the instant matter "operates in the area of the most fundamental First Amendment activities, Buckley, 424 U.S. at 14 (emphasis supplied), and given that "(A) major purpose of the First Amendment was to protect the free discussion of governmental affairs,

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Mills v. Alabama, 384 U.S. 214, 218 (1966), there can be no doubt that the application of the Campaign Act to the situation in question would result in the intimidation of fully protected political expression.

Judge Kaufman in his powerful concurrence in CLITRIM recognized the "chilling effect" of the independent expenditure provisions in an analogous situation. As a premise he stated that "(t)he First Amendment pre-supposes that free expression, without government regulation is the best method of fostering an informed electorate." CLITRIM, 616 F.2d at 54. Consequently, he found a far reaching compliance action was "disturbing because citizens of this nation should not be required to account to this court for engaging in debate of political issues." Id.

In concluding, it is argued that application of the statute in the present set of facts would be equally disturbing for "(i)f speakers are not granted wide latitude to disseminate information without government interference, they will" to reiterate the often used phrase, "'steer far wider of the unlawful zone.'" Id.

RELIEF SOUGHT

For the reasons discussed above, the Commission should reject the General Counsel's recommendation,

find no probable cause to believe J. David Dominelli
violated any provisions of the Campaign Act, and dismiss
this action forthwith.

August 10, 1982
Date

H. Richard Mayberry Jr.
H. Richard Mayberry, Jr.
1333 New Hampshire Avenue, N.W.
Suite 960
Washington, D.C. 20036
Telephone: 202/822-9622

Attorney for Respondent
J. David Dominelli

The comment at issue states:

DON'T LET HIM DO IT.

The President of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And we let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

We let him do it again.

In recent weeks. Carter has tried to buy entire cities, the steel industry, the auto industry, and others, with public funds.

We are letting him do it.

He continues to cultivate the fears, not the hopes, of the voting public by suggesting that the choice is between "peace or war," "black or white," "north or south," and "Jew vs. Christian," His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT.

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LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 960
1335 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
AREA 202 822-9622

August 12, 1982

AUG 12 4 9: 48

Frank P. Reiche
Chairman
Federal Election Commission

and

Charles H. Steele
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: MUR 1438, Brief of Harvey
Furgatch In Opposition To The
General Counsel's Probable
Cause Recommendation

Dear Sir:

On behalf of my client, I hereby file ten (10) copies
of the above referenced document with the Secretary of
the Commission, and three (3) copies with the Office of
General Counsel.

Please advise me as to the Commission determination
in this matter. Should there be any questions on the
documents enclosed herein, please contact me.

Sincerely yours,

H. Richard Mayberry, Jr.
H. Richard Mayberry, Jr.

HRM/cc
Enclosure: Furgatch Brief
(13 copies)

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ELECTION COMMISSION

In The Matter Of)
Harvey Furgatch)

MUR 1438
RESPONDENT'S BRIEF

10/12/80 12:48

Pursuant to 2 U.S.C. § 437g (a)(4), the respondent, Harvey Furgatch, through and by his counsel, submits this brief on the factual and legal issues in this matter. For the reasons set forth below, respondent Furgatch urges the Commission to find the communication at issue not an independent expenditure and to hold that there is not probable cause to believe a violation of the Federal Election Campaign Act of 1971, as amended, occurred through publication of this communication.

Statement of the Case

In 1980, Harvey Furgatch formed an opinion, and decided to communicate it to the public through publication of written commentary in two newspapers. Now, approximately two years later, Mr. Furgatch, a California citizen, is subject to this compliance action before the Commission on the basis of that commentary.

This matter being reviewed by the Commission arose

upon a referral from a public officeholder² in California in 1982. Based upon the information then available, the Commission found reason to believe a violation of 2 U.S.C. §§ 434(c) and 441d³ occurred on April 27, 1982. The General Counsel views the Furgatch communication to constitute an "independent expenditure" within the meaning of 2 U.S.C. § 431(17).

