



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 3162

DATE FILMED 7/1/91 CAMERA NO. 2

CAMERAMAN AS

21040350040

LARRY J. STEINBERG, CPA

**333 GUTHRIE GREEN
LOUISVILLE, KENTUCKY 40202**

**(502) 584-2337
(502) 589-6627 (FAX)**

90 NOV -6 AM 9:39

OGC 8561

RECEIVED
FEDERAL ELECTION COMMISSION

October 31, 1990

**Mr. Lawrence M. Noble
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463**

**RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
90 NOV -6 AM 11:36**

Re: Citizens for Informed Voting in the Commonwealth (C00247528)

Dear Mr. Noble:

This sworn complaint, filed pursuant to 2 U.S.C. 437g(a)(1), alleges that Citizens for Informed Voting in the Commonwealth, a nonconnected committee registered with the Federal Election Commission, violated the authorization notice requirements of 11 CFR §110.11(a)(1)(ii) or (iii) in its public political advertising.

Attached to this complaint is a copy of a public communication which was being handed out at around 1:00 p.m. today outside the Louisville Galleria, at the approximate vicinity of the corner of Fourth Avenue and Muhammad Ali Boulevard. This public communication advocates the election or defeat of clearly identified candidates and thus, pursuant to 11 CFR §110.11(a)(1), requires one of the disclaimers set forth in the first paragraph above. Such disclaimer was not present on either the front or back of the communication.

The communication in question, a copy of which is attached, was handed to me at the approximate time and place set forth above by an individual who I observed giving to other passers-by a communication from the same batch as mine was obtained. There appeared to be others passing out similar communications. The individuals were still passing out communications when I returned through this area approximately 20 minutes later.

Please advise if clarification is needed on any of the statements of fact included herein.

91040350041

Mr. Lawrence M. Noble
October 31, 1990
Page 2

Very truly yours,

Larry J. Steinberg
Larry J. Steinberg

Sworn to and subscribed before me this 31st day of October, 1990.

Sandra L. Dougherty
Notary Public

My Commission Expires: 11-21-93

21040350042

CIVIC

Citizens for Informed Voting in the Commonwealth

Post Office Box 1976
Louisville, Kentucky 40201-1976

502/585-5139
502/587-2601 FAX

1990 CIVIC SCORECARD

human
needs

environ-
ment

peace

campaign
reform

U.S. Senate

Mitch McCONNELL

Harvey SLOANE

CI	CI	C	C
CIVIC	CIVI	CIVI	CIVI

3rd Congressional District

Al BROWN

Ron MAZZOLI

CIVI	CI	C	?
CIVI	CIVI	CIV	CIVIC

4th Congressional District

Jim BUNNING

Galen MARTIN

C	C	C	?
CIVI	CIVIC	CIVIC	CIVI

Scorecard legend:

?	insufficient information
C	very bad
CI	bad
CIV	fair
CIVI	good
CIVIC	excellent

Sources : voting records from Bread for the World , Children 's Defense Fund , Council for a Livable World , Friends Committee on National Legislation , League of Conservative Voters , National Impact , Network , Peace PAC , Public Citizen , and SANE / FREEZE ; responses to CIVIC questionnaires ; campaign material ; and statements at October 12 Public Forum .

CIVIC is a non-partisan " people 's PAC " dedicated to actively promoting the protection of human rights , peace , providing for human needs , the health of our planet , jobs , the welfare of children , and ethical practices in government and the election process .

For more information , call CIVIC at 502/585-5139 .

91040350043



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

November 19, 1990

Larry J. Steinberg, CPA
333 Guthrie Green
Louisville, KY 40202

RE: MUR 3162

Dear Mr. Steinberg:

This letter acknowledges receipt on November 6, 1990, of your complaint alleging possible violations of the Federal Election Campaign Act of 1971 as amended ("the Act"), by Citizens for Informed Voting in the Commonwealth (CIVIC), Glen Harold Stassen, as treasurer. The respondents will be notified of this complaint within five days.

You will be notified as soon as the Federal Election Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be sworn to in the same manner as the original complaint. We have numbered this matter MUR 3162. Please refer to this number in all future correspondence. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

If you have any questions, please contact Retha Dixon, Docket Chief, at (202) 376-3110.

Sincerely,

Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

Enclosure
Procedures

21040850044



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

November 19, 1990

**Glen Harold Stassen, Treasurer
Citizens for Informed Voting
In the Commonwealth (CIVIC)
1114 South Third
Louisville, Kentucky 40203**

RE: MUR 3162

Dear Mr. Stassen:

The Federal Election Commission received a complaint which alleges that Citizens for Informed Voting In the Commonwealth (CIVIC) and you, as treasurer, may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 3162. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against you in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

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


21040350045

If you have any questions, please contact Xavier McDonnell, the attorney assigned to this matter at (202) 376-8200. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

Lawrence M. Noble
General Counsel

BY:


Lois G. Lerner
Associate General Counsel

Enclosures

1. Complaint
2. Procedures
3. Designation of Counsel Statement

21040350046

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE SERVICES BRANCH

90 DEC 24 AM 9:49

220 Pleasantview
Louisville, KY 40206
Dec. 20, 1990

Dear Mr. McDonnell:

Today I received your letter of Nov. 19 notifying CIVIC of a complaint from Mr. Larry Steinberg. It is numbered MUR 3162. The letter came late to me because our address has changed. I did notify FEC of the change of address, a couple of months ago and again a few days ago.

