



FEDERAL ELECTION COMMISSION

1125 K STREET NW
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 592

Date Filmed 4/25/79 Camera No. --- 2

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1979 APR 25 10 10 AM

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PS Form 3811 Apr 1977 RETURN RECEIPT REGISTERED INSURED AND CERTIFIED MAIL

• INSTRUCTIONS: Complete items 1, 2, and 3. Add your address in the RETURN TO space on reverse.

1. The following service is requested (check one):

- Show to whom and date delivered C
- Show to whom, date, and address of delivery C
- RESTRICTED DELIVERY
- Show to whom and date delivered C
- RESTRICTED DELIVERY
- Show to whom, date, and address of delivery C
- (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO
Lawrence T. MacDonagh

3. ARTICLE DESCRIPTION
REGISTERED NO. CERTIFIED NO. INSURED NO.
4340

(Always obtain signature of addressee or agent)

I have received the article described above:

SIGNATURE Addressee Authorized agent
Lawrence T. MacDonagh Jr.

4. DATE OF DELIVERY POSTMARK
9 Feb 79

5. ADDRESS (complete only, if required)

6. UNABLE TO DELIVER BECAUSE CLERK'S INITIALS

MUR 592

PS Form 3811, Apr. 1977

● SENDER Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1 The following service is requested (check one).
 Show to whom and date delivered C
 Show to whom, date, and address of delivery C
 RESTRICTED DELIVERY Show to whom and date delivered C
 RESTRICTED DELIVERY Show to whom, date, and address of delivery. \$..... (CONSULT POSTMASTER FOR FEES)

2 ARTICLE ADDRESSED TO
 L. T. MacNamara, Jr.

3 ARTICLE DESCRIPTION
 REGISTERED NO. | CERTIFIED NO. | INSURED NO.
 | 438515 | |

(Always obtain signature of addressee or agent)

I have received the article described above.
 SIGNATURE: [Signature] Addressee Authorized agent

4 DATE OF DELIVERY: 3/21/79 | POSTMARK

5 ADDRESS-Complete only if requested:

6 UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

RETURN RECEIPT REGISTERED INSURED AND CERTIFIED MAIL



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

March 19, 1979

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lawrence T. MacNamara, Jr., Esq.
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

RE: MUR 592 (78)

Dear Mr. MacNamara,

The Commission has approved the conciliation agreement which was signed by E. Spencer Abraham, President of the Harvard Journal of Law and Public Policy, and included with your letter dated February 12, 1979. Accordingly, I have signed the agreement.

Enclosed for your files is a copy of the original agreement signed by both parties in settlement of this matter.

Sincerely,

William C. Oldaker
General Counsel

Enclosure

Copy of conciliation agreement signed
by both parties.



CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lawrence T. MacNamara, Jr., Esq.
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

RE: NUR 592 (78)

Dear Mr. MacNamara,

The Commission has approved the conciliation agreement which was signed by E. Spencer Abraham, President of the Harvard Journal of Law and Public Policy, and included with your letter dated February 12, 1979. Accordingly, I have signed the agreement.

Enclosed for your files is a copy of the original agreement signed by both parties in settlement of this matter.

Sincerely,

William C. Oldaker
General Counsel

Enclosure

Copy of conciliation agreement signed
by both parties.

C.T. 3/15/79

79040114475

BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 592 (78)
Harvard Journal of Law)
and Public Policy)

CONCILIATION AGREEMENT

29041147
This matter having been initiated by the Federal Election Commission ("Commission") in the normal course of carrying out its supervisory responsibilities and the Commission having found reasonable cause to believe that the Harvard Journal of Law and Public Policy ("Respondent") violated a section of the Federal Election Campaign Act of 1971 as amended ("the Act"), 2 U.S.C. § 438(a)(4);^{*/}

NOW, THEREFORE, the Commission and Respondent having duly entered into conciliation as provided for in 2 U.S.C. § 437g(a)(5), do hereby agree as follows:

1. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
2. Respondent has submitted a brief stating its position why no action should be taken in this matter.

*/ The relevant proviso of 2 U.S.C. § 438(a)(4) states:

"any information copied from such reports and statements [filed with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose."

- 7904011473
7. That Respondent compiled the mailing list and conducted the above mailings in good faith reliance on 11 C.F.R. § 104.13 which states in part that "'any commercial purpose' does not include the sale of newspapers, magazines, books or similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." According to Respondent's interpretation, § 104.13 permits the use of the Reagan Reports for the purpose of selling the Journal by subscription. The Journal's principal purpose is not to "communicate lists or other information obtained from a report" on file with the Commission.
 8. That upon being informed on July 10, 1978 by a Commission staff member that, according to the Commission's interpretation, the exemption contained in 11 C.F.R. § 104.13 did not extend to the use of Commission disclosure reports to solicit subscriptions to a magazine, Respondent agreed to desist and has desisted from further mailings pending the Commission's resolution of this matter. On July 10, 1978, Respondent had in its possession approximately 5,500 outer envelopes, 5,500 business reply envelopes, and 12,500 solicitation letters and insertions, which Respondent has not been able to use because of its agreement to desist from further mailings.

- 7 9 9 4 0 1 1 4 4 7
3. Respondent is a non-profit Massachusetts corporation made up of students at Harvard Law School. Its sole purpose is publication of a law review entitled Harvard Journal of Law and Public Policy ("Journal"). The Journal is a scholarly publication that does not support or contribute to candidates for election to state or federal offices or attempt to influence the outcome of state or federal elections.
 4. On April 17, 1978, Respondent obtained from the Public Disclosure Division of the Federal Election Commission copies of disclosure reports filed by the Citizens for Reagan Committee ("Reagan Reports") after having stated to staff members of that Division that Respondent intended to use these reports to compile a mailing list to solicit subscriptions to its publication.
 5. The Reagan Reports contained the names of approximately 25,000 contributors to the 1976 presidential election campaign of Governor Ronald Reagan.
 6. Respondent compiled a mailing list from the information contained in the disclosure reports and mailed letters soliciting subscriptions and donations to the Journal to approximately 2,500 persons on the following dates and in the following amounts: June 21, 1978 -- 721; June 27, 1978 -- 675; June 30, 1978 -- 550; July 3, 1978 -- 531.

9. Having considered Respondent's legal arguments the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. § 438(a)(4).
10. Respondent agrees that it will forever desist from using the mailing list compiled from names obtained from the Reagan Reports to solicit subscriptions to the Journal. Additionally, Respondent agrees that in the future it will not use information in any other disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose. The Journal enters this agreement solely to avoid time-consuming and vexatious litigation; it adheres to the view that the Commission's regulation and the Act permitted it to solicit subscriptions from persons whose names appear on lists of contributors on file with the Commission.
11. This Conciliation Agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.

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12. The Commission, on the request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning matters at issue in this Agreement, or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.
13. This Agreement shall become effective as of the date that both parties have executed the same and the Commission has approved the entire Agreement.

3/16/79
Date

William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

February 11, 1979
Date

E. Spencer Abraham
E. Spencer Abraham
President
Harvard Journal of Law and
Public Policy
223 Langdell Hall
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-3105; (617) 492-8628

79040:14481

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
) MUR 592
Harvard Journal of Law)
and Public Policy)

CERTIFICATION

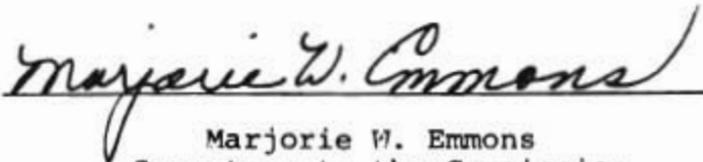
I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on March 14, 1979, the Commission determined by a vote of 6-0 to adopt the following recommendations, as set forth in the General Counsel's Memorandum dated March 9, 1979, regarding the above-captioned matter:

1. Approve the signing of the conciliation agreement, attached to the above-named memorandum.
2. Send the letter attached to the above-named memorandum.
3. Close the file in this matter.

Attest:

3/15/79

Date



Marjorie W. Emmons
Secretary to the Commission

Received in Office of Commission Secretary: Friday, March 9, 1979,
2:37
Circulated on 48 hour vote basis: Monday, March 12, 1979
4:30

7904911443

March 9, 1979

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Carr
SUBJECT: MUR 592

Please have the attached memo distributed to the Commission on a 48-hour tally basis.

Thank you.

79040114481



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

9 MAR 9 P 2: 37

March 9, 1979

MEMORANDUM TO: The Commission

FROM: William C. Oldaker
General Counsel *WCO*

SUBJECT: MUR 592 (Harvard Journal of Law
and Public Policy)

On February 6, 1979, the Commission approved the attached conciliation agreement. The respondent's attorney has mailed back the agreement to us signed by Mr. E. Spencer Abraham, President of the Harvard Journal of Law and Public Policy.

We therefore recommend that the Commission approve the signing of this agreement, send the attached letter, and close the file in this matter.

Attachments

1. Conciliation agreement signed by respondent's representative E. Spencer Abraham.
2. Letter to respondent's attorney.

7904011481



Low *CCC#* *9354*
COVINGTON & BURLINGAME
888 SIXTEENTH STREET, N.W.
WASHINGTON, D. C. 20006
FEDERAL ELECTION COMMISSION

TELEPHONE
(202) 452-6000

WRITERS DIRECT DIAL NUMBER
(202) 452-6770

19 FEB 16 AM 9:55
February 12, 1979

TWX: 710-822-0005
TELEX: 89-593
CABLE: COVLING

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

Re: Harvard Journal of Law and Public Policy
(MUR 592-78)

Dear Mr. Oldaker:

In response to your letter of February 7, 1979, and in accordance with my letter of January 29, 1979, I have enclosed a copy of the conciliation agreement signed by Mr. E. Spencer Abraham, President of the Journal, for the settlement of this matter.

With kind regards:

Sincerely,

Lawrence T. MacNamara, Jr.
Lawrence T. MacNamara, Jr.

jab

Enclosure

7904011443

BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 592 (78)
Harvard Journal of Law)
and Public Policy)

CONCILIATION AGREEMENT

79040114436

This matter having been initiated by the Federal Election Commission ("Commission") in the normal course of carrying out its supervisory responsibilities and the Commission having found reasonable cause to believe that the Harvard Journal of Law and Public Policy ("Respondent") violated a section of the Federal Election Campaign Act of 1971 as amended ("the Act"), 2 U.S.C. § 438(a)(4);^{*/}

NOW, THEREFORE, the Commission and Respondent having duly entered into conciliation as provided for in 2 U.S.C. § 437g(a)(5), do hereby agree as follows:

1. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
2. Respondent has submitted a brief stating its position why no action should be taken in this matter.

*/ The relevant proviso of 2 U.S.C. § 438(a)(4) states:

"any information copied from such reports and statements [filed with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose."

7. That Respondent compiled the mailing list and conducted the above mailings in good faith reliance on 11 C.F.R. § 104.13 which states in part that "'any commercial purpose' does not include the sale of newspapers, magazines, books or similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." According to Respondent's interpretation, § 104.13 permits the use of the Reagan Reports for the purpose of selling the Journal by subscription. The Journal's principal purpose is not to "communicate lists or other information obtained from a report" on file with the Commission.
8. That upon being informed on July 10, 1978 by a Commission staff member that, according to the Commission's interpretation, the exemption contained in 11 C.F.R. § 104.13 did not extend to the use of Commission disclosure reports to solicit subscriptions to a magazine, Respondent agreed to desist and has desisted from further mailings pending the Commission's resolution of this matter. On July 10, 1978, Respondent had in its possession approximately 5,500 outer envelopes, 5,500 business reply envelopes, and 12,500 solicitation letters and insertions, which Respondent has not been able to use because of its agreement to desist from further mailings.

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3. Respondent is a non-profit Massachusetts corporation made up of students at Harvard Law School. Its sole purpose is publication of a law review entitled Harvard Journal of Law and Public Policy ("Journal"). The Journal is a scholarly publication that does not support or contribute to candidates for election to state or federal offices or attempt to influence the outcome of state or federal elections.
4. On April 17, 1978, Respondent obtained from the Public Disclosure Division of the Federal Election Commission copies of disclosure reports filed by the Citizens for Reagan Committee ("Reagan Reports") after having stated to staff members of that Division that Respondent intended to use these reports to compile a mailing list to solicit subscriptions to its publication.
5. The Reagan Reports contained the names of approximately 25,000 contributors to the 1976 presidential election campaign of Governor Ronald Reagan.
6. Respondent compiled a mailing list from the information contained in the disclosure reports and mailed letters soliciting subscriptions and donations to the Journal to approximately 2,500 persons on the following dates and in the following amounts: June 21, 1978 -- 721; June 27, 1978 -- 675; June 30, 1978 -- 550; July 3, 1978 -- 531.

7904011443

9. Having considered Respondent's legal arguments the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. §-438(a)(4).
10. Respondent agrees that it will forever desist from using the mailing list compiled from names obtained from the Reagan Reports to solicit subscriptions to the Journal. Additionally, Respondent agrees that in the future it will not use information in any other disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose. The Journal enters this agreement solely to avoid time-consuming and vexatious litigation; it adheres to the view that the Commission's regulation and the Act permitted it to solicit subscriptions from persons whose names appear on lists of contributors on file with the Commission.
11. This Conciliation Agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.

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FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lawrence T. MacNamara, Jr., Esq.
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

RE: MUR 592 (78)

Dear Mr. MacNamara,

The Commission has approved the conciliation agreement which was signed by E. Spencer Abraham, President of the Harvard Journal of Law and Public Policy, and included with your letter dated February 12, 1979. Accordingly, I have signed the agreement.

Enclosed for your files is a copy of the original agreement signed by both parties in settlement of this matter.

Sincerely,

William C. Oldaker
General Counsel

Enclosure

Copy of conciliation agreement signed
by both parties.



BCC#
9354

COVINGTON & BURLINGAME
888 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20008

RECEIVED
FEDERAL ELECTION
COMMISSION
79 FEB 16 AM 9:55
February 12, 1979

TWX: 710-822-0008
TELEX: 89-803
CABLE: COVLING

TELEPHONE
(202) 452-6000
WRITER'S DIRECT DIAL NUMBER
(202) 452-6770

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

REC-5

900915

Re: Harvard Journal of Law and Public Policy
(MUR 592-78)

Dear Mr. Oldaker:

In response to your letter of February 7, 1979, and in accordance with my letter of January 29, 1979, I have enclosed a copy of the conciliation agreement signed by Mr. E. Spencer Abraham, President of the Journal, for the settlement of this matter.

With kind regards:

Sincerely,

Lawrence T. MacNamara Jr.
Lawrence T. MacNamara, Jr.

jab

Enclosure

7904011440

FIRST CLASS

Lawrence T. MacNamara, Jr., Esq.
COVINGTON & BURLING

688 SIXTEENTH STREET, N.W.
WASHINGTON D. C. 20006

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

79 FEB 16 AM 9:05

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Harvard Journal of)
Law and Public Policy)

MUR 592

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on February 14, 1979, the Commission approved by a vote of 5-0 the recommendation in the General Counsel's Memorandum dated February 9, 1979 that the recommendation in the General Counsel's Report dated February 1, 1979 and the certification dated February 6, 1979 be changed so that the words, "Close the file in this matter" are deleted.

Voting for this determination were Commissioners Springer, Aikens, McGarry, Thomson, and Harris.

Attest:

2/14/79

Date

Marjorie W. Emmons

Marjorie W. Emmons
Secretary to the Commission

Received in Office of Commission Secretary: 2-9-79, 12:33, Friday
Circulated on 48 hour vote basis: 2-12-79, 10:30, Monday

79040114401

February 9, 1979

MEMORANDUM TO: Margelmons
FROM: Elissa T. Carr
SUBJECT: MUR 592

Please have the attached Memo distributed to the
Commission on a 48 hour tally basis.

Thank you.

79040114495



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

79 FEB 9 PI2: 33

February 9, 1979

MEMORANDUM TO: The Commission

FROM: William C. Oldaker
General Counsel *[Signature]*

SUBJECT: MUR 592 (Harvard Journal of Law and Public Policy): Change in G.C. Report's Recommendation and Certification

Because the respondent has not yet signed the conciliation agreement, this matter should not be closed. Accordingly we recommend that the recommendation in the General Counsel's Report dated February 1, 1979 and the certification dated February 6, 1979 be changed so that the words, "Close the file in this matter" are deleted.