2

The communication from the San Diego District Attorney to the Commission was not made available to counsel. Consequently, possible procedural defects and violation of due process rights in the presentation of this claim are not waived, but preserved and reasserted herein. Assuming the communication from the District Attorney was a complaint, the provisions of 2 U.S.C. § 437g (a) (1) are applicable herein.

3

§ 434(c) provides that every person who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement containing certain information. In addition, every person is required to file within 24 hours after an independent expenditure is made, a report of any independent expenditure aggregating in excess of \$1,000 or more made after the 20th day but more than 24 hours before any election.

§ 441d provides that whenever a person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall, if not authorized by a candidate, an authorized political committee, or its agents, clearly state the name of the person who paid for the communication and that the communication is not authorized by any candidate or candidate's committee. One of the newspaper articles at issue had a disclaimer, while the other did not.

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The political commentary (full text appears in the Appendix) represents Mr. Furgatch's opinion in regards to the performance record and campaign practices of a national public officeholder -- President Jimmy Carter. The commentary calls the reader's attention to Mr. Furgatch's views about the "lack of (a record)" and less than ethical campaign rhetoric of Jimmy Carter.

Mr. Furgatch asserts that during 1980, Mr. Carter and his running mate attacked the patriotic character of various persons. The reader's attention is called to the fact that Carter "accused (former California Governor) Ronald Reagan of being unpatriotic," and remained silent when Senator Mondale "suggested Ted Kennedy was unpatriotic."

Concerning performance in office, Mr. Furgatch's comments focus on the issue of President Carter's handling of government grants to American cities and public subsidy of the private sector, e.g., steel and auto industries.

Also, the commentary illuminates Mr. Furgatch's personal viewpoint of the character of Mr. Carter by referencing "his meanness of spirit," and effect of this on the country; "lessening the prestige of the office of President," "cultivat(ing) the fears ...of the public," and resultant divisiveness in American society.

Based on this opinion, Mr. Furgatch asks the American people to fully consider this performance record and practices by Mr. Carter, and "Don't Let Him Do It" by doing whatever the reader finds an appropriate response to one man's opinion.

Mr. Furgatch wrote the text of this political commentary, and arranged for its placement in two newspapers. The publication was paid for entirely by Mr. Furgatch, and by no other person.

Summary of Reasons Why This Commentary
Is Not An Independent Expenditure

I. The discussion of issues involving public office-holders and the exhortation to the public that they fully consider the impact of these issues, does not create an "independent expenditure" as defined at 2 U.S.C. § 431(17).

- A. An issue awareness communication does not meet the element of "express" candidate advocacy.
- B. Discussion of campaign issues, without more, does not meet the element of a "clearly identifiable candidate."

II. Agency deference for the First Amendment ramifications attaching to the Furgatch communication requires the Commission to not regulate this communication, and avoid stifling constitutionally protected speech unless there is probable cause to believe all the elements constituting an independent expenditure are present.

Argument

I. Communications discussing issues and criticizing public officeholders are not "independent expenditures" without containing express candidate advocacy merely because the reader is urged not to be passive about such issues.

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A political comment was made two years ago to the public by one citizen, Harvey Furgatch. This exercise of free speech contained criticism of the President of the United States, and scrutinized his record in office, and his campaign rhetoric.

These personal observations of Mr. Furgatch should not be transposed into regulated speech with the content of the communication passed upon in an administrative compliance action merely because of a statement made to readers not to remain passive in light of these revelations. The phrase--"Don't Let Him Do It"--is used in the comment in regards to citizen participation in our political system which is essential to a free democracy.

Mr. Furgatch urges each reader to find the appropriate means to become involved and follow his own "guiding light" as to form. Nowhere in the four corners of the article can the words "get out and vote" be found, nor "defeat Carter" nor "elect Reagan," even though the General Counsel considered this one response to not letting him do it. See General Counsel's Report, pages 8-9. Other responses could be to stay home and not vote or communicate to Carter's advisors to tell the President to do things differently, or to form lobby coalitions, or to mobilize citizen discussion groups, or to "let him know how you feel," see FEC v. CLITRIM,

616 F.2d 45, 53 (2d Cir. 1980), or other actions only bound by one's imagination, but not expressly stated within the communication.