Because I have only received it today, could I please request an extension in the deadline for our reply?

My family and I are about to leave for an eight-day Christmas trip, and Christmas and New Years holidays will delay our ability to respond. Could I request a delay of 15 working days rather than 15 calendar days?

CIVIC adopted the clear policy of not endorsing any candidate, and as you can see from our Scorecard, we sought to inform voters how the candidates voted, and what their positions were on major issue areas, but did not advocate the election or defeat of candidates. We are a small citizens' organization that believes it important to help people understand how candidates stand, and to reform the election process. I doubt that we broke the law, and we certainly did not intend to.

Thank you very much for your consideration.

Yours sincerely,

Glen Stassen

Glen Stassen

Treasurer, CIVIC

cc. Lois G. Lerner

90 DEC 26 PM 12:21

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF CLERICAL COUNSEL



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

January 3, 1991

Glen Stassen, Treasurer
Citizens for Informed Voting
in the Commonwealth (CIVIC)
220 Pleasantview Ave.
Louisville, Kentucky
40206

RE: MUR 3162

Dear Mr. Stassen:

This is in response to your letter dated December 20, 1990, which we received on December 26, 1990, requesting an extension of 15 working days to respond to the complaint in MUR 3162. After considering the circumstances presented in your letter, I have granted a fifteen day extension. Accordingly, a response is due by the close of business on Monday January 21, 1990. Please note that, according to the public record, notification of CIVIC's address change was not submitted to the Commission until December 17, 1990, almost a month after the complaint in this matter was mailed.

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

Sincerely,

A handwritten signature in dark ink, appearing to read "Lisa E. Klein", is written over the typed name.

Lisa E. Klein
Assistant General Counsel

21040355043

STATEMENT OF DESIGNATION OF COUNSEL

06C 9839
RECEIVED
FEDERAL ELECTION COMMISSION
MAIL ROOMMUR 3162

91 JAN 15 PM 12:28

NAME OF COUNSEL: Gary Becker

ADDRESS:

800 Brown & Williamson TowerLouisville GalleriaLouisville, KY 40202

TELEPHONE:

(502) 581-1122

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.

Dec. 21, 1990
DateGlen H. Stassen
Signature

RESPONDENT'S NAME:

CIVIC

Glen H. Stassen, Treasurer

ADDRESS:

220 PleasantviewLouisville, KY 40206

HOME PHONE:

(502) 897-5733

BUSINESS PHONE:

897-441091 JAN 15 PM 3:57
RECEIVED
FEDERAL ELECTION COMMISSION
COUNSEL

91040350049

91 JAN 22 AM 10:32

Becker Law Office

800 BROWN & WILLIAMSON TOWER
LOUISVILLE GALLERIA
LOUISVILLE, KENTUCKY 40202
TELEPHONE (502) 581-1122
TELECOPIER (502) 581-0124

GARY BECKER
P. HIRAM HOGG
KEVIN J. RENFRO
WILLIAM J. BRITT

January 18, 1991

PARALEGALS
LISA B. BURTON
MARC A. TURNER
WILLIAM A. CHANDLER
CYNTHIA P. TAYLOR
BONNIE W. VARBLE
REBECCA H. HABERMAN
ROBERT J. BLINCOE

**Federal Election Commission
Attn: Mr. Xavier McDonnell
999 E Street, N.W.
Washington, DC 20463**

Re: MUR 3162

Dear Mr. McDonnell:

With respect to the Complaint which was filed against CIVIC dated October 31, 1990, please be advised that our defense would be as follows:

1. We did not expressly advocate the election or defeat of a clearly identified candidate. Our Board explicitly decided not to endorse candidates. The CIVIC Scorecard referred to in the Complaint listed the positions and/or voting records of six (6) candidates on human needs, the environment, peace, and campaign reform issues. It did not tell voters which candidate to vote for.

2. The communication did clearly list the committee which paid for the publication, that being CIVIC. It also gave our full name, our address, our phone number, and a definition of CIVIC as a non-partisan "people's PAC," and described our purpose as dedicated to the issues above. Our purpose was not endorsing candidates.