Attachments:

Last page of 2-1-79 General Counsel's Report
Certification dated 2-6-79

790401149

Mr. MacNamara understood our position and stated that he would have to consult with his client before making any final decisions. After such consultation, Mr. MacNamara stated that he would contact this office by Monday, January 29, 1979.

On Monday, January 29, 1979, this office received a telephone call from Mr. MacNamara. He stated that he had consulted with his client who agreed to have paragraph 11 and that part of paragraph 12 to which we objected, deleted from their revised version of the agreement. Mr. MacNamara agreed to deliver to us later in the day, another typed conciliation agreement with these disputed provisions deleted. This was delivered and is attached here as Attachment III.

In light of these changes, we recommend that the Commission approve the attached conciliation agreement (Attachment III) and close the file in this matter.

RECOMMENDATION

1. Approve the attached conciliation agreement and letter to the respondent.
2. Close the file in this matter.

2/1/79
Date

William C. Oldaker
General Counsel

Attachments

- Attachments I, II
- Attachment III, the complete conciliation agreement
- Letter to Respondent

79040114477

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Harvard Journal of)
Law and Public Policy)

MUR 592

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on February 6, 1979, the Commission determined by a vote of 5-0 to adopt the following recommendations, as set forth in the General Counsel's Report dated February 1, 1979, regarding the above-captioned matter:

1. Approve the conciliation agreement and letter to the respondent attached to the above-named report.
2. Close the file in this matter.

Voting for this determination were Commissioners Springer, Aikens, McGarry, Thomson, and Harris.

Attest:

2/6/79
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary to the Commission

Received in Office of Commission Secretary: 2-1-79, 3:53
Circulated on 48 hour vote basis: 2-2-79, 3:00

79040114493



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

February 7, 1979

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Lawrence T. MacNamara, Jr.
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Re: MUR 592(78)

Dear Mr. MacNamara:

Enclosed is the conciliation agreement that was hand delivered to this office on January 29, 1979 and that we are prepared to recommend to the Commission in settlement of this matter. Pursuant to your letter of January 29, 1979 which accompanied the agreement, if you agree with the provisions please have it signed and return it to the Commission within ten days. I will then recommend that the Commission approve the conciliation agreement.

Thank you for your patience and cooperation.

Sincerely,

William C. Oldaker
General Counsel

Enclosure

Conciliation Agreement

71904011475

BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 592 (78)
Harvard Journal of Law)
and Public Policy)

CONCILIATION AGREEMENT

7904011450)
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NOW, THEREFORE, the Commission and Respondent having duly entered into conciliation as provided for in 2 U.S.C. § 437g(a)(5), do hereby agree as follows:

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2. Respondent has submitted a brief stating its position why no action should be taken in this matter.

^{*/} The relevant proviso of 2 U.S.C. § 438(a)(4) states:

"any information copied from such reports and statements [filed with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose."

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7. That Respondent compiled the mailing list and conducted the above mailings in good faith reliance on 11 C.F.R. § 104.13 which states in part that "'any commercial purpose' does not include the sale of newspapers, magazines, books or similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." According to Respondent's interpretation, § 104.13 permits the use of the Reagan Reports for the purpose of selling the Journal by subscription. The Journal's principal purpose is not to "communicate lists or other information obtained from a report" on file with the Commission.
8. That upon being informed on July 10, 1978 by a Commission staff member that, according to the Commission's interpretation, the exemption contained in 11 C.F.R. § 104.13 did not extend to the use of Commission disclosure reports to solicit subscriptions to a magazine, Respondent agreed to desist and has desisted from further mailings pending the Commission's resolution of this matter. On July 10, 1978, Respondent had in its possession approximately 5,500 outer envelopes, 5,500 business reply envelopes, and 12,500 solicitation letters and insertions, which Respondent has not been able to use because of its agreement to desist from further mailings.

79040114501

- 7904011350
9. Having considered Respondent's legal arguments the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. § 438(a)(4).
 10. Respondent agrees that it will forever desist from using the mailing list compiled from names obtained from the Reagan Reports to solicit subscriptions to the Journal. Additionally, Respondent agrees that in the future it will not use information in any other disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose. The Journal enters this agreement solely to avoid time-consuming and vexatious litigation; it adheres to the view that the Commission's regulation and the Act permitted it to solicit subscriptions from persons whose names appear on lists of contributors on file with the Commission.
 11. This Conciliation Agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.

12. The Commission, on the request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning matters at issue in this Agreement, or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.
13. This Agreement shall become effective as of the date that both parties have executed the same and the Commission has approved the entire Agreement.

79040111501

Date

William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

Date

E. Spencer Abraham
President
Harvard Journal of Law and
Public Policy
223 Langdell Hall
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-3105; (617) 492-8628

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Harvard Journal of)
Law and Public Policy)

MUR 592

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on February 6, 1979, the Commission determined by a vote of 5-0 to adopt the following recommendations, as set forth in the General Counsel's Report dated February 1, 1979, regarding the above-captioned matter:

1. Approve the conciliation agreement and letter to the respondent attached to the above-named report.
2. Close the file in this matter.

Voting for this determination were Commissioners Springer, Aikens, McGarry, Thomson, and Harris.

Attest:

2/6/79
Date

Marjorie W. Emmons

Marjorie W. Emmons
Secretary to the Commission

Received in Office of Commission Secretary: 2-1-79, 3:53
Circulated on 48 hour vote basis: 2-2-79, 3:00

February 1, 1979

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Garr
SUBJECT: MUR 592

Please have the attached General Counsel's Report on MUR 592 distributed to the Commission on a 48 hour tally basis.

Thank you.

79040114506

BEFORE THE FEDERAL ELECTION COMMISSION

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

In the Matter of)
)
Harvard Journal of)
Law and Public Policy)

MUR 792 (18) P 3: 53

GENERAL COUNSEL'S REPORT

As previously reported, this matter was initiated by information received from the Public Records Office. A Mr. E. Spencer Abraham had placed an order for copies of reports of the Citizens for Reagan Committee with the stated intention of using these reports to compile a mailing list to solicit subscriptions to the Harvard Law Review. The order was filled on April 17, 1978.

Further investigation into the matter revealed that Mr. Abraham did not say he represented the Harvard Law Review but rather the Harvard Journal of Law and Public Policy ("Journal"). Before being contacted by this office, the Journal had already made mailings to approximately 2500 persons (out of an approximate 25,000 total). After being contacted by an OGC staff member, the Journal's representatives, Mr. E. Spencer Abraham and Mr. Stephen Eberhard, stated that they did not believe that the Journal violated the Act or the relevant regulation, but agreed to cease further mailings pending the Commission's resolution of the matter.

On August 1, 1978, the Commission found reason to believe the Journal violated 2 U.S.C. § 438(a)(4) by using information copied from FEC reports to solicit subscriptions.

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The Journal, in response to the Commission's reason to believe notification letter, submitted an affidavit from Mr. E. Spencer Abraham concerning the facts in this matter and a memorandum of law raising legal objections to the Commission's taking further action against respondent.

On November 15, 1978 the Commission found reasonable cause to believe the Journal violated 2 U.S.C. § 438(a)(4) by using information copied from FEC disclosure documents to solicit subscriptions to the Journal. A proposed conciliation agreement was mailed to the respondent along with the Commission's reasonable cause to believe notification letter.

The Journal has responded by mailing to us a revised conciliation agreement. This new agreement includes a number of small changes intended to clarify the situation. Also included however, are two more substantial revisions in paragraphs 11 and 12 (see Attachment I).

Paragraph 11 is a new addition to the original agreement. This new provision reflects the respondent's view that because of their good faith in purchasing solicitation materials, they should be allowed to mail their remaining materials in order to solicit persons whose names appear on copies of the Reagan reports which were acquired from the Federal Election Commission.

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Paragraph 12 roughly coincides with paragraph 10 of the original conciliation agreement (see Attachment II). Paragraph 12 however, states the proposition that the expression "other commercial purpose" presumably as this expression is used in 2 U.S.C. § 438(a)(4) and 11 CFR § 104.13*, does not include the solicitation of contributions to the Journal.

Our position concerning the inclusion of paragraph 11 and that portion of paragraph 12 which interprets the expression "other commercial purpose" is that they should be deleted from the conciliation agreement.

As for paragraph 11, the mere fact that the respondent Journal "acted in good faith" in this matter should not be justification for allowing it to solicit contributions from persons whose names appear on reports copied from FEC records. Section 438(a)(4) states, in part,

"... That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose."

Thus names copied from FEC records cannot be used either (a) to solicit contributions or (b) for any commercial purpose.

* These sections of the Act and Regulations use the term "any commercial purpose". It appears as if Respondent, in its revised conciliation agreement, has attempted to interpret this term.

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As for part (a), the word "contribution" is defined in section 431(e) as, generally, anything of value made for the purpose of influencing the results of an election to Federal office. The Journal states that it does not support or contribute to candidates for election to state or Federal offices or attempt to influence the outcome of such elections. In this context, the Journal's use of names copied from FEC records to solicit contributions may not fall within the meaning of "contribution" as defined under the Act.

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However, the Journal should not be allowed to engage in what may be interpreted as "other commercial activity" or "any commercial activity" as it is used in 2 U.S.C. § 438 (a)(4) and 11 CFR 104.13 by soliciting contributions by mail from persons whose names appear on reports copied from FEC records. In our view, such activity must be interpreted as commercial activity.

Likewise, the respondent Journal should not be allowed to place a narrowing interpretation on the term "other commercial purpose" as it has attempted to do in paragraph 12. We do not accept this interpretation and take the opposite view that the terms "other commercial purpose" and "any commercial purpose" embrace the activity of soliciting contributions to the Journal.

These views were expressed to Lawrence MacNamara Jr., the attorney for the respondent, in a telephone conversation on January 25, 1979.

Mr. MacNamara understood our position and stated that he would have to consult with his client before making any final decisions. After such consultation, Mr. MacNamara stated that he would contact this office by Monday, January 29, 1979.

On Monday, January 29, 1979, this office received a telephone call from Mr. MacNamara. He stated that he had consulted with his client who agreed to have paragraph 11 and that part of paragraph 12 to which we objected, deleted from their revised version of the agreement. Mr. MacNamara agreed to deliver to us later in the day, another typed conciliation agreement with these disputed provisions deleted. This was delivered and is attached here as Attachment III.

In light of these changes, we recommend that the Commission approve the attached conciliation agreement (Attachment III) and close the file in this matter.

RECOMMENDATION

1. Approve the attached conciliation agreement and letter to the respondent.
2. Close the file in this matter.

Date

3/1/79


William C. Oldaker
General Counsel

Attachments

Attachments I, II
Attachment III, the complete conciliation agreement
Letter to Respondent

79040111511

10. Having considered Respondent's legal arguments the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. § 438(a)(4).

11. Because the Journal acted in good faith in purchasing the materials, described in paragraph 9 of this Conciliation Agreement, it shall be allowed to mail 5,500 solicitations to persons whose names appear in the Reagan Reports.

12. Thereafter, Respondent will not use the mailing list of names obtained from the Reagan Reports to solicit subscriptions to the Journal. Additionally, in the future Respondent will not use information in any other disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose. { "Other commercial purpose" does not include the solicitation of contributions to the Journal. } The Journal enters this agreement solely to avoid time-consuming and vexatious litigation; it adheres to the view that the Commission's regulation and the Act permitted it to solicit subscriptions from persons whose names appear on lists of contributors on the file with the Commission.

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our parenthesis }

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- 10. Respondent will desist from using the mailing list made up of contributors in the Reagan Reports to solicit subscriptions to the Journal and will not use information in disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose in the future.
- 11. This conciliation agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.
- 12. The Commission, on the request of anyone filing a complaint under 2 U.S.C. §437g(a) (1) concerning matters at issue in this Agreement, or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States Court for the District of Columbia.
- 13. This Agreement shall become effective as of the date that both parties have executed the same and the Commission has approved the entire Agreement.

Date	William C. Oldaker General Counsel Federal Election Commission 1325 K Street, N.W. Washington, D.C. 20463 (202) 523-4143
Date	E. Spencer Abraham President <u>Harvard Journal of Law and Public Policy</u> 223 Langdell Hall Harvard Law School Cambridge, Massachusetts 0213 (617) 495-3105

COVINGTON & BURLING
888 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

Attachment III
MUR 592

TELEPHONE
(202) 452-6000

WRITERS DIRECT DIAL NUMBER
(202) 452-6770

TWX: 710-822-0005
TELEX: 80-593
CABLE: COVLING

January 29, 1979

BY HAND

Mr. William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street, N.W.
Seventh Floor
Washington, D.C. 20463

Re: MUR 592(78): Harvard Journal of Law and
Public Policy

Dear Mr. Oldaker:

7 7 0 4 0 1 1 4 5 1 1

Please find attached a revision of the proposed Conciliation Agreement that Respondent tendered under cover of its December 8, 1978 letter to you. Respondent has receded, in its revised proposed Agreement, from certain positions that it embraced in paragraphs 11 and 12 of the December 8 proposal and justified in its December 8 covering letter, a copy of which is attached. Respondent has made the revisions solely to expedite the settlement of this dispute; it remains persuaded that the deleted provisions were reasonable. Of course, respondent does not bind itself to adhere to the concessions in the attached proposal if the Commission does not find the proposal otherwise acceptable. Assuming however that the Commission will accept the proposal, Respondent will tender within ten days an original copy of the attached proposed Conciliation Agreement with Mr. Abraham's signature.

With kind regards:

Sincerely,

Lawrence T. MacNamara Jr.
Lawrence T. MacNamara, Jr.

jab
Enclosures
cc: Christopher Y. Tow, Esq. ✓
E. Spencer Abraham

BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 592 (78)
Harvard Journal of Law)
and Public Policy)

CONCILIATION AGREEMENT

7 9 0 4 0 1 1 3 5 1 1

This matter having been initiated by the Federal Election Commission ("Commission") in the normal course of carrying out its supervisory responsibilities and the Commission having found reasonable cause to believe that the Harvard Journal of Law and Public Policy ("Respondent") violated a section of the Federal Election Campaign Act of 1971 as amended ("the Act"), 2 U.S.C. § 438(a)(4);^{*/}

NOW, THEREFORE, the Commission and Respondent having duly entered into conciliation as provided for in 2 U.S.C. § 437g(a)(5), do hereby agree as follows:

1. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
2. Respondent has submitted a brief stating its position why no action should be taken in this matter.

*/ The relevant proviso of 2 U.S.C. § 438(a)(4) states:

"any information copied from such reports and statements [filed with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose."

3. Respondent is a non-profit Massachusetts corporation made up of students at Harvard Law School. Its sole purpose is publication of a law review entitled Harvard Journal of Law and Public Policy ("Journal"). The Journal is a scholarly publication that does not support or contribute to candidates for election to state or federal offices or attempt to influence the outcome of state or federal elections.
4. On April 17, 1978, Respondent obtained from the Public Disclosure Division of the Federal Election Commission copies of disclosure reports filed by the Citizens for Reagan Committee ("Reagan Reports") after having stated to staff members of that Division that Respondent intended to use these reports to compile a mailing list to solicit subscriptions to its publication.
5. The Reagan Reports contained the names of approximately 25,000 contributors to the 1976 presidential election campaign of Governor Ronald Reagan.
6. Respondent compiled a mailing list from the information contained in the disclosure reports and mailed letters soliciting subscriptions and donations to the Journal to approximately 2,500 persons on the following dates and in the following amounts: June 21, 1978 -- 721; June 27, 1978 -- 675; June 30, 1978 -- 550; July 3, 1978 -- 531.

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7. That Respondent compiled the mailing list and conducted the above mailings in good faith reliance on 11 C.F.R. § 104.13 which states in part that "'any commercial purpose' does not include the sale of newspapers, magazines, books or similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." According to Respondent's interpretation, § 104.13 permits the use of the Reagan Reports for the purpose of selling the Journal by subscription. The Journal's principal purpose is not to "communicate lists or other information obtained from a report" on file with the Commission.
8. That upon being informed on July 10, 1978 by a Commission staff member that, according to the Commission's interpretation, the exemption contained in 11 C.F.R. § 104.13 did not extend to the use of Commission disclosure reports to solicit subscriptions to a magazine, Respondent agreed to desist and has desisted from further mailings pending the Commission's resolution of this matter. On July 10, 1978, Respondent had in its possession approximately 5,500 outer envelopes, 5,500 business reply envelopes, and 12,500 solicitation letters and insertions, which Respondent has not been able to use because of its agreement to desist from further mailings.