An independent expenditure is defined at 2 U.S.C. § 431(17) 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 or suggestion of, any candidate, or any authorized committee or agent of such candidate.⁴

The mere fact that it is an election year, and Carter is involved in a campaign, does not ipso facto transform this political comment into an independent expenditure for "(C)ampaigns themselves generate issues of public interest," and discussions, indeed heartfelt criticism concerning campaign issues, do not make such comment an independent expenditure even though such communications will necessarily "exert some influence on voting...", Buckley v. Valeo, 424 U.S. 1, 42 n. 50 (1976). The General Counsel's position appears to be

⁴ Candidate collusion is not alleged.

that any public criticism of an incumbent public officeholder, who by his own design becomes a candidate, is an independent expenditure, subject to the Commission's jurisdiction.

Some of the same issues discussed in the Furgatch commentary were widely debated during the campaign. Carter's ethicality as President was clearly a widely discussed public issue considering his campaign platform four years earlier which, as Mr. Furgatch noted, suggested an image of "The Best" with reference to the level of integrity in the executive office.

Consequently, the image Carter presented to the public became a significant political issue with regard to performance in public office. Because of the 1980 election and the public decision making involved, Carter's performance in office encompassing both the general qualities of leadership and the more specific instances of conduct concerning, for example, inflation and the Iranian hostage crisis, became headline news in and of itself. A communication "'primarily devoted to subjects other than express advocacy of the election or defeat' of a candidate" does not trigger reporting obligations under the Campaign Act. FEC v. AFSCME, 471 F. Supp. 313, 316 (D.D.C. 1979) (quoting Buckley, 424 U.S. 1). The Furgatch ad, which lacks express candidate advocacy,

cannot be considered an independent expenditure merely because issues discussed in the campaign may be referenced.

The General Counsel's conclusion that the commentary does not contain issues debated in the campaign, General Counsel's Report at page 8, is the type of government review and evaluation of citizen speech courts have been criticized for in the First Amendment area. In United States v. National Committee for Impeachment, 469 F.2d 1135 (2d Cir. 1972), it was held that a resolution for impeachment of President Nixon was not subject to the requirements of the Campaign Act on the theory that allegations of unlawful acts in connection with the Vietnam War were derogating President Nixon's stand on a principal campaign issue. That court stated, "On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it say in a newspaper editorial or advertisement would be subject to proscription unless the registration and disclosure regulations (were)...complied with." Id. at 1142. The General Counsel thus acts in disregard of decisions of the Federal court, which have consistently held the government may not do what it is attempting to do here. See, e.g., Buckley, 424 U.S. 1, AFSCME, 471 F. Supp. 315, ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), Schwartz v. Romnes, 357 F. Supp. 30 (S.D. New York 1973).

- A. The commentary does not "expressly advocate" the election or defeat of a candidate within the meaning of 2 U.S.C. § 431(17).

Topics which may evoke public concern arise on an ongoing basis. Such topics or issues may be generated by public officeholders, especially in an election year. Citizen scrutiny of issues raised by politicians is the essence of a fully functioning democratic system. "...freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period." Thornhill v. Alabama, 310 U.S. 88, 102 (1940). Yet such commentary does not come within the ambit of the Campaign Act merely because it is communicated in a campaign year, may affect a public official, or even be a campaign issue for, "(t)he dampening effect on First Amendment rights...that would result from such a situation would be intolerable." National Committee for Impeachment, 469 F.2d at 1142.

The term "expressly advocating" as delineated in Buckley, supra, is defined to mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate. See 2 U.S.C. § 431(17).

In FEC v. CLITRIM, 616 F.2d 45 (2d Cir. 1980), that court clearly enunciated that "express advocacy"

of a particular election result was required under the relevant independent expenditure provisions of the Campaign Act for "(T)he words 'expressly advocating' means exactly what they say... ." CLITRIM, 616 F.2d at 53.