Very truly yours,

Gary Becker
Gary Becker

GB: 1b

cc: Mr. Glen Stassen
220 Pleasantview Avenue
Louisville, KY 40206

91 JAN 22 PM 3:46

21 54085050

91 MAY 22 AM 9:45

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

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR #3162
DATE COMPLAINT RECEIVED
BY OGC: November 6, 1990
DATE OF NOTIFICATION TO
RESPONDENTS: November 19, 1990
STAFF MEMBER: Xavier McDonnell

COMPLAINANT: Larry J. Steinberg

RESPONDENTS: Citizens for Informed Voting in the Commonwealth,
Glen Harold Stassen, as treasurer

RELEVANT STATUTES: 2 U.S.C. § 441d(a)
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

Larry J. Steinberg ("Complainant") filed a complaint against Citizens for Informed Voting in the Commonwealth ("CIVIC" or the "Committee"), and Glen Harold Stassen, treasurer, (collectively "Respondents"). CIVIC, which is a registered political action committee, was notified of the complaint and a response has been submitted. See Attachment 2.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

Complainant alleges that the Respondents violated Commission regulation 11 C.F.R. § 110.11(a)(1) by failing to place

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disclaimers on flyers which advocated the election and defeat of clearly identified candidates. See also 2 U.S.C. § 441d(a).

The complaint contains a copy of one of CIVIC's flyers or "Scorecards", which the Complainant contends were publicly distributed on October 31, 1990. See Attachment 1. The flyer, which contains the heading "1990 CIVIC Scorecard," contains a chart on which six Federal candidates are rated on four issues: "human needs," the "environment," "peace" and "campaign reform." Each of the six candidates participated in Kentucky's U.S. House or Senate elections, held on November 8, 1990. The Scorecard was arranged by elective office with the Republican candidates' scores in each of the categories placed opposite their Democratic opponents.¹

The Scorecard indicates that CIVIC's candidate ratings were derived from a variety of sources: voting records from different organizations and PAC's, responses to CIVIC's questionnaires, campaign materials and from statements made at a public forum.

1. The candidates listed consisted of: Mitch McConnell (R) and Harvey Sloane (D), (U.S. Senate); Al Brown (R) and Ron Mazzoli (D)(3rd Congressional District); Jim Bunning (R) and Galen Martin (D)(4th Congressional District).

On the Scorecard, the three Democratic candidates received substantially higher scores than their Republican opponents in almost every category. Two of the Democratic candidates received scores of good or excellent in each of the four categories, while the other Democratic candidate scored good or excellent in three categories, with one rating of fair. The Republican candidates received scores of bad or very bad in every category in which they were rated, with the exception of one good rating. CIVIC acknowledged that they had insufficient information on which to rate two of the Republican candidates in one category, campaign reform.

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The flyer also indicates that "CIVIC is a non-partisan 'people's PAC' dedicated to actively promoting the protection of human rights, peace, providing for human needs, the health of our planet, jobs, the welfare of children, and ethical practices in government and the election process." The flyer does not contain any statement to indicate who paid for the communication or whether it was authorized by any of the candidates or candidates' committees. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1).

B. Applicable law

Under the Federal Election Campaign Act of 1971, as amended, (the "Act") and Commission regulations, whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through general public advertising, such communication must contain a disclaimer clearly identifying who paid for the communication and whether or not it was authorized by a candidate or candidate's committee. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1).

The Supreme Court has insisted that "a clear distinction be made between 'issue discussion,' which strongly implicates the First Amendment, and the candidate-oriented speech that is the focus of the Campaign Act." FEC v Furgatch, 807 F.2d 857, 860 (9th cir. 1987) cert. denied, 108 S.Ct. 151 (1987), citing Buckley v. Valeo, 424 U.S. 1, 79 (1976). In Buckley, the Supreme Court listed several phrases that it considered to be examples of "express advocacy," such as "elect," "support," "vote for," "vote

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against" or "defeat." Buckley, 424 U.S. 1, 44, n. 52. More recently, the Court made it clear that express advocacy can be "less direct" than the short list of examples listed in Buckley, so long as the "essential nature" of the message goes "beyond issue discussion to express electoral advocacy." FEC v. Massachusetts Citizens For Life, 479 U.S. 230, 249 (1986); See also FEC v. Furgatch, 807 F.2d at 860. The Court also noted that while a communication which contains a discussion of public issues and which merely raises the names of certain politicians would not be subject to the requirements of the Act, a communication which "provides in effect an explicit directive" to vote for or against a particular candidate would constitute express advocacy. FEC v. Massachusetts Citizens For Life, 479 U.S. at 249.²

C. Analysis

In its response, CIVIC asserts that the Scorecard did not "tell voters which candidates to vote for," but merely "listed the positions and/or voting records" of the six candidates on the particular issues. Attachment 2. Therefore, Respondents assert,

2. In determining whether speech which did not contain the "magic words" listed in Buckley constituted "express advocacy," the Ninth Circuit adopted a test. Furgatch, 807 F.2d 857. Under that test, in order to make a finding of express advocacy, the language of the communication must be "express" so that "its message is unmistakable and unambiguous, suggestive of only one plausible meaning." The communication must be more than informative and must advocate "a clear plea for action," and "it must be clear what action is advocated." The court stated that speech cannot be express advocacy "when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." Id. at 864.

21040350054

the Scorecard did not expressly advocate the election or defeat of a clearly identified candidate. Id.³

Respondents' assertions are unavailing. The entire focus of the Scorecard is on evaluating the positions of six individuals who were candidates in the November 8, 1990 elections in Kentucky, and each of the candidates' names and scores are set in boxes directly beside those of their opponents. The federal offices sought by each are also clearly identified and listed above each set of candidates. In addition, according to the complaint, these flyers, which contained the heading "1990 CIVIC Scorecard," were publicly distributed on October 31, 1990, shortly before election day.