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9. Having considered Respondent's legal arguments the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. § 438(a)(4).
 10. Respondent agrees that it will forever desist from using the mailing list compiled from names obtained from the Reagan Reports to solicit subscriptions to the Journal. Additionally, Respondent agrees that in the future it will not use information in any other disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose. The Journal enters this agreement solely to avoid time-consuming and vexatious litigation; it adheres to the view that the Commission's regulation and the Act permitted it to solicit subscriptions from persons whose names appear on lists of contributors on file with the Commission.
 11. This Conciliation Agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.

12. The Commission, on the request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning matters at issue in this Agreement, or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.
13. This Agreement shall become effective as of the date that both parties have executed the same and the Commission has approved the entire Agreement.

Date

 William C. Oldaker
 General Counsel
 Federal Election Commission
 1325 K Street, N.W.
 Washington, D.C. 20463
 (202) 523-4143

Date

 E. Spencer Abraham
 President
 Harvard Journal of Law and
Public Policy
 223 Langdell Hall
 Harvard Law School
 Cambridge, Massachusetts 02138
 (617) 495-3105; (617) 492-8628

79040114511



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Lawrence T. MacNamara, Jr.
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Re: MUR 592(78)

Dear Mr. MacNamara:

Enclosed is the conciliation agreement that was hand delivered to this office on January 29, 1979 and that we are prepared to recommend to the Commission in settlement of this matter. Pursuant to your letter of January 29, 1979 which accompanied the agreement, if you agree with the provisions please have it signed and return it to the Commission within ten days. I will then recommend that the Commission approve the conciliation agreement.

Thank you for your patience and cooperation.

Sincerely,

William C. Oldaker
General Counsel

Enclosure

Conciliation Agreement

ACC# 9156

COVINGTON & BURLING
888 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

TELEPHONE
(202) 452-6000

TWX: 710-888-0005
TELEX: 88-883
CABLE: COVLING

WRITER'S DIRECT DIAL NUMBER
(202) 452-6770

January 29, 1979

BY HAND

Mr. William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street, N.W.
Seventh Floor
Washington, D.C. 20463

Re: MUR 592(78): Harvard Journal of Law and
Public Policy

Dear Mr. Oldaker:

Please find attached a revision of the proposed Conciliation Agreement that Respondent tendered under cover of its December 8, 1978 letter to you. Respondent has receded, in its revised proposed Agreement, from certain positions that it embraced in paragraphs 11 and 12 of the December 8 proposal and justified in its December 8 covering letter, a copy of which is attached. Respondent has made the revisions solely to expedite the settlement of this dispute; it remains persuaded that the deleted provisions were reasonable. Of course, respondent does not bind itself to adhere to the concessions in the attached proposal if the Commission does not find the proposal otherwise acceptable. Assuming however that the Commission will accept the proposal, Respondent will tender within ten days an original copy of the attached proposed Conciliation Agreement with Mr. Abraham's signature.

With kind regards:

Sincerely,
Lawrence T. MacNamara Jr.
Lawrence T. MacNamara, Jr.

jab
Enclosures
cc: Christopher Y. Tow, Esq.
E. Spencer Abraham

7904011452

COVINGTON & BURLING

888 SIXTEENTH STREET, N. W.

WASHINGTON, D. C. 20008

TELEPHONE
(202) 452-8000

WRITTEN DIRECT DIAL NUMBER
(202) 452-6770

TWX: 710-822-0018
TELEX: 89-603
CABLE: COVLING

December 8, 1978

Mr. William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street, N.W.
Seventh Floor
Washington, D.C. 20463

Re: Harvard Journal of Law and Public Policy
MUR - 592 (78)

Dear Mr. Oldaker:

There is a technical inaccuracy in Mr. Abraham's September 20, 1978 Affidavit with respect to the name of the Respondent in this case. The inaccuracy is corrected in paragraph 2 of Mr. Abraham's Supplementary Affidavit of December 5, 1978, which is attached. Mr. Abraham's Supplementary Affidavit also gives his present address, effective for the remainder of this month.

Also attached is a revision of the proposed Conciliation Agreement enclosed with your letter of November 21, 1978. The following paragraphs describe the purposes and justifications for the Journal's revisions.

1. The Journal's principal purpose is to preserve its good name and reputation for rectitude under the law. It is critical to the Journal's reputation that its Conciliation Agreement show that the Journal acted in good faith in this dispute. Paragraphs 3, 4, 7, and 8 of the revised Conciliation Agreement include additional facts and statements for this purpose. As far as we know, none of these facts and statements is in dispute. They concern the three aspects of the Journal's good faith: (1) the reasonableness of the Journal's interpretation of the Act and regulation; (2) the forthrightness of the Journal in explaining to the Commission the purpose for which it sought the Reagan Reports before it obtained them; and (3) the Journal's immediate cessation of solicitation when the Commission expressed its opinion that the solicitations were illegal.

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Mr. William C. Oldaker
December 8, 1978
Page Two

2. The Journal adheres to the view stated in its brief of September 25, 1978, that its solicitation of persons whose names appear in the Reagan Reports was permitted by the Federal Election Campaign Act of 1971 as amended ("the Act") and by 11 C.F.R. § 104.13. In essence the Journal's position is that while the Act proscribed the use of the filings for solicitation of contributions to political candidates and organizations, because the Journal is not a political candidate or organization or a supporter of one, its request for donations did not violate the Act; and while the Act proscribed the use of filings for "any commercial purpose," because the regulation stated that the sale of magazines is not a commercial purpose, the Journal's solicitation of subscriptions did not violate the Act. An addition to paragraph 12 of the revised Conciliation Agreement tersely states the Journal's position and its reason for entering this Conciliation Agreement.

3. Paragraph 8 of the revised Conciliation Agreement is revised to state only the Commission's present interpretation of 11 C.F.R. § 104.13. It is unreasonable to require the Journal to agree to the Commission's interpretation when the plain meaning of § 104.13 supported the Journal's interpretation and the history of promulgation of the section did not indicate otherwise. With respect to Journal actions that took place before the Commission stated its interpretation, subsequent *ipse dixit* is insufficient to change the meaning of the regulation. Moreover, the Journal's agreement with respect to the meaning of § 104.13 can serve no public purpose: public disclosure of the Conciliation Agreement will give prospective notice of the Commission's present interpretation of § 104.13, whether or not the Journal's agreement with that interpretation is stated. The Commission's proper concern is with the Journal's forbearance to use lists for commercial purposes in the future, and that concern is protected by Paragraph 12 of this Conciliation Agreement.

4. The Journal spent a substantial amount of its relatively meager "seed money" for materials -- outer envelopes, business reply envelopes and copies of the solicitation letter -- needed to solicit the persons listed in the Reagan Reports. The Journal has no other list, and therefore no other use for the approximately 5,500 solicitation packets that were on hand on July 10, 1978 when the Commission told the Journal of its position. The Journal also has precious little additional

7901011523

Mr. William C. Oldaker
December 8, 1978
Page Three

money for publicity purposes. Because the Journal bought the materials in good faith reliance on the language of 11 C.F.R. § 104.13 and the Commission's apparent acquiescence in its use of the Reagan Reports for solicitation purposes, and because of necessity, the Journal should be permitted to send its 5,500 remaining solicitations to persons listed in the Reagan Reports. Paragraph 9 of the revised Conciliation Agreement, adapted from Mr. Abraham's Supplementary Affidavit of December 5, 1978, states the relevant facts. Paragraph 11 of the revised Conciliation Agreement provides the relief to which Respondent is entitled as a matter of fairness.

5. The revision of Paragraph 2 of the Conciliation Agreement states the fact without characterizing it.

6. Paragraph 12 of the revised Conciliation Agreement includes the statement that "'Other commercial purpose' does not include the solicitation of contributions to the Journal." This statement appears consistent with the Conciliation Agreement that you proposed.

7. The other revisions are intended for clarity alone.

I shall be happy to discuss these matters with you or with Mr. Tow.

With kind regards:

Sincerely,

Lawrence T. MacNamara Jr.
Lawrence T. MacNamara, Jr.

LTM/jab
Enclosures

cc: Mr. Christopher Y. Tow
Mr. E. Spencer Abraham
bcc: Mr. Steven Eberhard
Mr. Bolton
Mr. Clagett

793411511



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

MEMORANDUM TO CHARLES STEELE
FROM: MARJORIE W. EMMONS *MW E*
DATE: DECEMBER 21, 1978
SUBJECT: MUR 592 (78) - Interim Conciliation
Report dated 12-17-78
Received in OCS: 12-20-78,
11:43

The above-named document was circulated on a 24
hour no-objection basis at 3:30, December 20, 1978.

The Commission Secretary's Office has received
no objections to the Interim Conciliation Report as of
4:30 this date.

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December 20, 1978

MEMORANDUM TO: Marge Ennes
FROM: Klissa T. Carr
SUBJECT: MUR 592

Please have the attached Interim Conciliation Report on MUR 592 distributed to the Commission on a 24 hour no-objection basis.

Thank you.

79040114526

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

BEFORE THE FEDERAL ELECTION COMMISSION

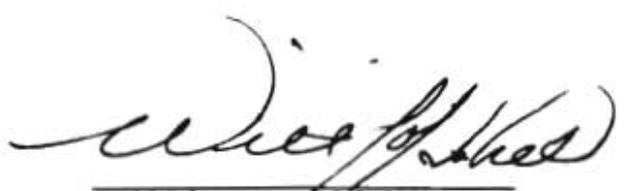
78 DEC 20 All: 43

In the Matter of)
)
Harvard Journal of) MUR 592 (78)
Law and Public Policy)

INTERIM CONCILIATION REPORT

A proposed conciliation agreement has been received from the respondents, the Harvard Journal of Law and Public Policy. Their attorney, Mr. Lawrence MacNamara, Jr. has made a number of substantial revisions to the original conciliation agreement. These changes are presently being reviewed and a report is forthcoming.

12/17/78
Date


William C. Oldaker
General Counsel

72040114527

GCC # 5823

COVINGTON & BURLING
888 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

TELEPHONE
(202) 452-6000

TWX: 710-822-0005
TELEX: 89-893
CABLE: COVLING

WRITER'S DIRECT DIAL NUMBER
(202) 452-6770

December 8, 1978

Mr. William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street, N.W.
Seventh Floor
Washington, D.C. 20463

Re: Harvard Journal of Law and Public Policy
MUR - 592 (78)

Dear Mr. Oldaker:

There is a technical inaccuracy in Mr. Abraham's September 20, 1978 Affidavit with respect to the name of the Respondent in this case. The inaccuracy is corrected in paragraph 2 of Mr. Abraham's Supplementary Affidavit of December 5, 1978, which is attached. Mr. Abraham's Supplementary Affidavit also gives his present address, effective for the remainder of this month.

Also attached is a revision of the proposed Conciliation Agreement enclosed with your letter of November 21, 1978. The following paragraphs describe the purposes and justifications for the Journal's revisions.

1. The Journal's principal purpose is to preserve its good name and reputation for rectitude under the law. It is critical to the Journal's reputation that its Conciliation Agreement show that the Journal acted in good faith in this dispute. Paragraphs 3, 4, 7, and 8 of the revised Conciliation Agreement include additional facts and statements for this purpose. As far as we know, none of these facts and statements is in dispute. They concern the three aspects of the Journal's good faith: (1) the reasonableness of the Journal's interpretation of the Act and regulation; (2) the forthrightness of the Journal in explaining to the Commission the purpose for which it sought the Reagan Reports before it obtained them; and (3) the Journal's immediate cessation of solicitation when the Commission expressed its opinion that the solicitations were illegal.

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Mr. William C. Oldaker
December 8, 1978
Page Two

2. The Journal adheres to the view stated in its brief of September 25, 1978, that its solicitation of persons whose names appear in the Reagan Reports was permitted by the Federal Election Campaign Act of 1971 as amended ("the Act") and by 11 C.F.R. § 104.13. In essence the Journal's position is that while the Act proscribed the use of the filings for solicitation of contributions to political candidates and organizations, because the Journal is not a political candidate or organization or a supporter of one, its request for donations did not violate the Act; and while the Act proscribed the use of filings for "any commercial purpose," because the regulation stated that the sale of magazines is not a commercial purpose, the Journal's solicitation of subscriptions did not violate the Act. An addition to paragraph 12 of the revised Conciliation Agreement tersely states the Journal's position and its reason for entering this Conciliation Agreement.

3. Paragraph 8 of the revised Conciliation Agreement is revised to state only the Commission's present interpretation of 11 C.F.R. § 104.13. It is unreasonable to require the Journal to agree to the Commission's interpretation when the plain meaning of § 104.13 supported the Journal's interpretation and the history of promulgation of the section did not indicate otherwise. With respect to Journal actions that took place before the Commission stated its interpretation, subsequent ipse dixit is insufficient to change the meaning of the regulation. Moreover, the Journal's agreement with respect to the meaning of § 104.13 can serve no public purpose: public disclosure of the Conciliation Agreement will give prospective notice of the Commission's present interpretation of § 104.13, whether or not the Journal's agreement with that interpretation is stated. The Commission's proper concern is with the Journal's forbearance to use lists for commercial purposes in the future, and that concern is protected by Paragraph 12 of this Conciliation Agreement.

4. The Journal spent a substantial amount of its relatively meager "seed money" for materials -- outer envelopes, business reply envelopes and copies of the solicitation letter -- needed to solicit the persons listed in the Reagan Reports. The Journal has no other list, and therefore no other use for the approximately 5,500 solicitation packets that were on hand on July 10, 1978 when the Commission told the Journal of its position. The Journal also has precious little additional

79010114524

Mr. William C. Oldaker
December 8, 1978
Page Three

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5. The revision of Paragraph 2 of the Conciliation Agreement states the fact without characterizing it.

6. Paragraph 12 of the revised Conciliation Agreement includes the statement that "'Other commercial purpose' does not include the solicitation of contributions to the Journal." This statement appears consistent with the Conciliation Agreement that you proposed.

7. The other revisions are intended for clarity alone.

I shall be happy to discuss these matters with you or with Mr. Tow.

With kind regards:

Sincerely,

Lawrence T. MacNamara Jr.
Lawrence T. MacNamara, Jr.

LTM/jab
Enclosures

cc: Mr. Christopher Y. Tow
Mr. E. Spencer Abraham

1151104007

and it is true to the

BEFORE THE
LECTION COMMISSION

MUR - 592 (78)

Journal
Policy

W. B. Bogue
D.C.

SUPPLEMENTARY AFFIDAVIT OF E. SPENCER ABRAHAM
E. SPENCER ABRAHAM, being duly sworn according to
law and authorized to make this affidavit on behalf of the
HARVARD JOURNAL OF LAW AND PUBLIC POLICY does depose and say:

1. This affidavit supplements my affidavit of September 20, 1978, presently on file with the Commission.
2. The first three sentences of Paragraph 2 of my affidavit of September 20, 1978 should be revised as follows:

"2. The Harvard Society for Law and Public Policy, Inc. is a non-profit Massachusetts corporation formed in Massachusetts. Its membership is comprised of students at Harvard Law School. Its sole function is the publication of a journal of ideas, the Harvard Journal of Law and Public Policy."

3. After the Commission sent a copy of the Reagan list to the Journal, the Journal purchased approximately 5,500 outer envelopes, 5,500 business return envelopes, and 12,500 letters and insertions that could not be used after the Commission's notice of July 10, 1978. In addition the Journal paid a secretary to address approximately 750 of the unused outer envelopes. The expenditures were made in good faith reliance on 11 C.F.R. § 104.13 and the Commission's apparent acquiescence in the Journal's use

BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of the)
)
Harvard Journal of Law)
and Public Policy)

MUR - 592 (78)

SUPPLEMENTARY AFFIDAVIT OF E. SPENCER ABRAHAM

E. SPENCER ABRAHAM, being duly sworn according to law and authorized to make this affidavit on behalf of the HARVARD JOURNAL OF LAW AND PUBLIC POLICY does depose and say:

1. This affidavit supplements my affidavit of September 20, 1978, presently on file with the Commission.
2. The first three sentences of Paragraph 2 of my affidavit of September 20, 1978 should be revised as follows:

"2. The Harvard Society for Law and Public Policy, Inc. is a non-profit Massachusetts corporation formed in Massachusetts. Its membership is comprised of students at Harvard Law School. Its sole function is the publication of a journal of ideas, the Harvard Journal of Law and Public Policy."