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The term "Don't Let Him Do It" calls for some citizen response, but the type is left to the reader's discretion. Only by implication can the Commission's General Counsel infer this statement solely and exclusively means "defeat Carter." See General Counsel's Report at 9. CLITRIM clearly stands for the proposition express advocacy cannot subsume advocacy by implication which may encourage candidate election. See also Buckley, 424 U.S. at 42, n. 50.

In the CLITRIM case, the facts are similar to the instant matter. An incumbent Congressman's voting record (performance record) on economic and tax issues (like campaign ethics, often a campaign issue) were produced, and published pursuant to directions that stated when distinguishing such records:

use a photograph of their congressman,
since this permits voters to connect him
or her with his or her voting record and
aids in 'unseating a liberal', 'unseating
...a 'moderate', or 'strengthening a
conservative representative,'

CLITRIM, 616 F.2d at 49-50 (emphasis supplied). The front and back page of the CLITRIM bulletin containing

evaluation of the voting records called for a response--"And don't ever let your Representative forget it!" Id. at 50-51, n. 6.

The bulletins were distributed to 5,000 to 10,000 persons (probably more than the number of persons reading the Furgatch comment during the summer of 1976, an election year). Id. at 51.

The bulletin statement, "(i)f your Representative consistently votes for measures that increase taxes, let him know how you feel." Id. at 53 (emphasis supplied), is indistinguishable from the statement at issue in the instant matter, "Don't Let Him Do It." A reading of "expressly advocating the election or defeat to mean for the purpose, express or implied, of encouraging elections or defeat...would nullify the change in the statute ordered in Buckley v. Valeo..." Id.

3. Reference to election-related terms, given the context of discussion of campaign related issues, is not what "clearly identified candidate" means in 2 U.S.C. §§ 434(c) and 441d.

In order for the commentary in question to be an independent expenditure, the contents of the expenditure must, in addition to expressly advocating election or defeat, be made relative to a clearly identified candidate. 2 U.S.C. § 431(17). While the Furgatch political communication does mention "Carter" and "President of the

United States," there is no express reference anywhere to the act of voting, or to candidacy. The references to "Carter" and "President" are necessary to clarify the issues raised in the commentary.

The Supreme Court in Buckley recognized the nexus between candidates and issues. "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Buckley, 424 U.S. at 42. Because of this inescapable tie between candidates and the political ideas concerning their prospective field of office, the terms of candidacy such as "electoral process," "voting public," and "campaign" may be necessary to elucidate the political idea involved: "(I)t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (emphasis supplied). Accordingly, mere mention of the various elements of identifiable candidacy does not ipso facto meet the second element of an independent expenditure.

II. Agency deference for the First Amendment ramifications attaching to the Furgatch communication.

The Furgatch communication is political speech which should be afforded the broadest possible protection

under the First Amendment. This reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

If individuals, as Mr. Furgatch, with a personal point of view are not granted a wide latitude to disseminate information without interference, the inherent danger is that they will "steer far wider of the unlawful zone." Speiser v. Randall, 357 U.S. 513, 526 (1958). Simply stated, "First Amendment freedoms need breathing space to survive..." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

The Campaign Act's requirement for disclosure of independent expenditures in the instant matter "operate(s) in an area of the most fundamental First Amendment activities," Buckley v. Valeo, 424 U.S. at 14 (emphasis added). Indeed this statement is a reiteration of a well-settled premise rendered by the Court a decade earlier. "(T)here is practically universal agreement that a major purpose of the (First) Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966).

Judge Kaufman, in his concurring opinion in the CLITRIM opinion, indicated grave concern over the effect

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that a liberal application of the independent expenditure provisions (§§ 434(c) and 441d) would have on constitutionally protected speech. He found that a far reaching enforcement action was "(D)isturbing because citizens of this nation should not be required to account to (this) Court for engaging in debate of political issues." CLITRIM, 616 F.2d at 54. "The First Amendment presupposes that free expression, without government regulation, is the best method of fostering an informed electorate." Id.

Unless the Commission finds each and every element comprising an independent expenditure is actually present, this matter must be dismissed. See FEC v. CLITRIM, supra, FEC v. AFSCME, supra, and FEC v. National Committee for Impeachment, supra.