Through the Scorecard's rating system, in which each of the clearly identified candidates is subjectively scored and compared with his opponent, the flyer communicates which candidates take the right positions, those that CIVIC favors, and which candidates take the wrong positions, those that CIVIC opposes. Cf. A.O.

3. The Committee also indicates that the Scorecard discloses the PAC's full name, address and phone number, and that it described the Committee's purpose. See Attachment 2. The Respondents are apparently asserting that the language used on the Scorecard implied that CIVIC paid for it and it was not authorized, and therefore they have complied with Section 441d(a). However, it is settled that the Act and the Commission's regulations do not provide for disclaimers by inference. FEC v. National Conservative Political Action Committee, NO 85-2898, memorandum opinion filed April 29, 1987 (D.D.C.); 2 U.S.C. § 441d(a)(3).

1987-7; A.O. 1984-17, A.O. 1984-14. A.O. 1983-43.⁴ By favorably rating the three Democratic candidates, CIVIC encourages the reader to vote for these candidates. Conversely, by rating poorly the three Republican candidates, CIVIC encourages their defeat. While the Scorecard does not expressly ask for a vote, "the failure to state with specificity the action required does not remove political speech from the coverage of the Campaign Act." Furgatch, 807 F.2d at 865. As the Supreme Court stated in MCFL: "The fact that this message is marginally less direct than 'Vote for [Martin, Mazzoli and Sloane, or Vote against Bunning, Brown and McConnell]' does not change its essential nature. The [Scorecard] goes beyond issue discussion to express electoral advocacy." FEC v. Massachusetts Citizens for Life, 479 U.S. at 249. The overall message of the Scorecard is unmistakable and unambiguous, and provides in effect an explicit directive: vote according to CIVIC's judgment. FEC v. Massachusetts Citizens for Life, 479 U.S. at 249; Furgatch, 807 F.2d at 864.

4. CIVIC's attempt to characterize its flyer as containing mere "issue advocacy" is unavailing. Nowhere on the Scorecard are the candidates' positions or views on legislation affecting "human needs," the "environment," "peace" or "campaign reform" disclosed or described, let alone discussed. Nor does the flyer disclose the criteria used by CIVIC to determine the candidates' scores. The flyer, therefore, does not appear to contain any issue discussion, but rather simply contains CIVIC's subjective evaluation of the candidates' positions. Consequently, the Scorecard cannot be characterized as "a mere discussion of public issues that by their nature raise the names of certain politicians." FEC v. Massachusetts Citizens for Life, 479 U.S. at 249.

IV. SUMMARY

Given that the names of the six candidates and the offices sought by each were clearly identified and subjectively rated on the "1990 CIVIC Scorecard" and that these flyers were publicly distributed shortly before election day, it appears that they constituted "express advocacy," thus requiring appropriate disclaimers. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1). On the other hand, the expenditures made for the production of the Scorecard appear to be minimal; Counsel for the Respondents indicated during a telephone conversation that a total of approximately 500 of the single-paged flyers were distributed. In light of the circumstances, the Office of General Counsel recommends that the Commission find reason to believe that CIVIC and Glen Harold Stassen, as treasurer, violated 2 U.S.C. § 441d(a), but take no further action.

V. RECOMMENDATIONS

1. Find reason to believe that Citizens for Informed Voting in the Commonwealth (CIVIC) and Glen Harold Stassen, as treasurer, violated 2 U.S.C. § 441d, but take no further action.
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letter.

21040850057

4. Close the file.

Lawrence M. Noble
General Counsel

Date 5/21/91

BY: 
Lois G. Lerner
Associate General Counsel

Attachments

1. Complaint
2. Responses
3. Factual and Legal Analysis

21040350058



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/DONNA ROACH *DR*
COMMISSION SECRETARY

DATE: MAY 31, 1991

SUBJECT: MUR 3162 - GENERAL COUNSEL'S REPORT
DATED MAY 21, 1991.

The above-captioned document was circulated to the Commission on Wed., May 22, 1991 at 4:00 p.m..

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

Commissioner Aikens	_____
Commissioner Elliott	XXX
Commissioner Josefiak	XXX
Commissioner McDonald	_____
Commissioner McGarry	_____
Commissioner Thomas	_____

This matter will be placed on the meeting agenda for Tuesday, June 4, 1991.

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

21040850059

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Citizens for Informed Voting) MUR 3162
in the Commonwealth;)
Glen Harold Stassen, as treasurer.)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on June 4, 1991, do hereby certify that the Commission failed in a vote of 3-3 to take the following actions in MUR 3162:

1. Find reason to believe that Citizens for Informed Voting in the Commonwealth (CIVIC) and Glen Harold Stassen, as treasurer, violated 2 U.S.C. § 441d, but take no further action.
2. Approve the Factual and Legal Analysis attached to the General Counsel's report dated May 21, 1991.
3. Approve the appropriate letter as recommended in the General Counsel's report dated May 21, 1991.
4. Close the file.