3. After the Commission sent a copy of the Reagan list to the Journal, the Journal purchased approximately 5,500 outer envelopes, 5,500 business return envelopes, and 12,500 letters and insertions that could not be used after the Commission's notice of July 10, 1978. In addition the Journal paid a secretary to address approximately 750 of the unused outer envelopes. The expenditures were made in good faith reliance on 11 C.F.R. § 104.13 and the Commission's apparent acquiescence in the Journal's use of the Reagan list.

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I have read the foregoing and it is true to the best of my knowledge, information and belief.

E. Spencer Abraham
E. Spencer Abraham
President, Harvard Journal
of Law and Public Policy

Sworn and Subscribed to before me this
5th day of December, 1978

Arthur W. Biggs
Notary Public, D.C.

My Commission Expires May 11, 1981

79040114533

BEFORE THE
FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 592 (78)
Harvard Journal of Law)
and Public Policy)

CONCILIATION AGREEMENT

This matter having been initiated by the Federal Election Commission ("Commission") in the normal course of carrying out its supervisory responsibilities and the Commission having found reasonable cause to believe that the Harvard Journal of Law and Public Policy ("Respondent") violated a section of the Federal Election Campaign Act of 1971 as amended ("the Act"), 2 U.S.C. § 438(a)(4);^{*/}

NOW, THEREFORE, the Commission and Respondent having duly entered into conciliation as provided for in 2 U.S.C. § 437g(a)(5), do hereby agree as follows:

1. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
2. Respondent has submitted a brief stating its position why no action should be taken in this matter.

*/ The relevant proviso of 2 U.S.C. § 438(a)(4) states:

"any information copied from such reports and statements [filed with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose."

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3. Respondent is a non-profit Massachusetts corporation made up of students at Harvard Law School. Its sole purpose is publication of a law review entitled Harvard Journal of Law and Public Policy ("Journal"). The Journal is a scholarly publication that does not support or contribute to candidates for election to state or federal offices or attempt to influence the outcome of state or federal elections.
4. On April 17, 1978, Respondent obtained from the Public Disclosure Division of the Federal Election Commission copies of disclosure reports filed by the Citizens for Reagan Committee ("Reagan Reports") after having stated to staff members of that Division that Respondent intended to use these reports to compile a mailing list to solicit subscriptions to its publication.
5. That the Reagan Reports contained the names of approximately 25,000 contributors to the 1976 presidential election campaign of Governor Ronald Reagan.
6. That Respondent compiled a mailing list from the information contained in the disclosure reports and mailed letters soliciting subscriptions and donations to the Journal to approximately 2,500 persons on the following dates and in the following amounts: June 21, 1978 -- 721; June 27, 1978 -- 675; June 30, 1978 -- 550; July 3, 1978 -- 531.

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7. That Respondent compiled the mailing list and conducted the above mailings in good faith reliance on 11 C.F.R. § 104.13 which states in part that "'any commercial purpose' does not include the sale of newspapers, magazines, books or similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." According to Respondent's interpretation, § 104.13 permits the use of the Reagan Reports for the purpose of selling the Journal by subscription. The Journal's principal purpose is not to "communicate lists or other information obtained from a report" on file with the Commission.
8. That upon being informed on July 10, 1978 by a Commission staff member that, according to the Commission's interpretation, the exemption contained in 11 C.F.R. § 104.13 did not extend to the use of Commission disclosure reports to solicit subscriptions to a magazine, Respondent agreed to desist and has desisted from further mailings pending the Commission's resolution of this matter.
9. On July 10, 1978, Respondent had in its possession approximately 5,500 outer envelopes, 5,500 business reply envelopes, and 12,500 solicitation letters and insertions, which Respondent has not been able to use because of its agreement to desist from further mailings.

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10. Having considered Respondent's legal arguments the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. § 438(a)(4).
11. Because the Journal acted in good faith in purchasing the materials, described in paragraph 9 of this Conciliation Agreement, it shall be allowed to mail 5,500 solicitations to persons whose names appear in the Reagan Reports.
12. Thereafter, Respondent will not use the mailing list of names obtained from the Reagan Reports to solicit subscriptions to the Journal. Additionally, in the future Respondent will not use information in any other disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose. "Other commercial purpose" does not include the solicitation of contributions to the Journal. The Journal enters this agreement solely to avoid time-consuming and vexatious litigation; it adheres to the view that the Commission's regulation and the Act permitted it to solicit subscriptions from persons whose names appear on lists of contributors on the file with the Commission.

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- 13. This Conciliation Agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.
- 14. The Commission, on the request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning matters at issue in this Agreement, or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District for the District of Columbia.
- 15. This Agreement shall become effective as of the date that both parties have executed the same and the Commission has approved the entire Agreement.

Date

 William C. Oldaker
 General Counsel
 Federal Election Commission
 1325 K Street, N.W.
 Washington, D.C. 20463
 (202) 523-4143

Date

 E. Spencer Abraham
 President
Harvard Journal of Law and
Public Policy
 223 Langdell Hall
 Harvard Law School
 Cambridge, Massachusetts 02138
 (617) 495-3105
 (Address through December 31, 1978:)
 1125 Hitching Post Road
 E. Lansing, Michigan 48823

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FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

November 21, 1978

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. E. Spencer Abraham, President
Harvard Journal of Law and Public
Policy
223 Langdell Hall
Harvard Law School
Cambridge, Massachusetts 02138

Re: MUR 592 (78)

Dear Mr. Abraham:

On November 15, 1978, the Commission determined that there was reasonable cause to believe that the Harvard Journal of Law and Public Policy ("Journal") violated §438 (a)(4) of the Federal Election Campaign Act of 1971, as amended.

Specifically, the Commission found reasonable cause to believe that the Journal used information copied from Commission disclosure reports to compile a mailing list to solicit subscriptions to the Journal in violation of the prohibition against the use of information copied from F.E.C. reports for commercial purposes contained in 2 U.S.C. §438(a)(4).

The Commission has a duty to attempt to correct such violations for a period of 30 days by informal methods of conference, conciliation and persuasion, and by entering into a conciliation agreement (2 U.S.C. §437g(a)(5)(B)). If we are unable to reach an agreement during that period, the Commission may, upon a finding of probable cause to believe a violation has occurred, institute a civil suit in United States District Court.

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We enclose a conciliation agreement that this office is prepared to recommend to the Commission in settlement of this matter. If you agree with the provisions of the enclosed conciliation agreement, please sign and return it to the Commission within ten days. I will then recommend that the Commission approve the agreement.

If you have any questions or suggestions for changes in the enclosed agreement, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4039.

Sincerely,

[Handwritten signature of William E. Oldaker]

William E. Oldaker
General Counsel

Enclosure

cc: Lawrence T. MacNamara, Jr., Esquire
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

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MUR 59d *CHRISTIAN*

PS Form 3811, Apr 1977

1. The following service is requested (check one)
 Show to whom and date delivered
 Show to whom, date, and address of delivery
 RESTRICTED DELIVERY
 Show to whom and date delivered
 RESTRICTED DELIVERY
 Show to whom, date, and address of delivery \$
 (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
 E. SHENK & P. P. AHAM
 H. J. L. LANGRISH HILL
 1123 LANSBERRY ST SW
 WASHINGTON, D.C. 20035 20139

3. ARTICLE DESCRIPTION:
 REGISTERED NO. 438279 CERTIFIED NO. INSURED NO.

4. I have received the article described above:
 SIGNATURE Addressee Authorized agent
S. P. [Signature]

5. ADDRESS: (Complete only if requested)
 DATE OF DELIVERY NOV 27 1978
 POSTMARK 8151 LG N

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

7500 1977-0-749-566

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Harvard Journal of Law and)
Public Policy)

MUR 592 (78)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on November 15, 1978, the Commission, meeting in an Executive Session at which a quorum was present, determined by a vote of 4-1 to adopt the recommendation of the General Counsel to take the following actions in MUR 592 (78):

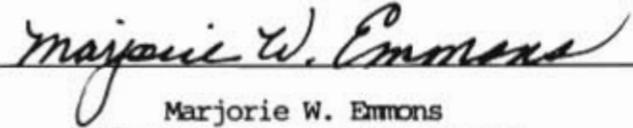
1. Find reasonable cause to believe the Harvard Journal of Law and Public Policy violated 2 U.S.C. §438(a)(4) by using information copied from FEC disclosure documents to solicit subscriptions to the Journal.
2. Send the proposed conciliation agreement and letter attached to the General Counsel's Report signed November 8, 1978.

Commissioners Aikens, McGarry, Springer, and Tiernan voted affirmatively for the above actions. Commissioner Harris dissented. Commissioner Thomson was not present at the time of the vote.

Attest:

11/17/78

Date



Marjorie W. Emmons
Secretary to the Commission

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FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

MEMORANDUM TO: CHARLES STEELE
FROM: MARJORIE W. EMMONS *mwe*
SUBJECT: OBJECTION - MUR 592 (78) - General
Counsel's Report dated 11-6-78
Received in OCS: 11-9-78, 10:02
DATE: NOVEMBER 13, 1978

The above-named document was circulated on a
48 hour vote basis at 2:00, November 9, 1978.

Commissioner Harris submitted an objection
at 10:36, November 13, 1978, thereby placing
MUR 592 on the Executive Session Agenda for
November 15, 1978.

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November 9, 1978

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Carr
SUBJECT: NUR 592

Please have the attached General Counsel's Report on NUR 592 distributed to the Commission on a 48 hour tally basis.

Thank you.

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RECEIVED
OFFICE OF THE
COMMISSIONER BEFORE THE FEDERAL ELECTION COMMISSION
November 6, 1978

'8 NOV 9 AID: 02
In the Matter of

Harvard Journal of Law
and Public Policy

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MUR 592 (78)

GENERAL COUNSEL'S REPORT

BACKGROUND

This matter arose from information received from the Public Records Office that Mr. E. Spencer Abraham had placed an order for copies of reports of the Citizens for Reagan Committee ("Reagan Committee") with the stated intention of using the reports to compile a mailing list to solicit subscriptions to the Harvard Law Review. The order was filled on April 17, 1978.

Subsequent investigation revealed that Mr. Abraham did not say he represented the Harvard Law Review but in fact the Harvard Journal of Law and Public Policy ("Journal"). Prior to being contacted by the Office of General Counsel, the Journal had already conducted mailings to approximately 2500 persons (out of an approximate 25,000 total). When contacted by an OGC staff member, the Journal's representatives, Mr. E. Spencer Abraham and Mr. Stephen Eberhard, stated that they did not believe that the Journal had violated the Act or the relevant regulation but agreed to desist from further mailings pending the Commission's resolution of this matter.

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On August 1, 1978, the Commission found reason to believe the Journal violated 2 U.S.C. §438(a)(4) by using information copied from FEC reports to solicit subscriptions.

EVIDENCE

In response to the Commission's notification letter, the Journal submitted the attached affidavit from Mr. E. Spencer Abraham concerning the facts in this matter (Attachment I) and a memorandum of law raising legal objections to the Commission's taking further action against respondent (Respondent's Memorandum, hereinafter "R.M.") (Attachment II).

ANALYSIS

We have no reason to dispute any of the statements made by Mr. Abraham in his affidavit.

In its Memorandum (Attachment II), respondent raises three legal arguments against the Commission's taking further action against the Journal. 1/ 1) The Commission's notification letter represents a repudiation of 11 C.F.R. §104.13. Respondent contends that the Commission's "new" interpretation may only be applied prospectively and therefore the Commission's action against the Journal is procedurally defective. 2) The Commission's interpretation of 2 U.S.C. §438(a)(4) misreads congressional intent in enacting the statute's prohibition against use of FEC

1/ Respondent also states that it assumes the Commission's silence on the matter of the Journal's solicitation of donations in addition to soliciting subscriptions indicates that the Commission does not dispute the legality of this activity. R.M. at p. 3. In fact, the reason for the omission of any reference to solicitation of donations in the August 3 notification letter was due to the Commission's being unaware at that time that donations had also been requested.

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reports for solicitation of contributions or other commercial purposes. 3) The Commission's interpretation of 2 U.S.C. §438(a)(4) violates the First Amendment right of the Journal to solicit subscriptions.

In our opinion the Commission's actions have been procedurally correct, the Commission's interpretation of 2 U.S.C. §438(a)(4) has been consistent and accurate, and the Commission's interpretation of the Act does not violate the Journal's First Amendment rights.

A. The Commission's action against the Journal is not procedurally defective.

Respondent bases its contention that the Commission has acted improperly as a procedural matter on a perceived change in the Commission's interpretation of 2 U.S.C. §438(a)(4) and 11 C.F.R. §104.13. R.M. at pp. 6 - 9. The Commission's interpretation has in fact been consistent.

The Commission's interpretation of the commercial use prohibition in 2 U.S.C. §438(a)(4) is found in 11 C.F.R. §104.13. 11 C.F.R. §104.13 states that the definition of "commercial purpose" does not include "the sale of newspapers, magazines, books or other similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." Respondent contends that the "plain meaning" of the regulation permits the solicitation of subscriptions by a magazine such as the Journal. R.M. at pp. 5 - 6. Respondent further states that the Commission's interpretation

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of the Act as applied to the Journal is a repudiation of 11 C.F.R. §104.13 and therefore a new interpretation which should only be applied prospectively. R.M. at pp. 6 - 9.

The Commission has never interpreted 11 C.F.R. §104.13 or 2 U.S.C. §438(a)(4) to permit the solicitation of subscriptions to a magazine. The consistency of the Commission's present interpretation of the exemption contained in 11 C.F.R. §104.13 is evidenced by the explanation which accompanied 11 C.F.R. §104.13 when it was transmitted to Congress. The explanation states that the regulation "defines commercial use to exclude use in news media and books." Chairman's Communication, H. Doc. No. 95-44 at 48. (emphasis supplied)

The "plain meaning" referred to by respondent is in the phrase which exempts from the definition of commercial purpose "the sale of newspapers, magazines and similar communications" Although equating the term "sale" with "solicitation" might be a reasonable interpretation of the regulation, it is hardly its "plain meaning" and, as is shown by the Chairman's Communication, supra, not the meaning the Commission intended to convey.

The term "sale" has a precise legal meaning. It means the transfer of property for a fixed price in money or its equivalent. Grinell Corp. v. United States, 390 F.2d 932 (Ct.Cl. 1968). The sale of an item is a transaction distinct from soliciting offers to buy the item. Trabon Engineering Corporation v. Dirkes, 136 F.2d 24 (6th Cir. 1943).

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Restricting the definition of "sale" to its legal meaning gives the interpretation of 11 C.F.R. §104.13 intended by the Commission: if a newspaper, magazine, or book contains information from FEC reports, the sale of that publication will not be considered to be use of FEC reports for a commercial purpose. This interpretation is buttressed by the legislative history, specifically Senator Nelson's remarks in the debate on 2 U.S.C. §438(a)(4) concerning the use of FEC disclosure documents for journalistic purposes.^{2/}

Assuming respondent acted in good faith on what it thought was a proper interpretation of 11 C.F.R. §104.13, the reasonableness of its interpretation should be considered an important mitigating circumstance. It should not, however, constrain the Commission to endorse an interpretation which is contrary to the Commission's original intent in prescribing 11 C.F.R. §104.13 and contrary to congressional intent in enacting the commercial use prohibition in 2 U.S.C. §438(a)(4).

Since the Commission has not altered its interpretation of 2 U.S.C. §438(a)(4) or 11 C.F.R. §104.13, the procedural defect alleged by respondent does not exist.

B. The Commission's interpretation of 2 U.S.C. §438(a)(4) accurately reflects congressional intent.

Respondent further submits that the Commission's interpretation of 2 U.S.C. §438(a)(4) is not mandated by the Act or its

^{2/} MR. NELSON. Do I understand that the only purpose is to prohibit lists from being used for commercial purposes?
MR. BELLMON. That is correct.
MR. NELSON. The list is a public document, however.
MR. BELLMON. That is correct.
MR. NELSON. And newspapers may, if they wish, run lists of contributors and amounts.
MR. BELLMON. That is right 117 Cong. Rec. 30058 (1971)

legislative history. R.M. at pp. 9-14. Respondent argues that the prohibition against the use of information copied from FEC reports was 1) of secondary importance to the overall scheme of disclosure and 2) primarily aimed at protecting contributors from the practice of list brokering for profit with only the additional object of protecting contributors from harassment by other unsolicited mailings. R.M. at pp. 11-12.