Relief Sought

For the reasons discussed above, the Commission should reject the General Counsel's recommendation, find no probable cause to believe Harvey Furgatch violated any provisions of the Campaign Act, and dismiss this action forthwith.

August 10, 1982
Date

H. Richard Mayberry Jr.
H. Richard Mayberry, Jr.
1333 New Hampshire Avenue, N.W.
Suite 960
Washington, D.C. 20036
Telephone: 202/822-9622

Attorney for Respondent
Harvey Furgatch

The comment at issue states:

DON'T LET HIM DO IT.

The President of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And we let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

We let him do it again.

In recent weeks. Carter has tried to buy entire cities, the steel industry, the auto industry, and others, with public funds.

We are letting him do it.

He continues to cultivate the fears, not the hopes, of the voting public by suggesting that the choice is between "peace or war," "black or white," "north or south," and "Jew vs. Christian," His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT.

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SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

82 OCT 8 All: 07

In the Matter of
Harvey Furgatch
J. David Dominelli

)
)
) MUR 1438
)

EXECUTIVE SESSION

General Counsel's Report

OCT 19 1982

I. Background

On April 26, 1982, the Commission determined that there is reason to believe that Harvey Furgatch violated 2 U.S.C. § 434(c) and § 441d, and that J. David Dominelli violated 2 U.S.C. § 434(c). Responses were submitted by the respondents on May 28, 1982, and June 7, 1982. Briefs were mailed to both respondents on July 8, 1982, and responses were filed on August 12, 1982.

II. Legal Analysis

The General Counsel's probable cause recommendation concerns the placement of an advertisement entitled "Don't Let Him Do It" in the New York Times and Boston Globe on October 28, 1980, and November 1, 1980, respectively, by Harvey Furgatch, and by J. David Dominelli in the Chicago Tribune on November 1, 1980. The three advertisements were not reported to the Commission. The ads placed by Mr. Furgatch in the New York Times and Boston Globe cost \$16,800 and \$8,208, respectively, and the ad placed by Mr. Dominelli cost \$8,471. In addition, the advertisement which appeared in the Boston Globe did not state whether it was authorized by any candidate or candidate's committee. In the General Counsel's view, the advertisement constitutes an "independent expenditure" (2 U.S.C. § 431(17)) as it expressly

advocates the defeat of President Carter in the 1980 general election.

In that Messrs. Furgatch and Dominelli are represented by the same counsel, the arguments presented in their respective reply briefs are virtually identical. The reply briefs repeat several of the arguments raised by the respondents in response to the reason to believe finding in this matter, and which were specifically addressed in the General Counsel's Briefs. See the General Counsel's Briefs to Harvey Furgatch and J. David Dominelli.

It is the position of the respondents that the instant ad does not constitute an "independent expenditure." In support of this view, the respondents argue that the ad is an issue awareness communication which reflects personal opinion, and which focuses on subjects other than the express advocacy of the election or defeat of a candidate. According to the respondents, some of the same issues discussed in the ad were widely debated during the campaign, and the fact that the ad was placed during an election year does not automatically transform it into an independent expenditure.

Two additional arguments are raised. The first argument is that the ad does not contain any words of "express advocacy." Focusing on the ad's appeal "Don't Let Him Do It," the respondents insist that the demand simply encourages readers not

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to be passive and to react in whatever manner they think appropriate. The respondents emphasize that only by implication can the Commission interpret the appeal to be a message to defeat Carter, and that this is contrary to the court's decision in FEC v. CLITRIM, 616 F.2d 45 (2d Cir. 1980), which, according to the respondents, is analagous and stands for the proposition that "express advocacy cannot subsume advocacy by implication which may encourage candidate election."

The final argument presented is that a "[d]iscussion of campaign issues, without more, does not meet the element of a 'clearly identified candidate.'" While the respondents concede that the ad refers to "Carter" and the "President of the United States," and the "voting public" and "campaigning," they argue that there is no express reference anywhere to the act of voting, or to Carter as a candidate. Hence, the respondents conclude that because the President is not specifically mentioned as a candidate and because the words identifying the President are used in conjunction with public issues as opposed to election results, it must be concluded that the expenditures were not made relative to a clearly identified candidate.