Commissioners McDonald, McGarry, and Thomas voted affirmatively to take the action; Commissioners Aikens, Elliott, and Josefiak dissented.

Attest:

June 4, 1991
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission

21040350060



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 14, 1991

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Larry J. Steinberg, CPA
333 Gurthrie Green
Louisville, Kentucky 40202

RE: MUR 3162
Citizens for Informed Voting in
the Commonwealth, and
Glen H. Stassen, as treasurer

Dear Mr. Steinberg:

The Federal Election Commission has reviewed the allegations contained in your complaint dated October 31, 1990. On June 4, 1991, the Commission considered your complaint, but was equally divided on whether there was reason to believe Citizens for Informed Voting in the Commonwealth, and Glen H. Stassen, as treasurer, violated the Federal Election Campaign Act of 1971, as amended.

Accordingly, on June 4, 1991, the Commission closed the file in this matter. A statement of reasons explaining the Commission's determination will be issued and sent to you at a later time. The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

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

Sincerely,

Lawrence M. Noble
General Counsel

BY: 
Lois G. Lerner
Associate General Counsel

Enclosure
General Counsel's Report
and Certification

91040350061



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 14, 1991

Gary Becker
800 Brown & Williamson Tower
Louisville Galleria
Louisville, KY 40202

CLOSED

RE: MUR 3162
Citizens For Informed Voting in
the Commonwealth, and
Glen Harold Stassen, as treasurer

Dear Mr. Becker:

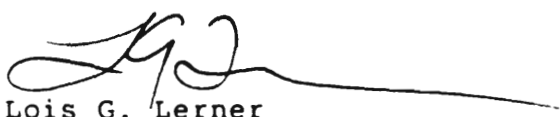
On November 19, 1990, the Federal Election Commission notified Citizens For Informed Voting in the Commonwealth, and Glen Harold Stassen, as treasurer ("your clients") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

On June 4, 1991, the Commission considered the complaint but was equally divided on whether there was reason to believe your clients violated the Act. Accordingly, the Commission closed its file in this matter. A statement of reasons for the Commission's decision will follow. This matter will become part of the public record within 30 days. Should you wish to submit any materials to appear on the public record, please do so within ten days of your receipt of this letter. Please send such materials to the General Counsel's Office.

If you have any questions, please direct them to Xavier K. McDonnell, the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

Lawrence M. Noble
General Counsel

BY: 
Lois G. Lerner
Associate General Counsel

21040350062



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 3162

DATE FILMED 7/1/91 CAMERA NO. 2

CAMERAMAN AS

91040350063



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3162.

10/11/91

91040871682



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

In the Matter of)
)
Citizens for Informed Voting) MUR 3162
in the Commonwealth;)
Glen Harold Stassen, as)
treasurer)

STATEMENT OF REASONS

Chairman John Warren McGarry
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas

In MUR 3162, the Commission split 3-3 on whether a political action committee distributing a flyer comparing opposing candidates in three federal races on a scale from "very bad" to "excellent" should be required to tell the public who paid for the communication and whether it was authorized by any federal candidate. Because we believe that the public has a right to know this information under the Federal Election Campaign Act of 1971, as amended ("the Act"), we supported the recommendation of the General Counsel to find reason to believe that the committee in this matter failed to include the required disclaimer on its communication in violation of the Act.

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I.

The Act provides that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through any type of general public advertising, such communication must contain a disclaimer providing certain information. 2 U.S.C. §441d(a)(3);¹ 11 C.F.R. §110.11(a)(1). The disclaimer must clearly identify the name of the person who paid for the communication and state whether the communication was authorized by any candidate or candidate's committee. Id.

Citizens for Informed Voting in the Commonwealth ("Citizens for Informed Voting") is a political action committee which receives contributions and makes expenditures for the purpose of

-
1. 2 U.S.C. §441d(a) provides, in pertinent part:

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

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

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influencing federal elections. See 2 U.S.C. §§431(4), (8) and (9). On October 31, 1990, approximately one week prior to the November 8, 1990 general elections, Citizens for Informed Voting handed out political flyers to the general public in Louisville, Kentucky. Using a scale ranging from very bad to excellent, the flyers characterized the positions of the major party Kentucky candidates for United States Senate as well as the Third and Fourth Congressional Districts on four general subject areas: "human needs," "the environment," "peace" and "campaign reform." The flyer did not contain a disclaimer indicating who paid for the flyer or whether it was authorized by any candidate or candidate committee. 2 U.S.C. §441d.

On November 5, 1990, a complaint was filed with the Federal Election Commission against Citizens for Informed Voting and Glen Harold Stassen as treasurer. The complaint alleged that the flyer advocated "the election or defeat of clearly identified candidates" and thus was required to have a disclaimer. Complaint at 1. The complaint stated that "[s]uch disclaimer was not present on either the front or back of the communication." Id.