The prohibition against commercial use of FEC reports may have been secondary to the overall scheme of enforcement, but the Commission should not therefore decline to enforce the statute. Cf. Ross v. Community Services, 396 F.Supp. 278 (D.Md. 1975), motion granted 405 F.Supp. 831 (D.Md. 1975), affirmed 544 F.2d 514 (4th Cir. 1976). Moreover, the Congress intended to accomplish more by the prohibition in 2 U.S.C. §438(a)(4) than proscribe the use of FEC reports in list brokering. On the contrary, Congress intended to proscribe the use of information in FEC reports for any commercial solicitation whether conducted by a "list-broker" or not.

While Senator Bellmon's remarks in the floor debate on 2 U.S.C. §438(a)(4) primarily deal with list brokers, this was only because list brokers were perceived as the gravest potential offenders. 117 Cong. Rec. 30057 (1971). The statute by its terms proscribes not only the sale of information copied from FEC reports but also the use of such information for any commercial purpose. Senator Bellmon's opening statement introducing the amendment stated that "the purpose of this amendment is to protect the privacy of ... public spirited citizens" 117 Cong. Rec. 30057 (1971). It cannot be supposed that from the perspective of

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the individual citizen whose rights the statute aims to protect that it is of any difference whether an unsolicited mailing comes via the services of a list broker or not.

Respondent further argues that attitude surveys show that recipients of unsolicited mailings may not be so annoyed as to deter them from making future political contributions. R.M. at p. 13. Even if these studies are accurate, they are irrelevant. What is controlling in this matter is that Congress perceived that the prospect of receiving unsolicited mailings would deter individuals from making political contributions. The Commission should not decline to enforce a statute even if it believes Congress' action in passing it was based on erroneous information. Ross v. Community Services supra, at 286.

In summary, we believe that Congress did not intend 2 U.S.C. §438(a)(4) to only proscribe the practice of list brokering for profit but rather to more broadly proscribe the sale or use by any party for a commercial purpose of information copied from FEC reports.

C. The Commission's interpretation of 2 U.S.C. §438(a)(4) does not violate the Journal's First Amendment rights.

Respondent contends that 2 U.S.C. §438(a)(4), as interpreted by the Commission, violates the Journal's First Amendment right to engage in commercial speech. R.M. at pp. 14-15. Since the Journal is a fledgling publication, denying it the use of the Reagan reports allegedly "squashes the only economically feasible form of commercial speech, which in turn will force the Journal to close down." R.M. at pp. 16-17.

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In our opinion the Commission's interpretation does not violate the Journal's First Amendment rights.

(1) The First Amendment is inapplicable to this matter.

2 U.S.C. §438(a)(4) does not abridge freedom of expression. Respondent confuses the statute's prohibition on the use of information in FEC reports to solicit subscriptions with a prohibition on the Journal's right to use direct mail solicitations, per se. 2 U.S.C. §438(a)(4) does not prohibit such solicitations, it only requires that the mailing list used be obtained from a source other than FEC disclosure documents.

The Journal would have the Commission affirmatively assist it in selling its magazine by permitting the use of information in disclosure reports to solicit subscriptions. There is no obligation on the Commission to do so under the First Amendment. See, Overseas Media Corp. v. McNamara, 259 F.Supp. 162 (D.D.C. 1966), reversed on other grounds, 385 F.2d 309 (D.C.Cir. 1967). If the Commission did decide to interpret 2 U.S.C. §438(a)(4) to permit the Journal to use FEC disclosure information to solicit subscriptions, it would arguably have to allow all publications (and under respondent's theory of law perhaps all advertisers) to do the same. Cf. Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972); Bonner-Lyons v. School Committee of Boston, 480 F.2d 442 (1st Cir. 1973). Such action would render the commercial use prohibition of 2 U.S.C. §438(a)(4) meaningless.

The principal legal issue presented in this matter is whether Congress has the authority to place controls on the use of public records after disclosure. There is substantial statutory precedent for Congress' authority to control the dissemination and use of

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filing of architectural plans with a government office where they are available to public inspection and copying does not permit another's use of those plans to erect a building. Edgar H. Wood Associates v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964); Seay v. Vialpando, 567 P.2d 285 (Wyo. 1977); Jones v. Spindel, 128 Ga. App. 88, 196 S.E.2d 22 (1973); Krakener v. Lukingg, 127 N.J. Super. 270, 317 A.2d 96 (1974); Masterson v. McCroskie, 556 P.2d 1231 (Colo. Ct. App. 1976). Likewise, the filing of a patent application for a kite design, even though the patent was denied, was held to not place the kite design in the public domain so that the kite could be produced by another for commercial purposes. Zachary v. Western Publishing Company, Inc., 75 Cal. App. 3d 911, 143 Cal. Rptr. 34 (1977). This common law protection has been recently embodied in the Federal law of copyrights. 17 U.S.C. §§101 and 301.

We cite the above only as analogy to demonstrate that there are situations in which limitations are placed on the use of information on the public record.^{4/} It is reasonable to infer, however, that such a record of judicial and legislative protection of personal property rights through limits on the use of public documents would also indicate the validity of similar restrictions to protect personal privacy rights.

^{4/} It is highly debatable whether the Reagan list of contributors might be protected by 17 U.S.C. §301 as a compilation within the meaning of 17 U.S.C. §103 and we do not make that argument. We note however that mailing lists have been held to be capital assets for Federal tax purposes so that it appears the Reagan Committee would have a legitimate property interest in the unauthorized use of its contributor list. Houston Chronicle Publishing Co. v. United States, 481 F.2d 1240 (5th Cir. 1973), 24 ALR Fed 718.

Respondent argues that as a practical matter, the Journal does not have an alternative method of solicitation available to it. R.M. at pp. 16-17. While we may sympathize with the Journal's plight, we find this contention less than persuasive. There are economically feasible alternatives available, such as: advertisements in other publications, use of mailing lists borrowed or rented from private sources, and compiling mailing lists from unrestricted public sources. Even if the Journal did not have these alternatives available to it, the First Amendment would still not impose an obligation on the Commission to assist the Journal by permitting the use of FEC reports in the manner desired. Overseas Media Corp. v. McNamara, supra.

In summary, the Commission's interpretation of 2 U.S.C. §438(a)(4) does not restrict the Journal's right to commercial speech in violation of the First Amendment but rather carries out Congress' legitimate authority to control the use of Federal public records to protect personal privacy.

- (2) Even if the Commission's interpretation of 2 U.S.C. §438(a)(4) were construed as infringing the Journal's right of "commercial speech", the restriction is only incidental and does not violate the First Amendment.

Assuming, arguendo, that the Commission's interpretation of 2 U.S.C. §438(a)(4) does restrict respondent's First Amendment right of "commercial speech," it does so only incidentally. Respondents are incorrect in viewing the statute as a "manner" restriction on the Journal's First Amendment rights. R.M. at p. 17. In fact, the statute's object is not the regulation of expression but rather the protection of personal privacy.

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The Supreme Court has established four criteria to determine whether a government regulation which incidentally infringes on freedom of expression is justified. 1) It must be within the constitutional power of the government. 2) It must further an important government interest. 3) The government interest must be unrelated to the suppression of freedom of expression. 4) The incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 378 (1968).

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The government's control over the dissemination and use of public records is within its constitutional power. Nixon v. Administrator of General Services, supra. The statute in question does advance an important government interest, i.e. encouraging individual involvement in the electoral process by protecting the privacy of contributors. This interest is unrelated to the suppression of freedom of expression.^{5/} The means adopted are the least intrusive available.^{6/} 2 U.S.C. §438(a)(4) therefore meets the four O'Brien criteria.

Since the use of the names of contributors in FEC reports to compile a mailing list may be viewed as a distribution system for

^{5/} On the contrary, the statute's purpose is actually protection of freedom of expression from possible prior restraints on contributors.

^{6/} It should be noted that the statute does not prevent the Journal from contacting the persons named in the reports, per se. The Journal could still do so by obtaining the names directly from the Reagan Committee or contracting with a private list broker for the use of a similar list.

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respondent's First Amendment speech, a useful analogy can be found in Bonner-Lyons v. School Committee of Boston, supra. In that case the school board of Boston used an internal message distribution system to distribute letters to the parents of pupils urging them to attend a rally in support of an anti-busing bill in the Massachusetts House of Representatives. A pro-busing group initially sought to enjoin the school board from distributing the messages and subsequently sought to be afforded use of the distribution system to disseminate pro-busing materials. The First Circuit U.S. Court of Appeals held that once the forum was opened for the expression of views on the busing question, the school board could not pick and choose the views to be expressed. The court's order offered the school board a choice of either ceasing further distribution of anti-busing materials or affording the pro-busing group an equal opportunity to use the system. By allowing the board to simply cease distribution of the anti-busing material, the court's order implies that had the school board not used the system for this purpose in the first place, the plaintiffs would have had no ground for a First Amendment challenge to a denial of use of the distribution system.

The analogy to the matter before the Commission is apt. Because respondents claim commercial solicitation comes within the protection of the First Amendment under the Supreme Court's holding in Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), they claim a right to use lists of contributors in FEC reports to conduct such solicitations. The Bonner-Lyons case underscores the point that until the Commission

allows the use of FEC reports to conduct commercial solicitations, the First Amendment does not require the Commission to permit any such use of disclosure documents. On the other hand, the case also shows that to allow FEC reports to be used for such solicitations, may raise serious questions whether all similarly situated commercial entities would have to be provided the privilege of using FEC reports in this matter.

SUMMARY

The Commission's interpretation of 2 U.S.C. §438(a)(4) and 11 C.F.R. §104.13 has not varied since the regulation was prescribed in 1976. The Journal is therefore not being subjected to a new interpretation which should only be applied prospectively.

Furthermore, the Commission's interpretation of the statute and regulation accurately reflects congressional intent and does not violate respondent's First Amendment rights.

As we noted above, the possible ambiguity in the wording of 11 C.F.R. §104.13 should not constrain the Commission to accept the Journal's interpretation of the regulation but should instead be viewed as an important mitigating circumstance. We are therefore recommending that the Commission find reasonable cause to believe the Journal violated the Act but only require in conciliation of this matter the Journal's agreement to cease and desist from further mailings based on information in FEC reports.

RECOMMENDATIONS

1. Find reasonable cause to believe the Harvard Journal of Law and Public Policy violated 2 U.S.C. §438(a)(4) by using information copied from FEC disclosure documents to solicit subscriptions to the Journal.

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2. Send the attached proposed conciliation agreement and letter.

11/8/78
Date

William C. Oldaker
William C. Oldaker
General Counsel

ATTACHMENTS

- I. Affidavit of E. Spencer Abraham
- II. Respondent's Memorandum in Response to RTB Notification
- III. Proposed Conciliation Agreement
- IV. Letter to Respondent

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In The
FEDERAL ELECTION COMMISSION

In the Matter of the)
)
Harvard Journal of Law) MUR - 592(78)
)
and Public Policy)

AFFIDAVIT OF E. SPENCER ABRAHAM

E. SPENCER ABRAHAM, being duly sworn according to law and authorized to make this affidavit on behalf of the HARVARD JOURNAL OF LAW AND PUBLIC POLICY does depose and say:

1. I am the President of the Harvard Journal of Law and Public Policy.

2. The Harvard Journal of Law and Public Policy is a non-profit Massachusetts corporation formed in Massachusetts. Its membership is comprised of students at Harvard Law School. Its function is the publication of a journal of ideas. The format of the Journal follows that of a law review, including articles by outside contributors and student-written notes and comments. The Journal does not receive financial support from Harvard University. It is a new publication without an established list of subscribers. One issue has been printed.

3. To attempt to establish a circulation, the Journal contacted both by letter and phone the Federal Election Commission in March of 1978 in an effort to obtain a list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, which was on file in the public records of the Commission. The Journal apprised the Commission of the purposes for which it requested the list. In subsequent discussions between Mr. Abraham and

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Mr. Michael Malone of the FEC's public documents section, the Journal reiterated its purpose for requesting a copy of the Reagan list. Mr. Malone of the Commission furnished the records to Mr. Thomas Klunzinger on April 17, 1978. During discussions prior to the obtaining of such lists Mr. Malone indicated that he felt the use of the lists for commercial purposes was in violation of 2 U.S.C. section 438 (a) (4). Mr. Malone was then informed of the existence of 11 C.F.R. section 104.13. Mr. Malone was unfamiliar with this provision and made no further comment with regard to the legality of using the Reagan lists after notification of the existence of this regulation (a copy of the regulation was sent to Mr. Malone).

4. After the Journal obtained the Reagan list, it mailed letters to approximately 2,500 of the persons named in the list. The letters were mailed on the following dates: June 21 - 721; June 27- 675; June 30 - 550; July 3 - 531.

5. In mid-July, 1978, Mr. Gary Christian of the Enforcement Division of the Commission called Mr. Abraham and said that the Commission considered the Journal's mailings to be violations of § 438 (a) (4). Thereupon the Journal ceased mailing letters to persons named in the Reagan list since that time.

6. The Journal has an extremely limited budget. It must advertise if it is to continue in business, but it can afford to advertise only to a discrete group that is likely to be sympathetic to the Journal's purpose. In the opinion of the Journal's editors, the Reagan list includes the names of persons most likely to support the Journal with subscriptions or contributions.

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I have read the foregoing and it is true to the best of my knowledge, information and belief.

E. Spencer Abraham

E. Spencer Abraham
President, Harvard Journal
of Law and Public Policy

Sworn and Subscribed to before me this
20th day of September, 1978

Wilma Jean Hammond
Notary Public
Wayne Co
aug 20, 1979

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RESPONSE OF THE JOURNAL TO THE COM-
MISSION'S NOTICE THAT IT HAS REASON
TO BELIEVE THAT THE JOURNAL MAY HAVE
VIOLATED 2 U.S.C. § 438(a)(4).

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452-6770

Attorney for the Harvard
Journal of Law and Public
Policy

September 25, 1978

According to agreement between the Journal and the Commission
this response supersedes the "Preliminary Statement of the
Dispute by the Journal" dated September 18, 1978.

ATTACHMENT II

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I. Facts.^{*/}

The Harvard Journal of Law and Public Policy is a new periodical published by a not-for-profit, tax exempt organization comprised of students at Harvard Law School. In the one issue its editors have produced, the Journal follows the law review format of articles from outside authors supplemented by student-written notes and comments. It does not support or oppose candidates for election, expressly or otherwise, or attempt to influence the outcome of elections in any other way.

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Stating that their purpose was to establish a circulation for the Journal, its editors asked the Commission in the early Spring of 1978 to provide a copy of the list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, on file in the Commission's public records ("Reagan List"). The Commission furnished to the Journal, in April 1978, a list of some 20,000 names. Thereafter the Journal began to mail, in batches of several hundred envelopes at a time, a letter that solicited subscriptions and donations to the Journal.^{**/} By July 1978, the letter had been

^{*/} This recitation of facts is supported by the attached affidavit of E. Spencer Abraham, President of the Journal.

^{**/} The letter requesting subscriptions and donations was short and polite. After explaining the objectives of the Journal, it stated:

"If you wish to subscribe to the
Harvard Journal of Law and Public

(footnote continued)

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sent to approximately 2500 persons named in the Reagan list. At that time the Commission informally told the Journal that it had reason to believe that the Journal's use of the Reagan list may have violated a section of the Federal Election Campaign Act of 1971 as amended ("Act"), 2 U.S.C. § 438(a)(4), and as implemented by the Commission's relevant regulation, 11 C.F.R. § 104.13.^{*/} The Journal thereupon ceased using the list and has not used it since. The Commission's informal communication was confirmed by a letter of August 3, 1978 from Mr. Oldaker to Mr. Abraham, the President of the Journal ("August 3 letter").

II. Scope of the Dispute.

This dispute concerns the proper interpretation of the proviso of 2 U.S.C. § 438(a)(4), which states that "any information copied from such reports and statements [filed

(footnote continued)

Policy, please send the four dollar subscription fee in the enclosed self-addressed stamped envelope. And, if you can, please join the Journal's Patrons Program by donating \$50 to the cause of academic diversity and freedom of thought. Since the Journal is a non-profit making educational organization, of course, such contribution will be tax deductible."

^{*/} The Commission submitted 11 C.F.R. § 104.13 to Congress on January 11, 1977 and, pursuant to 2 U.S.C. § 438(c), the regulation became effective thirty legislative days thereafter. Thus 11 C.F.R. § 104.13 is the regulation that governs the present dispute.

with the Commission and required to be made available for public inspection and copying) shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose." The Journal's position is that its use of the Reagan list did not violate any of the elements of this proscription, and that the Commission acted correctly in April 1978 when it gave the Journal the Reagan list, with the apparent understanding that it would be used for the purpose of soliciting contributions to establish the Journal's circulation.