The respondents' argument that the instant ad does not constitute an independent expenditure is without merit, in the view of the General Counsel. As discussed in the General Counsel's Briefs to the respondents, a communication

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need not contain the exact words (e.g., "defeat" or "vote for") of advocacy noted by the Court in Buckley v. Valeo, 424 U.S. 44 n.52, to "expressly advocate" a particular result. The instant ad's appeal, "Don't Let Him Do It," exemplifies such alternative language. This appeal, combined with the ad's criticisms of the President, and the language "[i]f he succeeds, the country will be burdened with four more years of incoherencies, ineptness and illusion," clearly implores and directs the reader not to reelect the President. That the ads were published less than one week prior to the general election not only reinforces this view, but undermines the respondents' assertion that the appeal calls for innumerable responses.

The respondents' claim that the ad focuses on public issues is equally unconvincing. To the contrary, the ad concentrates on the reelection campaign as it refers to the President's "low level campaigning" and "ineptness," the "electoral process," the "voting public," and the President's opponents. References within the ad to any "public issues" are insignificant and serve only to buttress the respondents' message that the President should not be reelected.

Finally, the contention that the ad does not refer to a "clearly identified candidate," as required by statute (2 U.S.C. § 431(17)), also fails. To meet this standard, a communication

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must state only the name of the candidate, contain a photograph or drawing of the candidate, or be so drafted that the identity of the candidate is otherwise apparent by unambiguous reference. See 11 C.F.R. § 109.1(b)(3). The instant ad meets this standard as it refers to "Carter" and the "President of the United States." There is no requirement, as the respondents maintain, that the communication also state that the person named, pictured, or referred to, is a "candidate."

In view of the foregoing, the General Counsel recommends that the Commission find probable cause to believe that Harvey Furgatch and J. David Dominelli violated 2 U.S.C. § 434(c) by failing to report the independent expenditures they each made. Furthermore, it is the General Counsel's recommendation that the Commission find probable cause to believe that Harvey Furgatch violated 2 U.S.C. § 441d by failing to state on the communication which appeared in the Boston Globe whether the communication was authorized by any candidate or candidate's committee.

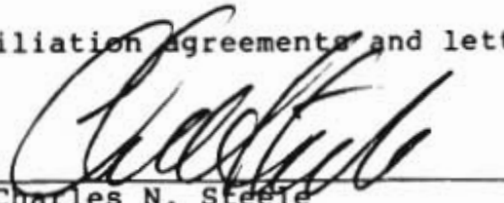
III. Discussion of Conciliation and Civil Penalties

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IV. General Counsel's Recommendations

1. Find probable cause to believe that Harvey Furgatch violated 2 U.S.C. §§ 434(c) and 441d.
2. Find probable cause to believe that J. David Dominelli violated 2 U.S.C. § 434(c).
3. Approve the attached conciliation agreements and letter.

8 October 1962
Date


Charles N. Steele
General Counsel

Attachments

- 1 - Letter (1)
- 2 - Conciliation Agreements (2)

20040765131

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Harvey Furgatch)
J. David Dominelli)

MJR 1438

CERTIFICATION

I, Marjorie W. Emmons, Recording Secretary for the Federal Election Commission Executive Session on October 19, 1982, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions in the above-captioned matter:

1. Find probable cause to believe that Harvey Furgatch violated 2 U.S.C. §§434(c) and 441d.
2. Find probable cause to believe that J. David Dominelli violated 2 U.S.C. §434(c).
3. Approve the conciliation agreements and letter attached to the General Counsel's October 8, 1982, report.

Commissioners Aikens, Elliott, Harris, McGarry, and Reiche voted affirmatively for the decision. Commissioner McDonald was not present at the time of the vote.