The Office of General Counsel prepared a report for Commission consideration that contained a factual and legal analysis of the allegation presented in the complaint. The General Counsel found that the flyer constituted express advocacy and, accordingly, recommended that the Commission find reason to believe that Citizens for Informed Voting violated 2 U.S.C. §441d for failing to include the appropriate disclaimer.

The General Counsel further recommended, however, to take no further action and close the file against Citizens for Informed Voting in light of the small number of flyers distributed to the public and the minimal expenditure made to produce those flyers.

The General Counsel's recommendation failed to secure four affirmative votes. Three Commissioners supported the General Counsel's recommendation and three Commissioners opposed the recommendation.

II.

The central issue in this matter is whether the flyer distributed by Citizens for Informed Voting expressly advocated the election or defeat of federal candidates. If the flyer contained express advocacy, the Act required Citizens for Informed Voting to include a statement on the flyer indicating whether the organization paid for the flyer and whether the flyer was authorized by any candidate. After reviewing the text of the flyer, the circumstances surrounding its distribution and applicable case law, we have no doubt that the flyer asks the general public to vote for or against specific federal candidates. Accordingly, we voted to find reason to believe that Citizens for Informed Voting violated 2 U.S.C. §441d for failing to include the appropriate public disclaimer in the flyer.

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A.

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Congress included the "express advocacy" provision as part of §441d in response to the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976). See H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976). In Buckley, the Court upheld as constitutional certain reporting requirements on expenditures made by individuals and groups that were "not candidates or political committees." 424 U.S. at 80. The Court expressed its concern, however, that these reporting provisions might be broadly applied to communications which discussed public issues which also happened to be campaign issues. In order to ensure that expenditures made for pure issue discussion would not be reportable under FECA, the Court construed these reporting requirements "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. (emphasis added).

In creating the express advocacy standard, the Buckley Court sought to draw a distinction between issue advocacy and partisan advocacy focused on a clearly-identified candidate. Thus, the Court explained that the purpose of the express advocacy standard was to limit the application of the pertinent reporting provision to "spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80 (emphasis added). See also 424 U.S. at 81. (Under an express advocacy standard, the reporting requirements would "shed the light of publicity on spending that is unambiguously

campaign related....") (emphasis added). The Court, however, provided no definition of what constituted "spending that is unambiguously related to the campaign of a particular federal candidate" or "unambiguously campaign related." The Court only indicated that express advocacy would include communications containing such obvious campaign related words or phrases as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 80 n.108 citing 424 U.S. at 44 n.52.

In FEC v. Massachusetts Citizens For Life ("FEC v. MCFL"), 479 U.S. 238 (1986), the Supreme Court clarified the scope of the express advocacy standard. The Court indicated that a communication could be considered express advocacy even though it lacked the specific buzzwords or catch phrases listed as examples in Buckley. The Court explained that express advocacy could be "less direct" than the examples listed in Buckley so long as the "essential nature" of the communication "goes beyond issue discussion to express electoral advocacy." 479 U.S. at 249.

Similarly, in FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir.), cert. denied, 484 U.S. 850 (1987), the Ninth Circuit concluded that "speech need not include any of the words listed in Buckley to be express advocacy under the Act." The court found that "'express advocacy' is not strictly limited to communications using certain key phrases." 807 F.2d at 862. Such a wooden and mechanical construction, the court recognized, would invite and allow for the easy circumvention of the Act:

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A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the [Act]. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.

Id. (emphasis added).

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Rather than rely on the inclusion or exclusion of certain "magic words" for determining whether a particular communication contained express advocacy, the court concluded that for a communication "to be express advocacy under the Act...it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." 807 F.2d at 864. (emphasis added). In defining "express advocacy" under this standard, the court considered the following factors:

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

Furgatch, 807 F.2d at 864.

B.

We believe that the flyer distributed by Citizens for Informed Voting "goes beyond issue discussion to express electoral advocacy." FEC v. MCFL, 479 U.S. at 249. Applying the standard set out in Furgatch, we have no doubt that the flyer asks the public to vote for or against specific candidates.

First, we find that the flyer contains a clear and unmistakable message of support for certain candidates and of opposition to other candidates. The Citizens for Informed Voting flyer names and divides out the candidates for the United States Senate and two Congressional districts in Kentucky by office and then adversely compares the Republican candidate for each office with the Democratic candidate for that office by subject category.² The flyer assigns subjective scores of "bad" or "very bad" to the Republican candidate in every category in which they were rated with the exception of one category for one Republican candidate who received a "good" rating. By comparison, the three Democratic candidates fared much better. For two of the Democratic candidates, the flyer gives subjective scores of "good" or "excellent" in all four categories. For the third Democratic candidate, the flyer gives scores of "good" or "excellent" in three categories and a rating of "fair" in the

2. The candidates listed consisted of Mitch McConnell (R) and Harvey Sloane (D), (United States Senate); Al Brown (R) and Ron Mazzoli (D) (Third Congressional District); Jim Bunning (R) and Galen Martin (D) (Fourth Congressional District).

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fourth. By contrasting the candidates directly and depicting one as "good" or "excellent" and the other as "bad" or "very bad," the flyer provides a plain and unmistakable message of support for one candidate over the other.