There appears to be no dispute about whether the Journal "sold" the Reagan list. The Journal has not done so. The Commission did not contend in its August 3 letter that the Journal may have violated the Act by "soliciting contributions,"^{*} and the Journal assumes that this issue is not in dispute in this matter.

^{*}/ In his letter to the Journal of August 3, 1978, Mr. Oldaker stated that:

"[T]he use of names obtained from the FEC reports to solicit subscriptions to a magazine such as the Journal is considered to be for commercial purposes and prohibited by the Act."

There is no reference to suspected violations of the prohibition against soliciting contributions.

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There is a clear dispute between the Journal and the Commission as to whether the Journal violated the Act's proscription against utilizing the list "for any commercial purpose." The Journal's position, explained in the following paragraphs, is that it did not violate this proscription or the proscription against soliciting contributions.

III. Argument.

- A. The Plain Meaning of 2 U.S.C. § 431(e) and 11 C.F.R. § 100.4(a)(1) Permits the Journal's Solicitation for Donations.

The Journal solicited donations for a purpose that has nothing to do with political election campaigns. Thus its solicitations were not included within the proscription in § 438(a)(4) against "soliciting contributions." Section 431(e) states unequivocally that "[w]hen used in this subchapter," which includes § 438(a)(4), the definition of "contribution" is limited to a contribution for the purpose of influencing the result of a political election campaign. The Commission's own regulations, at 11 C.F.R. § 100.4(a)(1), properly adopt the limited definition of the Act. That limited definition is exclusive, and no special definition of the term "contribution" applies exclusively to § 438(a)(4). Thus there can be no question that the proscription against "soliciting contributions"

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in § 438(a)(4) does not extend to the donations that the Journal solicited.^{*/} The Commission cannot contravene the terms of the Act it enforces on the basis of its belief that it would have been wise for Congress to have defined its terms differently.

B. The Plain Meaning of 11 C.F.R.
§ 104.13 Permits the Activities
by the Journal That Are the Sub-
ject of This Dispute.

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"Commercial purpose" is a phrase of broad and uncertain scope. It is not defined in the Act; nor is it a term of art with a settled meaning. The Commission's regulations do not define the term, but 11 C.F.R. § 104.13 includes an exception to the "commercial purpose" proscription. According to that exception, "'any commercial purpose' does not include the sale of newspapers, magazines, books or other similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." Thus, according to the regulation, the Act does not proscribe utilization of campaign donor lists for the purpose of sale of magazines the principal purpose of which is not to communicate the lists. The activities of the Journal which precipitated this MUR clearly fit within the express exception of 11 C.F.R. § 104.13. The Journal is a periodical similar to a magazine; its principal purpose is not

*/ Moreover, the prohibition against use of donor lists for a "commercial purpose" does not prohibit requests for donations to a not-for-profit entity. Whatever the meaning of "commercial purpose," it does not comprehend gifts.

to publish campaign donor lists; and its use of the Reagan list to invite subscriptions was for the purpose of "sale" of the Journal. The Journal contends that, for this reason alone, the Commission lacks reason to believe that the Journal may have violated the Act by using the list for a "commercial purpose." The Journal also contends that it was fully justified in relying on the plain meaning of the Commission's regulations when it determined that the "commercial purpose" proscriptioin would not apply to its activities.

C. The Commission's August 3 Letter Represents an Invalid Repudiation of the Plain Meaning of 11 C.F.R. § 104.13.

In its August 3 letter, however, the Commission stated that the Journal's activities were within the "commercial purpose" proscriptioin. The letter must be considered as representing a substantial change in the Commission's interpretation of § 438(a)(4) that repudiates the plain meaning of 11 C.F.R. § 104.13. The Commission apparently is harkening back to a 1972 regulation of the Comptroller General,^{*/} which provides:

*/ Regulatory authority under the Act was vested in the Comptroller General until 1974.

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"No information copied or obtained from reports and statements shall be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose. For purposes of this subchapter, 'soliciting contributions' means requesting gifts or donations of money, or anything of value for any cause or organization -- political, social, charitable, religious, or otherwise. For purposes of this subchapter, 'any commercial purpose' means any sale, trade, or barter of any list of names or addresses taken from such reports and statements and surveys or sales promotion activity. Violations of this section are subject to the criminal penalties provided in section 311 of the Act." 11 C.F.R. § 20.3 (1972); 37 Fed. Reg. 6167 (1972).

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This regulation purported to proscribe activity of the type that is at issue in this case, but its proscription of contributions exceeded the scope of the Act, and its definition of "commercial purpose" conflicted with First Amendment principles protecting commercial speech, which the Supreme Court has clarified since 1972. The Commission apparently recognized the infirmity of the 1972 regulation when, in 1977, it promulgated the substantially less restrictive provisions of 11 C.F.R. § 104.13, in supersession of 11 C.F.R. § 20.3 (1972). And the Journal was certainly justified in assuming that the 1977 regulation represented a substantial change away from the Commission's interpretation of the Act in the 1972 regulation. The Commission's present vacillation in the direction of the Comptroller's 1972 regulation is wrong as a matter of administrative procedure,

proper interpretation of the intent of Congress, and proper application of First Amendment principles.*/

D. A Finding That the Journal Violated the Act Would Be Improper as a Matter of Administrative Procedure.

Irrespective of the merits of the new interpretation that the Commission has placed on § 438(a)(4), a finding that a violation had occurred in this case would be a denial of due process. While it is proper for an agency to alter its policies and approaches, e.g., Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App. D.C. 175, 183 (1971), due process indicates that sanctions be applied only prospectively. Having fundamentally altered its interpretation of § 438(a)(4) in its August 3 letter, the Commission cannot now expose the Journal to the possibility of a civil penalty that would attend a finding of violation of the Act, on the basis of the Journal's actions taken prior to August 3 in good faith reliance on the

*/ In transmitting its proposed general regulations to Congress on January 11, 1977, the Commission did not indicate that it intended to interpret 11 C.F.R. § 104.13 as merely a restatement of 11 C.F.R. § 20.3 (1972). In its only relevant comment, the Commission said that 11 C.F.R. § 104.13 "defines commercial use to exclude use in news media and books." H. Doc. No. 95-44 at 48. This statement is too cryptic to be helpful in resolving the present issue. But even if it were more precise, it could not have the effect of altering the plain meaning of the regulation itself.

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Commission's prior interpretation. In this respect, the observation of Judge Friendly in NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966), is relevant: "the [judicial] hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known"

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If the Commission wishes to alter its interpretation of § 438(a)(4), it should do so either in a separate rulemaking proceeding, or by the crafting in this proceeding of a rule of prospective application. See, e.g., NLRB v. Beech-Nut Life Savers, Inc., 406 F.2d 253, 257 (2d Cir. 1968), cert. denied, 394 U.S. 1012 (1969). Indeed, the Commission's revision of its interpretation of § 438(a)(4) in a contemplated enforcement action indicates that its regulations, which it presented to Congress as a "readable and practical guide" for the public, Letter of Hon. Vernon W. Thompson, to Hon. Thomas P. O'Neill, Jan. 11, 1977, served in fact as a snare for the Journal. See generally, Moser v. United States, 341 U.S. 41 (1951).

E. The Commission's Interpretation of § 438(a)(4), as Expressed in Its August 3 Letter, Is Not Mandated by the Act or Its Legislative History Because the Journal Is Not a Commercial Organization and Its Mailings Did Not Harass Recipients.

In passing a proscription against use of campaign filings for "commercial purposes," without defining that term,

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Congress implicitly gave the Commission broad discretion to define the term in particular circumstances. Where First Amendment problems are raised by the "commercial purpose" proscription, the Commission has a duty to define it in a way that preserves the validity of the Act. For the reasons stated in subsequent paragraphs, the application of § 438(a)(4) to the Journal indicated by the Commission in its August 3 letter violates the First Amendment. Moreover, if the Commission's interpretation prohibits use of the donor lists on file at the Commission for any type of solicitation, that interpretation is overbroad in light of the First Amendment. It is therefore especially significant that the Act itself does not require such application or interpretation.

The "commercial purpose" proscription in the proviso to § 438(a)(4) was added as a floor amendment by Senator Bellmon without discussion in hearings. By contrast, the public disclosure provision to which the proscription was belatedly attached had been a keystone of the legislative scheme from its inception. Thus as the fabric of the Act was woven, the assumption of Congress was that campaign donor lists would be made public without

restriction,^{*/} and the intent of Congress to restrict the use of information once publicized was at best pale and secondary in relation to the paramount intent to require public disclosure.^{**/} The attitude of Congress reflected the approach of earlier campaign disclosure acts, which placed no restriction

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^{*/} It was the judgment of Congress that its objectives, the promotion of honesty and the appearance of honesty in election campaigns and the increase in information relevant to voting decisions, justified disclosure and publicization of donors' names, even though the result was to invade the donors' privacy of association and to deter future contributions to a significant extent, Buckley v. Valeo, 424 U.S. 1, 68, 83 (1976); see also id. at 237 (dissenting opinion of Burger, C.J.).

^{**/} Indeed, the relative insouciance with which Congress treated its restrictions on the use of public information is indicated by its failure to provide any restriction on the use of information filed with state officials. See 2 U.S.C. § 439(b)(3). The absence of such a restriction was filled by the Commission's Advisory Opinion No. AO 1975-124, CCH Fed. Election Campaign Financing Guide ¶ 5191. Moreover, in light of the regulatory scheme it had crafted, Congress itself was doubtful about its ability to control the use of information in the public domain. When Senator Bellmon, the sponsor of the floor amendment that became the proviso to § 438(a)(4), argued for his amendment, the leader of the floor debate of the Act, Senator Cannon, responded:

"Mr. President, this is certainly a laudable objective. I do not know how we are going to prevent it from being done. I think as long as we are going to make the lists available, some people are going to use them to make solicitations. But as far as it can be made effective, I am willing to accept the amendment" 117 Cong. Rec. 30057 (1971).

In stating that, in light of the Act's scheme, the achievement of Senator Bellmon's objectives could not be guaranteed, Senator Cannon in effect stated that Congress did not consider those objectives to be a primary part of the legislative scheme.

on the use of disclosed lists of contributors once they were in the public domain. See, e.g., 37 Stat. 25, 26 (§ 5) (1911).

The floor discussion of Senator Bellmon's amendment is significant. It indicates that his purpose was primarily to protect contributors from the practice of list-brokering for profit. Additionally, he intended to protect the privacy of contributors from harassment of the sort that would deter their making future contributions to candidates for political office. 117 Cong. Rec. 30057-58 (1971). It is the position of the Journal that it has not committed either of the practices that disturbed Senator Bellmon.

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First, it has not engaged in list-brokering. List brokering involves collection and dissemination of names for profit, as distinguished from the use of a list of names with the hope of producing profitable transactions. Indeed, the Journal's use of the Reagan list is far removed from either practice; as a not-for-profit organization, it neither sold the Reagan list nor used it for profit. Consequently, the Journal did not use the list for a "commercial purpose," as Congress intended to define that term.

Second, the Journal's mailing of a solicitation letter to persons on the Reagan list is not an invasion of privacy or harassment that will deter future contributions, ^{*/}

^{*/} The Journal has not engaged in more intrusive forms of solicitation, such as telephone calls and door-to-door solicitation of persons on the donor list. Whether the Commission

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for the following reasons. From a general point of view, householder attitude surveys in 1972 and 1974 by the U.S. Postal Service show that persons receiving unsolicited mail do not consider it either an invasion of privacy or harassment.^{*/} Moreover, unsolicited mailings are a prevalent form of advertising that, it is reasonable to assume, is directed with special frequency toward persons sufficiently affluent to contribute more than \$100 to a political candidate.^{**/} If campaign contributors are already accustomed to receiving unsolicited mailings from other sources, it is unreasonable to assert that the receipt of additional mailings as a result of their campaign contribution will so annoy them that they will stop making contributions. With respect to the Journal letter

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would be justified in placing time, place or manner restraints on telephone or door-to-door solicitations using campaign donor lists is therefore a question that is not comprehended by this dispute.

^{*/} The persons surveyed in 1974 stated that 66% of the unsolicited mailings they had received were "the kind of information that I like to receive" or "interesting and enjoyable, but not especially useful to me." In 1972 the figure was 64%. In 1974, 20% of the mailings were described as "neither interesting, enjoyable nor useful." In 1972 the figure was 21%. In both survey years, only 4% of the mailings were described as "objectionable." No opinion or no answer was given regarding 10% of the mailings in 1974 and 11% of the mailings in 1972. U.S. Postal Service, Office of Public Information, "The Household Advertising Mailstream," 1972 and 1974, reprinted in B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 5.

^{**/} In B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 7, it is stated that persons with "higher income" tend to receive an above-average number of pieces of unsolicited mail.

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in particular, there are strong reasons for assuming that their message would be even more favorably received by the persons on the Reagan list than average unsolicited mailings are received by the average householder. The Journal's letter both informed recipients of the existence of the Journal and asked for subscriptions and donations. Most Reagan supporters would be interested to learn about the existence and objectives of the Journal even if they did not subscribe or donate to it. Additionally, the content and form of the Journal's letter was inoffensive, and its format -- a letter in an envelope -- meant that it could be readily discarded if unwanted.

Thus, the Act, as illuminated by its legislative history, does not require the interpretation expressed by the Commission in its August 3 letter.

F. The Commission's August 3 Interpretation of § 438(a)(4), as It Is Proposed to Be Applied to the Journal, Violates the First Amendment.

A finding by the Commission that the Journal violated § 438(a)(4) by soliciting subscriptions or donations would construe the section in a way that violates the First Amendment. The First Amendment value at stake here is protection of commercial speech.^{*} The

^{*}/ 2 U.S.C. § 438(a)(4) and 11 C.F.R. 104.13 do not on their face proscribe, and therefore do not raise an issue concerning, the use of lists of donors to the campaign of one candidate by other candidates for the purpose of soliciting votes or work from individuals. The Act

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relevant principles were declared by the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Virginia Pharmacy decision makes it clear that the First Amendment protects commercial speech in the form of a proposal of a commercial transaction, even though "the advertiser's interest is a purely economic one." Id. at 762. According to the Court:

"Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." Id. at 765.

The Journal's solicitation of subscriptions fits this standard for First Amendment protection; moreover, the facts that the

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and regulation do prohibit a candidate's use of donor lists to solicit contributions. The question whether this prohibition is consonant with the First Amendment's protection of speech, and the corollary right effectively to participate in the electoral process, however, is not raised by the facts of the present controversy. That the Journal is a printed periodical and a forum for discussion of ideas implicates the First Amendment's protection of the press, but freedom of the press is not the primary element of the Journal's position.

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Journal's solicitation was for the purpose of giving notice of the existence of a medium for discussion of ideas, and that its impetus was education, not profits, strengthen the protection afforded by the First Amendment.

Moreover, the First Amendment requires access to the mails for the transmission of inoffensive communications. "[T]he use of the mails is almost as much a part of free speech as the right to use our tongues . . ." United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting), quoted with approval, Blount v. Rizzi, 400 U.S. 410, 416 (1971). See also Taylor v. Sterrett, 532 F.2d 462, 480 (5th Cir. 1976). The mails, of course, are the medium of communication used by the Journal.

However the Commission's burden of justifying its proscription of the Journal's activities is defined, the Commission cannot meet it. The Journal has strong grounds for contending that the Commission's prohibition of its use of the Reagan list effectively denies the Journal all communication. The Journal's meager budget permits only a small amount of advertising directed toward a discrete group likely to support the Journal's purposes. In the opinion of the Journal's editors, the Reagan list includes the persons who are most likely to subscribe or make a donation. Thus, the Commission's prohibition squelches the only economically feasible form of commercial speech,

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which in turn will force the Journal to close down.^{*/} In Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (8-0 decision), the Court stated that whether "sellers realistically are relegated", by a proscription against one form of speech, to alternatives that are "more cost[ly]," involve "less autonomy," "are less likely to reach persons not deliberately seeking sales information," or are "less effective media" determine whether the alternatives are "satisfactory" and therefore whether the existence of the alternatives is a persuasive basis for sustaining the proscription. Id. at 93.