Attest:

10-19-82

Date

Marjorie W. Emmons

Marjorie W. Emmons
Secretary of the Commission

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 21, 1982

H. Richard Mayberry
Suite 960
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: MUR 1438
Harvey Furgatch
J. David Dominelli

Dear Mr. Mayberry:

On October 19, 1982, the Commission determined that there is probable cause to believe that your client, Harvey Furgatch, violated 2 U.S.C. §§ 434(c) and 441d, and that your client, J. David Dominelli, violated 2 U.S.C. § 434(c), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), in connection with independent expenditures they each made.


The Commission has a duty to attempt to correct such violations for a period of thirty to ninety days by informal methods of conference, conciliation and persuasion, and by entering into a conciliation agreement. If we are unable to reach an agreement with respect to each of your clients during that period, the Commission may institute civil suit in United States District Court and seek payment of a civil penalty.

We enclose a conciliation agreement for each of your clients that this office is prepared to recommend to the Commission in settlement of this matter. If you agree with the provisions of the enclosed agreements, please have your clients sign and return them to the Commission within ten days. I will then recommend that the Commission approve the agreements. Checks for the civil penalty should be made payable to the U.S. Treasurer.

Letter to H. Richard Mayberry
Page 2

If you have any questions or suggestions for changes in the enclosed conciliation agreements, please contact Maura White at 202-523-4057.

Sincerely,



Charles N. Steele
General Counsel

Enclosures
Conciliation Agreements (2)

90040765184

GCC # 9135

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 800
1833 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
AREA 202 822-9822

RECEIVED
COMMISSION
DEC 17 11:19 AM

December 14, 1982

Chairman Frank P. Reiche
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: MUR 1438 -- Harvey Furgatch

Dear Chairman Reiche:

This firm represents Harvey Furgatch in the above-captioned matter. We have reviewed the General Counsel's October 21, 1982 Proposed Conciliation Agreement and discussed it with Scott Thomas, Esquire and Ms. Maura White of the General Counsel's staff on December 8, 1982.

Mr. Furgatch's position is that the communication at issue in MUR 1438 is not an independent expenditure, but is instead protected speech under the First Amendment of the U.S. Constitution. Consequently, we cannot agree to the proposed Conciliation or to any conciliation involving any type of an admission of a violation of 2 U.S.C. §§ 434(c) or 441(d) since we believe none occurred. Furthermore, Mr. Furgatch does not agree to imposition of any type of a civil penalty.

For the reasons addressed in our briefs submitted in the matter, we do urge the Commission to take no further action and to dismiss this compliance action.

Sincerely,

H. Richard Mayberry Jr
H. Richard Mayberry, Jr.

HRM:mm
cc: Mr. Harvey Furgatch
Charles Steele, Esq.
Scott Thomas, Esq.

000040705182

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 960
1833 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
AREA 202 822-9622

December 15, 1982

Chairman Frank P. Reiche
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: MUR 1438 -- J. David Dominelli

Dear Chairman Reiche:

In reference to the above captioned matter, we have reviewed the October 21, 1982 General Counsel's Proposed Conciliation Agreement, and have discussed it on December 6, 1982 with Scott Thomas, Esquire and Maura White of the General Counsel's office.

As reflected in Mr. Dominelli's briefs, previously submitted to the Commission, we believe that the communication at issue in MUR 1438 does not constitute an independent expenditure. We further believe that the communication is protected under the First Amendment of the United States Constitution. Coupled with the Commission's apparent policy of requiring some type of admission to a violation of law in the conciliation process, Mr. Dominelli is unwilling to agree to conciliation along the lines proposed in the General Counsel's Conciliation Agreement.

We, however, do not believe that it would be consistent with the Commission's mandate to take no further action in this matter, and accordingly request this compliance action be dismissed.

Sincerely yours,

H. Richard Mayberry Jr.
H. Richard Mayberry, Jr.

HRM:mmm

cc: Mr. J. David Dominelli
Fred Storm, Esq.
Charles Steele, Esq.
Scott Thomas, Esq.