Second, we believe that the flyer presents a clear plea for specific action. As discussed above, the flyer is entirely focused on the voter's choice between clearly identified candidates in specific elections. By characterizing one candidate in this direct comparison as "good" or "excellent" and the other candidate as "bad" or "very bad," the Citizens for Informed Voting "Scorecard" unmistakably communicates the message that the voter receiving the flyer should vote against the "bad" candidate on election day. See United States v. Lewis Food Co., 366 F.2d 710, 712 (9th Cir. 1966) ("The 'Notice to Voters' was not intended to give an objective report on the voting record of public office holders...[but] makes it plain that, in [the corporation's] opinion, those office holders who are given low ratings on their votes...should not be re-elected.") (emphasis added).

Moreover, we should not lose sight of the fact that the flyer was distributed by an organization named "Citizens for Informed Voting." Generally, groups and organizations name themselves in certain ways because they want to convey a message regarding their purposes and goals. Citizens for Informed Voting is an organization devoted to elections and the voting process. Indeed, Citizens for Informed Voting operates in a political context as a federally-registered political action

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committee which receives contributions and makes expenditures "for the purpose of influencing elections for federal office."³ In view of these considerations, we believe that "when read as a whole...[the flyer is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." 807 F.2d at 864.

As in Furgatch, "our conclusion is reinforced by consideration of the timing" of the flyer. 807 F.2d at 865. In Furgatch, the court noted that the newspaper ad denigrating Jimmy Carter failed "to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in." Id. The court went on to find, however, that the ad constitutes express advocacy partly because "[t]iming the appearance of the advertisement less than a week before the election left no doubt of the action proposed." Id. (emphasis added). In the instant matter, Citizens for Informed

3. Citizens for Informed Voting has registered as a "political committee" with the Federal Election Commission. In pertinent part, 2 U.S.C. §431(4)(A) defines "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." (emphasis added).

Under 2 U.S.C. §431(8)(A)(i), the term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." (emphasis added).

Similarly, under 2 U.S.C. §431(9)(A)(i), the term "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by an person for the purpose of influencing any election for Federal office." (emphasis added).

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Voting distributed its flyer also approximately one week before the election. We believe that here, as in Furgatch, the timing of the flyer leaves "no doubt of the action proposed." Id. (emphasis added). In our opinion, the flyer conveyed a message to the voting public that unmistakably urged the election or defeat of clearly identified candidates. Accordingly, the Citizens for Informed Voting flyer should have contained a §441d public disclaimer.⁴

A superficially plausible argument might be made that the flyer does not constitute express advocacy because it does not contain certain words or phrases of exhortation such as "Stop the candidate with a bad rating." By requiring the presence of specific words or phrases of exhortation in a communication, however, this argument would effectively create a new "magic" words test. Rather than looking for the old magic words of "Vote for" or "Vote against," we would look for new magic words such as "Don't let this continue."

We do not accept the argument that the Furgatch standard requires actual words or phrases of exhortation in order for an advertisement to be considered express advocacy. Indeed, the Furgatch court recognized that an "entity may give a clear

4. It is not difficult to comply with the §441d disclaimer provision. For example, the Citizens for Informed Voting flyer would have complied with §441d if it had simply contained a statement such as:

This flyer was not authorized by any candidate and was financed by Citizens for Informed Voting in the Commonwealth.

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impression that is never succinctly stated in a single phrase or sentence." 807 F.2d at 863. In specifically rejecting a narrow and limited construction of its express advocacy standard, Furgatch clearly stated that "[T]he court is not forced under this standard to ignore the plain meaning of campaign-related speech in search of certain fixed indicators of 'express advocacy.'" 807 F.2d at 864 (emphasis added).

Likewise, the Commission should not ignore the plain meaning of the Citizens for Informed Voting flyer because the flyer avoids certain fixed words of exhortation. To accept such a standard is to invite clever political consultants and advisers to package hard-hitting partisan ads which nevertheless fall short of express advocacy because they easily avoid the use of certain magic words or phrases.⁵ Instead, the Commission should follow the guidance of Furgatch that speech is considered express advocacy when the communication "read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Furgatch, 807 F.2d at 864 (emphasis added). Plainly, a test relying on the presence or

5. See Furgatch, 807 F.2d at 863 ("A test requiring the magic words 'elect,' 'support,' etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. 'Independent' campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.") (emphasis added).

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absence of certain "magic" words or phrases is incompatible with the Furgatch standard.

III.

A narrow, "magic" words test for express advocacy adversely affects not only the disclosure requirements of FECA, but it may also have serious implications for other provisions of the Act as well. For example, in FEC v. MCFL the Supreme Court stated that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of §441b." 479 U.S. at 249.⁶ If express advocacy is the standard for all organizations covered by §441b, and express advocacy is present only when magic words of exhortation appear within the four corners of the communication, there is little question that the §441b prohibitions will be easily circumvented. One of the pillars of congressional efforts to prevent "the unfair deployment of wealth for political purposes" would crumble to dust. FEC v. MCFL, 479 U.S. at 259.