In the present case, there is no realistic alternative method of communication open to the Journal if mail solicitation of the persons on the Reagan list is prohibited. Thus, it is at least arguable that the Commission must meet the heavy burden of showing that a compelling public interest justifies its prohibition, because the effect of the prohibition is to prevent speech.^{**/}

Indulging the assumption, however, that if the Journal is denied use of the Reagan list, other means of commercial speech will realistically remain open to it, the Commission's prohibition of the Journal's solicitation of persons by means of the Reagan list might be characterized as a restriction on the manner of its speech. The Commission may impose reasonable time, place and manner

^{*/} The Journal receives no financial support from Harvard University.

^{**/} "After Virginia Pharmacy Bd. it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental'." Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 92 n.6. (1977) (emphasis added).

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restrictions on the exercise of speech, provided that the restriction is "narrowly tailored to further the [government's] legitimate interest." Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). But the First Amendment requires that the Commission justify its prohibition.^{*/} Thus, even if the interpretation of § 438(a)(4) announced in the Commission's August 3 letter is a restraint on only the manner of speech, the Commission must nonetheless show that its interpretation of § 438(a)(4) "is needed to assure" a legitimate governmental interest. Linmark Associates, Inc. v. Township of Willingboro, supra, 431 U.S. at 95. The Journal contends that the Commission's interpretation is not necessary for that purpose.

The only governmental interest that is asserted in the legislative history of the Act as the basis for its "commercial purpose" proscription is protection of election campaign contributors from harassment of the sort that will significantly deter their contribution to future campaigns. It may be assumed that this interest is legitimate and substantial. But the Commission must show clearly that its proscription of inoffensive mail solicitations furthers this interest.

^{*/} That justification cannot be simply that "ample alternate channels of communication," Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976), remain available to the Journal. "Restraint on expression may not generally be justified by the fact that there may be other times, places or circumstances available for such expression." Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976). See also Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Kleindeinst v. Mandel, 408 U.S. 753, 765 (1972).

The Journal contends that the Commission cannot make this showing for the reasons stated in section E of its argument, supra at pages 12-14. ^{*/} Therefore it cannot justify its proscription against the inoffensive mail solicitation of persons named in a donor list on file at the Commission by a tax-exempt, non-commercial organization not involved in influencing the outcome of political campaigns.

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In contrast with the legitimate governmental interest in protecting contributors from harassment that will deter future contributions, two putative "interests" are not legitimate and therefore cannot justify abridgment of the First Amendment interests of the Journal and its addressees. First, the government has no legitimate interest in paternalistically insulating the public from advertising messages in order to minimize the possibility of annoyance. As the Supreme Court stated in the Virginia Pharmacy case, supra, 425 U.S. at 770, the First Amendment requires that government:

*/ Additionally, if the Journal's position regarding Congress' definition of "contributions" (see subsection A of this argument) is correct, it is clearly proper for the Journal to solicit donations from the persons named on the Reagan list. Consequently, there can be no justification for prohibiting the solicitation of subscriptions. Surely it is not likely that the recipients of a letter from the Journal will be deterred from making future campaign contributions simply because a solicitation of a subscription has been added to the solicitation of a donation.

"assume that this [advertisement] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them."

Furthermore, in Cohen v. California, 403 U.S. 15, 21 (1971), the Court stated:

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." (Emphasis added.)

Indeed, the assumption is that the public has an interest in receiving -- indeed, a right to receive -- advertising. Virginia Pharmacy, supra, 425 U.S. at 757.

It is true that when communications are mailed to a residence, the householder's privacy interests must be considered along with the interests of mailer and householder in communication by mail. A householder has the right to exclude offensive mail from his home. Rowan v. Post Office Department, 397 U.S. 728 (1970). But the Court and Congress have made it clear that the decision as to what shall be deemed offensive and therefore excluded from an individual's home is to be made by the individual himself,

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id. at 736; see also Martin v. City of Struthers, 319 U.S. 141, 144 (1943), not by a government agency sitting "astride the flow of mail." Lamont v. Postmaster General, 381 U.S. 301, 306 (1965). The statutory mechanism for such exclusion exists in 39 U.S.C. § 3008 (1976).^{*/} Moreover, the businesses that are the primary users of unsolicited mail advertising operate a centralized "Mail Preference Service" that invites persons who receive their mail to ask that their names be removed from active solicitation lists.^{**/}

Second, there is no legitimate interest in protecting the proprietary interest of candidates in donor lists filed with the Commission. The assertion of such an interest follows an assumption that if the public may use campaign donor lists filed with the Commission for solicitations, the value of those lists to candidates will be dissipated.^{*/} But this assumption, even if it is accurate,

^{*/} While the statute refers only to mail that is "erotically arousing or sexually provocative," in practice "the power of the householder under the statute is unlimited; he may prohibit the mailing [to himself] of a dry goods catalog because he objects to the contents" Rowan v. Post Office Department, 397 U.S. 728, 737 (1970).

^{**/} This voluntary approach was recommended by the Privacy Protection Study Commission in its 1976 Report to Congress. Interestingly, "[c]onsumer response to MPS [Mail Preference Service] has yielded more requests to get on than off mailing lists." B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 9.

^{***/} The rationale behind this assumption is apparently as follows: the more frequently the persons on a mailing list are solicited, the less likely it is that they will respond to a particular solicitation; in other words, the more a list is used, the less effective it becomes.

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cannot support the Commission's position. The legislative history of the Act affords no basis for the Commission's assertion of a mandate to protect such an "interest." In adopting the proviso to § 438(a)(4), Congress adverted only to the objective of protecting contributors from harassment. There is no mention of an objective of protecting candidates' interests in maximizing the effectiveness of their campaign donor lists for their future use or for sale or loan to other persons.

There is a more fundamental flaw in the assertion of this putative "interest." At bottom, it must be justified by the rationale that additional solicitations by the public will cause persons on candidates' donor lists to direct some of their money and loyalty to new causes. But the prohibition of this effect is not a legitimate governmental interest. The Commission cannot stifle the free flow of truthful and inoffensive information because it assumes that recipients will act directly and lawfully on that information to their detriment or to that of the general public.^{*/} Such a

^{*/} In the Linmark case, the Court concluded that the regulatory proscription was based on the "content" of the communications at issue because the Township "fears their 'primary' effect -- that they will cause those receiving the information to act upon it." "The [Township] Council has sought to restrict the free flow of these data because it fears that otherwise [the recipients of the data] will make decisions inimical to what the Council views as the [recipients'] self-interest and the corporate interest of the township. . . ." The Court characterized the "constitutional defect" in such a regulation as "basic." 431 U.S. at 94, 96.

rationale involves a prohibition of speech on the basis of its content, the most suspect type of restraint on First Amendment rights.

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Finally, the interpretation that the Commission adopted in its August 3 letter is not necessary to protect the government's legitimate interest in assuring the proper use of public records. If the Commission asserts such an interest, the assertion cannot strengthen the Commission's position. Such an assertion would simply beg the question of what constitutes proper use of the campaign donor lists on file with the Commission. Statutes other than the Act itself do not answer this question; ^{*}/ and reference to the Act itself raises the questions of proper interpretation of § 438(a)(4) in light of its legislative history and the limitations of the First Amendment, which have already been discussed in this brief.

^{*}/ Statutes relating to the disclosure of information, such as the Privacy Act, 5 U.S.C. § 552a, the exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b), and the criminal proscription of disclosure by officials of confidential information, 18 U.S.C. § 1905, are not relevant to the duties of the Commission with respect to the campaign donor lists in its files, because these lists are not secret or confidential. Congress has required that they be disclosed to the public. The present dispute about the meaning of § 438(a)(4) concerns the ways in which the public may use lists already in the public domain.

For the foregoing reasons, the Commission has not shown and cannot show that its new interpretation of § 438 (a)(4), which abridges First Amendment rights, is necessary to protect a compelling, or even a legitimate, governmental interest, or that its interpretation involves a proscription of a manner of speech that is narrowly tailored to further such an interest.

IV. Conclusion.

The Journal respectfully submits that the plain meaning of the Act and the regulations promulgated by the Commission for its implementation, the legislative history of the Act principles of due process, and First Amendment principles require the conclusion that the Journal has not violated § 438(a)(4) of the Act as that section must be construed, and that the Commission lacks the authority to prohibit the Journal's mail solicitation of the persons whose names appear on the Reagan list for the purpose of establishing its circulation.

Respectfully submitted,

Lawrence T. MacNamara, Jr.
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorney for the Harvard
Journal of Law and Public
Policy

79940114535

BEFORE THE FEDERAL ELECTION COMMISSION
November 6, 1978

In the Matter of)
)
Harvard Journal of Law) MUR 592 (78)
and Public Policy)

CONCILIATION AGREEMENT

This matter having been initiated by the Federal Election Commission ("Commission") in the normal course of carrying out its supervisory responsibilities and reasonable cause to believe having been found that the Harvard Journal of Law and Public Policy ("Respondent") violated the provisions of 2 U.S.C. §438(a) (4);

NOW, THEREFORE, the Commission and Respondent having duly entered into conciliation as provided for in 2 U.S.C. §437g(a) (5), do hereby agree as follows:

1. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
2. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.
3. Respondent is a non-profit Massachusetts corporation made up of students at Harvard Law School which publishes a law review entitled Harvard Journal of Law and Public Policy ("Journal").
4. On April 17, 1978, Respondent obtained from the Public Disclosure Division of the Federal Election Commission copies of disclosure reports filed by the Citizens for Reagan Committee ("Reagan Reports") and stated its intention to use these reports to compile a mailing list to solicit subscriptions to its publication.

ATTACHMENT III (1 of 3)

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- 7 2 0 4 0 1 1 5 3 1
5. That the Reagan Reports contained the names of approximately 25,000 contributors to the 1976 presidential election campaign of Governor Ronald Reagan.
 6. That Respondent compiled a mailing list from the information contained in the disclosure reports and mailed letters soliciting subscriptions to the Journal to approximately 2,500 persons on the following dates and in the following amounts: June 21, 1978 -- 721; June 27, 1978 -- 675; June 30, 1978 -- 550; July 3, 1978 -- 531.
 7. That Respondent compiled the mailing list and conducted the above mailings in reliance on its interpretation of 11 C.F.R. §104.13 which states in part that "'any commercial purpose' does not include the sale of newspapers, magazines, books or similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above."
 8. That upon being informed on July 10, 1978 by a Commission staff member that the exemption contained in 11 C.F.R. §104.13 did not extend to the use of Commission disclosure reports to solicit subscriptions to a magazine, Respondent agreed to desist from further mailings pending the Commission's resolution of this matter.
 9. Having considered Respondent's legal arguments, the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. §438(a)(4).

- 10. Respondent will desist from using the mailing list made up of contributors in the Reagan Reports to solicit subscriptions to the Journal and will not use information in disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose in the future.
- 11. This conciliation agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.
- 12. The Commission, on the request of anyone filing a complaint under 2 U.S.C. §437g(a)(1) concerning matters at issue in this Agreement, or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.
- 13. This Agreement shall become effective as of the date that both parties have executed the same and the Commission has approved the entire Agreement.

Date

 William C. Oldaker
 General Counsel
 Federal Election Commission
 1325 K Street, N.W.
 Washington, D.C. 20463
 (202) 523-4143

Date

 E. Spencer Abraham
 President
Harvard Journal of Law and
Public Policy
 223 Langdell Hall
 Harvard Law School
 Cambridge, Massachusetts 02138
 (617) 495-3105

7904011587



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. E. Spencer Abraham, President
Harvard Journal of Law and Public
Policy
223 Langdell Hall
Harvard Law School
Cambridge, Massachusetts 02138

Re: MUR 592(78)

Dear Mr. Abraham:

On _____, 1978, the Commission determined that there was reasonable cause to believe that the Harvard Journal of Law and Public Policy ("Journal") violated §438 (a)(4) of the Federal Election Campaign Act of 1971, as amended.

Specifically, the Commission found reasonable cause to believe that the Journal used information copied from Commission disclosure reports to compile a mailing list to solicit subscriptions to the Journal in violation of the prohibition against the use of information copied from F.E.C. reports for commercial purposes contained in 2 U.S.C. §438(a)(4).

The Commission has a duty to attempt to correct such violations for a period of 30 days by informal methods of conference, conciliation and persuasion, and by entering into a conciliation agreement (2 U.S.C. §437g(a)(5)(B)). If we are unable to reach an agreement during that period, the Commission may, upon a finding of probable cause to believe a violation has occurred, institute a civil suit in United States District Court and seek payment of a civil penalty not in excess of \$5,000.

ATTACHMENT IV (1 of 2)

79040114501

We enclose a conciliation agreement that this office is prepared to recommend to the Commission in settlement of this matter. If you agree with the provisions of the enclosed conciliation agreement, please sign and return it to the Commission within ten days. I will then recommend that the Commission approve the agreement.

If you have any questions or suggestions for changes in the enclosed agreement, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4039.

Sincerely,

William C. Oldaker
General Counsel

Enclosure

cc: Lawrence T. MacNamara, Jr., Esquire
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

79040114591

IV (2 of 2)

BEFORE THE FEDERAL ELECTION COMMISSION
November 6, 1978

In the Matter of)
)
Harvard Journal of Law) MUR 592 (78)
and Public Policy)

CONCILIATION AGREEMENT

This matter having been initiated by the Federal Election Commission ("Commission") in the normal course of carrying out its supervisory responsibilities and reasonable cause to believe having been found that the Harvard Journal of Law and Public Policy ("Respondent") violated the provisions of 2 U.S.C. §438(a)(4);

NOW, THEREFORE, the Commission and Respondent having duly entered into conciliation as provided for in 2 U.S.C. §437g(a)(5), do hereby agree as follows:

1. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
2. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.
3. Respondent is a non-profit Massachusetts corporation made up of students at Harvard Law School which publishes a law review entitled Harvard Journal of Law and Public Policy ("Journal").
4. On April 17, 1978, Respondent obtained from the Public Disclosure Division of the Federal Election Commission copies of disclosure reports filed by the Citizens for Reagan Committee ("Reagan Reports") and stated its intention to use these reports to compile a mailing list to solicit subscriptions to its publication.

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5. That the Reagan Reports contained the names of approximately 25,000 contributors to the 1976 presidential election campaign of Governor Ronald Reagan.
6. That Respondent compiled a mailing list from the information contained in the disclosure reports and mailed letters soliciting subscriptions to the Journal to approximately 2,500 persons on the following dates and in the following amounts: June 21, 1978 -- 721; June 27, 1978 -- 675; June 30, 1978 -- 550; July 3, 1978 -- 531.
7. That Respondent compiled the mailing list and conducted the above mailings in reliance on its interpretation of 11 C.F.R. §104.13 which states in part that "'any commercial purpose' does not include the sale of newspapers, magazines, books or similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above."
8. That upon being informed on July 10, 1978 by a Commission staff member that the exemption contained in 11 C.F.R. §104.13 did not extend to the use of Commission disclosure reports to solicit subscriptions to a magazine, Respondent agreed to desist from further mailings pending the Commission's resolution of this matter.
9. Having considered Respondent's legal arguments, the Commission determined that Respondent's use of the Reagan Reports to solicit subscriptions to the Journal constituted use of Commission disclosure reports for a commercial purpose in violation of 2 U.S.C. §438(a)(4).

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- 10. Respondent will desist from using the mailing list made up of contributors in the Reagan Reports to solicit subscriptions to the Journal and will not use information in disclosure reports filed with the Commission to solicit subscriptions to the Journal or for any other commercial purpose in the future.
- 11. This conciliation agreement, unless violated, shall constitute a complete bar to any further action by the Commission against Respondent with regard to the matters set forth in this Agreement.
- 12. The Commission, on the request of anyone filing a complaint under 2 U.S.C. §437g(a)(1) concerning matters at issue in this Agreement, or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.
- 13. This Agreement shall become effective as of the date that both parties have executed the same and the Commission has approved the entire Agreement.

Date

 William C. Oldaker
 General Counsel
 Federal Election Commission
 1325 K Street, N.W.
 Washington, D.C. 20463
 (202) 523-4143

Date

 E. Spencer Abraham
 President
Harvard Journal of Law and
Public Policy
 223 Langdell Hall
 Harvard Law School
 Cambridge, Massachusetts 02138
 (617) 495-3105

7904011501



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. E. Spencer Abraham, President
Harvard Journal of Law and Public
Policy
223 Langdell Hall
Harvard Law School
Cambridge, Massachusetts 02138

Re: MUR 592(78)

Dear Mr. Abraham:

On _____, 1978, the Commission determined that there was reasonable cause to believe that the Harvard Journal of Law and Public Policy ("Journal") violated §438 (a) (4) of the Federal Election Campaign Act of 1971, as amended.