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BEFORE THE FEDERAL ELECTION COMMISSION

MUR 1438

EXECUTIVE SESSION

83 JAN 28 AM 11

General Counsel's Report

I. Background

FEB 8 1983

On October 19, 1982, the Commission determined that there is probable cause to believe that Harvey Furgatch and J. David Dominelli each violated 2 U.S.C. § 434(c) by failing to report independent expenditures they made against President Carter in connection with the 1980 general election. In addition, the Commission determined that there is probable cause to believe that Mr. Furgatch violated 2 U.S.C. § 441d with respect to one of the advertisements. Mr. Furgatch and Mr. Dominelli spent \$25,008 and \$8,471, respectively, on the advertisements.

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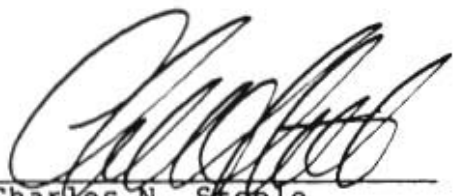
From our discussions with the respondents' counsel, it does not appear that conciliation is possible in this matter. Litigation, therefore, will be necessary, as the respondents strongly believe that they did not violate the Act. */

II. General Counsel's Recommendations

Authorize the Office of General Counsel to file a civil suit for relief in United States District Court against:

1. Harvey Furgatch; and,
2. J. David Dominelli

28 January 1962
Date


Charles N. Steele
General Counsel

Attachments

- 1 - letter re: Furgatch
- 2 - letter re: Dominelli
- 3 - letter to Mayberry

*/ Counsel has urged that his two clients be viewed separately in the sense that Mr. Furgatch was the person who conceived the idea and the content of the advertisement, while Mr. Dominelli only copied the advertisement Mr. Furgatch had placed in the New York Times. This is not a basis for concluding that either respondent did not fail to report an independent expenditure, however. Nor is it a basis for not proceeding to litigation against both.

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of)
Harvey Furgatch)
J. David Dominelli)

MUR 1438

CERTIFICATION

I, Lena L. Stafford, Recording Secretary for the Federal Election Commission meeting on February 8, 1983, do hereby certify that the Commission decided in a vote of 5-1 to authorize the Office of General Counsel to file a civil suit for relief in United States District Court against respondents Harvey Furgatch and J. David Dominelli.

Commissioners Aikens, Harris, McDonald, McGarry, and Reiche voted affirmatively. Commissioner Elliott dissented.

Attest:

2-8-83
Date

Lena L. Stafford
Recording Secretary

9004070318



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 16, 1983

H. Richard Mayberry, Esquire
Suite 960
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: MUR 1438

Dear Mr. Mayberry:

90040735190
You were previously notified that on October 19, 1982, the Federal Election Commission found probable cause to believe that your client, Harvey Furgatch, violated 2 U.S.C. §§ 434(c) and 441d, and that your client, J. David Dominelli, violated 2 U.S.C. § 434(c), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with the above captioned matter.

As a result of our inability to settle this matter through conciliation within the allowable time period, the Commission has authorized the institution of a civil action for relief in United States District Court.

Should you have any questions, or should you wish to settle this matter prior to suit, please contact Lawrence M. Noble at 523-4166 within one week of your receipt of this letter.

Sincerely,

A handwritten signature in cursive script, which appears to read "Charles N. Steele", is written over the word "Sincerely,".

Charles N. Steele
General Counsel

GCG#8182
White

LAW OFFICE OF
H. RICHARD MAYBERRY, JR. ED
HE FEC
SECRETARY
NINTH FLOOR
1667 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 822-1922

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July 30, 1985

John McGarry, Chairman
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: Harvey Furgatch, MUR # 1438, Federal Election
Commission v. Furgatch, No. 85-5524 (9th Cir.
January 31, 1985) (appeal docketed)

Dear Chairman McGarry:

On behalf of our client, we hereby waive the confidentiality of the above-referenced matter. We further request that all Commission documents be placed promptly on the public record.

Please advise the undersigned if this request will not be fulfilled within thirty (30) calendar days of the date of this letter. Thank you very much for your cooperation.

Sincerely,

H. Richard Mayberry, Jr.
H. Richard Mayberry, Jr.

HRM/reh
Enclosure
cc: Mr. Harvey Furgatch



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 1438

DATE FILMED 4/1/90 CAMERA NO. 4

CAMERAMAN AS

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