Suppose for example, that a corporation wishes to defeat congressional candidate John Jones and elect candidate James Smith. The corporation takes out a large newspaper ad in the

6. Currently, 2 U.S.C. §441b prohibits corporations and labor organizations from using their general treasury funds to make any "contribution or expenditure in connection with any [federal] election." (emphasis added). In FEC v. MCFL, which involved a non-profit ideological corporation that was not the "traditional corporatio[n] organized for economic gain" (479 U.S. at 259, quoting FEC v. National Conservative Political Action Committee, 470 U.S. 480, 500 (1985)), the Court applied an 'express advocacy' test to non-coordinated communications by the organization.

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congressional district the day before the election which says "JOHN JONES CHEATS ON HIS WIFE, CHEATS ON HIS TAXES, AND CHEATS ON THE CITIZENS OF THIS DISTRICT. HIS SO-CALLED PUBLIC SERVICE IS A CRUEL AND VICIOUS JOKE! JAMES SMITH, BY COMPARISON, SHARES YOUR VIEWS AND VALUES." No one would seriously doubt that this ad is the paradigm of negative advertising expressly designed to defeat a candidate. The ad can "be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Furgatch, 807 F.2d at 864. Yet, as we understand our colleagues' approach, this would not constitute express advocacy because actual words of exhortation are absent. As a result, the prohibition of §441b would not apply, and the corporation could make unlimited expenditures for such negative advertising from its corporate treasury.

On the other hand, what if we substitute the words "voters" for "citizens" and "candidacy" for "public service"? Would our colleagues' position change? Or would it take the inclusion of a short phrase such as "This must stop" to convert this partisan message into prohibited express advocacy?

Or, let us assume that the corporation takes out a newspaper ad praising candidate Smith the day before the election. The full page ad features a picture of candidate Smith with a large American flag in the background. Under the picture are the following words in large, bold print: "JAMES SMITH BELIEVES IN AMERICA FIRST. AND HE STANDS FOR FAMILY VALUES. DOES JOHN JONES?" Again, there would seem to be little question that this ad was made in connection with the election.

Absent words of exhortation, however, our colleagues apparently would argue that voters are not being urged to support one candidate over the other and that there is no express advocacy. Consequently, there is no violation of §441b and this is permissible corporate activity.

Some would argue that the value of such advertising would be minimized, if not fully nullified, by disclosure of the identity of the corporation that paid for an ad supporting a candidate. Yet, the identity of the ad sponsor may never be known since that information is required by statute to be disclosed only when there is express advocacy. Under a wooden 'words of exhortation' test applied under §§441b and 441d, corporations could not only pay for these newspaper advertisements; they also could avoid placing a notice in the ad identifying who paid for it and whether it was authorized by any federal candidate.

The Commission need not leave commonsense at the doorstep when it considers matters such as these. The messages contained in the above hypotheticals are "unambiguously campaign related." Buckley, 424 U.S. at 80-81. This fact is obvious to any voter and should be obvious to the Federal Election Commission. There is nothing in the express advocacy standard that requires members of the Federal Election Commission to be "'blind'" to what "'all others can see and understand.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 486 (1985) (quoting United States v. Rumely, 345 U.S. 41, 44 (1953)).

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IV.

The cornerstone of the Federal Election Campaign Act is its disclosure provisions. In Buckley, the Supreme Court found that the independent expenditure disclosure provision served a compelling governmental interest: "The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." 424 U.S. at 81.

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Congress sought to facilitate the complete disclosure of campaign finance information when it enacted §441d only months after Buckley was decided. As the legislative history demonstrates, Congress recognized the importance of placing a §441d public disclaimer on communications supporting federal candidates. In its report to accompany H.R. 12406 the Committee on House Administration explained that §441d was "designed to provide additional information to the voting public." H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976) (emphasis added). Similarly, Congressman Brademas summarized §441d this way:

I believe that these "truth in advertising" requirements for independent expenditures will both help prevent sharp practices and further reduce the corrupting influence of big money in Federal elections.


122 Cong. Rec. H3782 (daily ed. May 3, 1976) (remarks of Rep. Brademas).

By narrowing the definition of "express advocacy" to an almost meaningless standard, our colleagues would restrict the flow of information to the voting public. They would allow negative campaign literature, floating around only days before an election, to escape the Act's disclaimer requirements without any hint of who paid for it or who authorized it. In our opinion, this position is unsound legally and improperly interferes with the public's right to know.

We agree with the recommendation of the General Counsel to find reason to believe that Citizens for Informed Voting failed to include the appropriate public disclaimer in violation of 2 U.S.C. §441d.

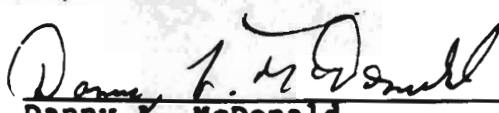
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Date

10-Oct. 91


John Warren McGaffey
Chairman

Date

10 - Oct. 91


Danny E. McDonald
Commissioner

Date

10 October 1991


Scott E. Thomas
Commissioner