Specifically, the Commission found reasonable cause to believe that the Journal used information copied from Commission disclosure reports to compile a mailing list to solicit subscriptions to the Journal in violation of the prohibition against the use of information copied from F.E.C. reports for commercial purposes contained in 2 U.S.C. §438(a) (4).

The Commission has a duty to attempt to correct such violations for a period of 30 days by informal methods of conference, conciliation and persuasion, and by entering into a conciliation agreement (2 U.S.C. §437g(a) (5) (B)). If we are unable to reach an agreement during that period, the Commission may, upon a finding of probable cause to believe a violation has occurred, institute a civil suit in United States District Court and seek payment of a civil penalty not in excess of \$5,000.

We enclose a conciliation agreement that this office is prepared to recommend to the Commission in settlement of this matter. If you agree with the provisions of the enclosed conciliation agreement, please sign and return it to the Commission within ten days. I will then recommend that the Commission approve the agreement.

If you have any questions or suggestions for changes in the enclosed agreement, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4039.

Sincerely,

William C. Oldaker
General Counsel

Enclosure

cc: Lawrence T. MacNamara, Jr., Esquire
Covington and Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

7-9-0-4-2-1-14-5-2



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

MEMORANDUM TO

CHARLES STEELE

FROM:

MARJORIE W. EMMONS *mwe*

DATE:

OCTOBER 10, 1978

SUBJECT:

MUR 592 - Interim Report dated 9-29-78
Signed: 10-5-78; Received in
OCS: 10-6-78, 11:45

The above-named document was circulated on a 24
hour no-objection basis at 5:15, October 6, 1978.

The Commission Secretary's Office has received
no objections to the Interim Report as of 5:15 this date.

77040111597

October 6, 1978

MEMORANDUM TO: Marge Emmons
FROM: Elissa P. Carr
SUBJECT: MUR 592

Please have the attached Interim Report on MUR 592
distributed to the Commission.

Thank you.

79040114598

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

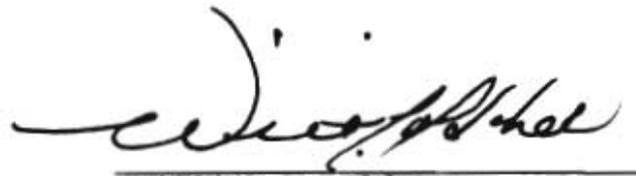
BEFORE THE FEDERAL ELECTION COMMISSION
September 29, 1978
78 OCT 6 All: 45

In the Matter of)
) MUR 592 (78)
Harvard Journal of Law)
and Public Policy)

INTERIM REPORT

Respondent's counsel has filed a 24 page Response to the Commission's notification of reason to believe respondent violated the Act as well as an Affidavit giving the facts of the matter sworn to by respondent's President, Mr. E. Spencer Abraham. The Response raises several legal objections to the Commission's taking further action against respondent. We are currently preparing our analysis of respondent's arguments and will report more fully to the Commission when this is completed.

10/5/78
Date



William C. Oldaker
General Counsel

79940114591

300#
5051

COVINGTON & BURLING
888 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

TELEPHONE
(202) 452-6000

WRITER'S DIRECT DIAL NUMBER
(202) 452-6770

TWX: 710-822-0008
TELEX: 89-803
CABLE: COVLING

September 25, 1978

HAND DELIVERED

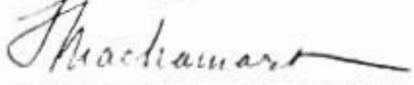
Mr. Gary Christian
Enforcement Division
Federal Election Commission
Fourth Floor
1325 K Street, N.W.
Washington, D.C. 20463

Re: Harvard Journal of Law and Public Policy
MUR - 592(78)

Dear Mr. Christian:

The original copy of the affidavit of E. Spencer Abraham was omitted from today's filing. I have enclosed it with this note. I also noticed an error on page 12 of the Response that I sent you earlier today. I have attached three copies of the corrected version of page 12. Could you please substitute the corrected page for the original page?

Sincerely,



Lawrence T. MacNamara, Jr.

LTM/jab
Enclosures

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In The
FEDERAL ELECTION COMMISSION

In the Matter of the)
)
Harvard Journal of Law) MUR - 592(78)
)
and Public Policy)

AFFIDAVIT OF E. SPENCER ABRAHAM

E. SPENCER ABRAHAM, being duly sworn according to law and authorized to make this affidavit on behalf of the HARVARD JOURNAL OF LAW AND PUBLIC POLICY does depose and say:

1. I am the President of the Harvard Journal of Law and Public Policy.

2. The Harvard Journal of Law and Public Policy is a non-profit Massachusetts corporation formed in Massachusetts. Its membership is comprised of students at Harvard Law School. Its function is the publication of a journal of ideas. The format of the Journal follows that of a law review, including articles by outside contributors and student-written notes and comments. The Journal does not receive financial support from Harvard University. It is a new publication without an established list of subscribers. One issue has been printed.

3. To attempt to establish a circulation, the Journal contacted both by letter and phone the Federal Election Commission in March of 1978 in an effort to obtain a list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, which was on file in the public records of the Commission. The Journal apprised the Commission of the purposes for which it requested the list. In subsequent discussions between Mr. Abraham and

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Mr. Michael Malone of the FEC's public documents section, the Journal reiterated its purpose for requesting a copy of the Reagan list. Mr. Malone of the Commission furnished the records to Mr. Thomas Klunzinger on April 17, 1978. During discussions prior to the obtaining of such lists Mr. Malone indicated that he felt the use of the lists for commercial purposes was in violation of 2 U.S.C. section 438 (a) (4). Mr. Malone was then informed of the existence of 11 C.F.R. section 104.13. Mr. Malone was unfamiliar with this provision and made no further comment with regard to the legality of using the Reagan lists after notification of the existence of this regulation (a copy of the regulation was sent to Mr. Malone).

4. After the Journal obtained the Reagan list, it mailed letters to approximately 2,500 of the persons named in the list. The letters were mailed on the following dates: June 21 - 721; June 27- 675; June 30 - 550; July 3 - 531.

5. In mid-July, 1978, Mr. Gary Christian of the Enforcement Division of the Commission called Mr. Abraham and said that the Commission considered the Journal's mailings to be violations of § 438 (a) (4). Thereupon the Journal ceased mailing letters to persons named in the Reagan list since that time.

6. The Journal has an extremely limited budget. It must advertise if it is to continue in business, but it can afford to advertise only to a discrete group that is likely to be sympathetic to the Journal's purpose. In the opinion of the Journal's editors, the Reagan list includes the names of persons most likely to support the Journal with subscriptions or contributions.

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on the use of disclosed lists of contributors once they were in the public domain. See, e.g., 37 Stat. 25, 26 (§ 5) (1911).

The floor discussion of Senator Bellmon's amendment is significant. It indicates that his purpose was primarily to protect contributors from the practice of list-brokering for profit. Additionally, he intended to protect the privacy of contributors from harassment of the sort that would deter their making future contributions to candidates for political office. 117 Cong. Rec. 30057-58 (1971). It is the position of the Journal that it has not committed either of the practices that disturbed Senator Bellmon.

First, it has not engaged in list-brokering. List brokering involves collection and dissemination of names for profit, as distinguished from the use of a list of names with the hope of producing profitable transactions. Indeed, the Journal's use of the Reagan list is far removed from either practice; as a not-for-profit organization, it neither sold the Reagan list nor used it for profit. Consequently, the Journal did not use the list for a "commercial purpose," as Congress intended to define that term.

Second, the Journal's mailing of a solicitation letter to persons on the Reagan list is not an invasion of privacy or harassment that will deter future contributions, ^{*/}

*/ The Journal has not engaged in more intrusive forms of solicitation, such as telephone calls and door-to-door solicitation of persons on the donor list. Whether the Commission

(footnote continued)

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Second, the Journal's mailing of a solicitation letter to persons on the Reagan list is not an invasion of privacy or harassment that will deter future contributions,^{*/}

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7 9 0 4 0 1 1 0 0 7
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*/ The Journal has not engaged in more intrusive forms of solicitation, such as telephone calls and door-to-door solicitation of persons on the donor list. Whether the Commission

(footnote continued)

*Blonda -
pleas let us
know
9/26*

FIRST CLASS

Lawrence T. MacNamara, Jr., Esq.
COVINGTON & BURLING

800 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

HAND DELIVERED

Mr. Gary Christian
Enforcement Division
Federal Election Commission
Fourth Floor
1325 K Street, N.W.
Washington, D.C. 20463

ROUTING SLIP

TO

Gary Christian

RE

Gary -

Here three, ^{enclosed} copies of the
Journal's Response

are the final draft,

with typographical

errors corrected. Thanks

very much for substituting

them for the copies I sent over
yesterday.

From Larry Mac Namara

Qcc*
5029

In The
FEDERAL ELECTION COMMISSION

In the Matter of the)
Harvard Journal of Law) MUR - 592(78)
and Public Policy)

RESPONSE OF THE JOURNAL TO THE COM-
MISSION'S NOTICE THAT IT HAS REASON
TO BELIEVE THAT THE JOURNAL MAY HAVE
VIOLATED 2 U.S.C. § 438(a)(4).

Lawrence T. MacNamara, Jr.
888 Sixteenth Street, N.W.
Washington, D.C. 20006
452-6770

Attorney for the Harvard
Journal of Law and Public
Policy

September 25, 1978

According to agreement between the Journal and the Commission
this response supersedes the "Preliminary Statement of the
Dispute by the Journal" dated September 18, 1978.

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I. Facts.^{*/}

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The Harvard Journal of Law and Public Policy is a new periodical published by a not-for-profit, tax exempt organization comprised of students at Harvard Law School. In the one issue its editors have produced, the Journal follows the law review format of articles from outside authors supplemented by student-written notes and comments. It does not support or oppose candidates for election, expressly or otherwise, or attempt to influence the outcome of elections in any other way.

Stating that their purpose was to establish a circulation for the Journal, its editors asked the Commission in the early Spring of 1978 to provide a copy of the list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, on file in the Commission's public records ("Reagan List"). The Commission furnished to the Journal, in April 1978, a list of some 20,000 names. Thereafter the Journal began to mail, in batches of several hundred envelopes at a time, a letter that solicited subscriptions and donations to the Journal.^{**/} By July 1978, the letter had been

^{*/} This recitation of facts is supported by the attached affidavit of E. Spencer Abraham, President of the Journal.

^{**/} The letter requesting subscriptions and donations was short and polite. After explaining the objectives of the Journal, it stated:

"If you wish to subscribe to the
Harvard Journal of Law and Public

(footnote continued)

sent to approximately 2500 persons named in the Reagan list. At that time the Commission informally told the Journal that it had reason to believe that the Journal's use of the Reagan list may have violated a section of the Federal Election Campaign Act of 1971 as amended ("Act"), 2 U.S.C. § 438(a)(4), and as implemented by the Commission's relevant regulation, 11 C.F.R. § 104.13.^{*/} The Journal thereupon ceased using the list and has not used it since. The Commission's informal communication was confirmed by a letter of August 3, 1978 from Mr. Oldaker to Mr. Abraham, the President of the Journal ("August 3 letter").

II. Scope of the Dispute.

This dispute concerns the proper interpretation of the proviso of 2 U.S.C. § 438(a)(4), which states that "any information copied from such reports and statements [filed

(footnote continued)

Policy, please send the four dollar subscription fee in the enclosed self-addressed stamped envelope. And, if you can, please join the Journal's Patrons Program by donating \$50 to the cause of academic diversity and freedom of thought. Since the Journal is a non-profit making educational organization, of course, such contribution will be tax deductible."

^{*/} The Commission submitted 11 C.F.R. § 104.13 to Congress on January 11, 1977 and, pursuant to 2 U.S.C. § 438(c), the regulation became effective thirty legislative days thereafter. Thus 11 C.F.R. § 104.13 is the regulation that governs the present dispute.

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with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose." The Journal's position is that its use of the Reagan list did not violate any of the elements of this proscription, and that the Commission acted correctly in April 1978 when it gave the Journal the Reagan list, with the apparent understanding that it would be used for the purpose of soliciting contributions to establish the Journal's circulation.

There appears to be no dispute about whether the Journal "sold" the Reagan list. The Journal has not done so. The Commission did not contend in its August 3 letter that the Journal may have violated the Act by "soliciting contributions,"^{*/} and the Journal assumes that this issue is not in dispute in this matter.

^{*/} In his letter to the Journal of August 3, 1978, Mr. Oldaker stated that:

"[T]he use of names obtained from the FEC reports to solicit subscriptions to a magazine such as the Journal is considered to be for commercial purposes and prohibited by the Act."

There is no reference to suspected violations of the prohibition against soliciting contributions.

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There is a clear dispute between the Journal and the Commission as to whether the Journal violated the Act's proscription against utilizing the list "for any commercial purpose." The Journal's position, explained in the following paragraphs, is that it did not violate this proscription or the proscription against soliciting contributions.

III. Argument.

- A. The Plain Meaning of 2 U.S.C. § 431(e) and 11 C.F.R. § 100.4(a)(1) Permits the Journal's Solicitation for Donations.

The Journal solicited donations for a purpose that has nothing to do with political election campaigns. Thus its solicitations were not included within the proscription in § 438(a)(4) against "soliciting contributions." Section 431(e) states unequivocally that "[w]hen used in this subchapter," which includes § 438(a)(4), the definition of "contribution" is limited to a contribution for the purpose of influencing the result of a political election campaign. The Commission's own regulations, at 11 C.F.R. § 100.4(a)(1), properly adopt the limited definition of the Act. That limited definition is exclusive, and no special definition of the term "contribution" applies exclusively to § 438(a)(4). Thus there can be no question that the proscription against "soliciting contributions"

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in § 438(a)(4) does not extend to the donations that the Journal solicited.^{*/} The Commission cannot contravene the terms of the Act it enforces on the basis of its belief that it would have been wise for Congress to have defined its terms differently.

B. The Plain Meaning of 11 C.F.R.
§ 104.13 Permits the Activities
by the Journal That Are the Sub-
ject of This Dispute.

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"Commercial purpose" is a phrase of broad and uncertain scope. It is not defined in the Act; nor is it a term of art with a settled meaning. The Commission's regulations do not define the term, but 11 C.F.R. § 104.13 includes an exception to the "commercial purpose" proscription. According to that exception, "'any commercial purpose' does not include the sale of newspapers, magazines, books or other similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." Thus, according to the regulation, the Act does not proscribe utilization of campaign donor lists for the purpose of sale of magazines the principal purpose of which is not to communicate the lists. The activities of the Journal which precipitated this MUR clearly fit within the express exception of 11 C.F.R. § 104.13. The Journal is a periodical similar to a magazine; its principal purpose is not

*/ Moreover, the prohibition against use of donor lists for a "commercial purpose" does not prohibit requests for donations to a not-for-profit entity. Whatever the meaning of "commercial purpose," it does not comprehend gifts.

to publish campaign donor lists; and its use of the Reagan list to invite subscriptions was for the purpose of "sale" of the Journal. The Journal contends that, for this reason alone, the Commission lacks reason to believe that the Journal may have violated the Act by using the list for a "commercial purpose." The Journal also contends that it was fully justified in relying on the plain meaning of the Commission's regulations when it determined that the "commercial purpose" proscriptioin would not apply to its activities.

C. The Commission's August 3 Letter Represents an Invalid Repudiation of the Plain Meaning of 11 C.F.R. § 104.13.

In its August 3 letter, however, the Commission stated that the Journal's activities were within the "commercial purpose" proscriptioin. The letter must be considered as representing a substantial change in the Commission's interpretation of § 438(a)(4) that repudiates the plain meaning of 11 C.F.R. § 104.13. The Commission apparently is harkening back to a 1972 regulation of the Comptroller General,^{*/} which provides:

*/ Regulatory authority under the Act was vested in the Comptroller General until 1974.

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"No information copied or obtained from reports and statements shall be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose. For purposes of this subchapter, 'soliciting contributions' means requesting gifts or donations of money, or anything of value for any cause or organization -- political, social, charitable, religious, or otherwise. For purposes of this subchapter, 'any commercial purpose' means any sale, trade, or barter of any list of names or addresses taken from such reports and statements and surveys or sales promotion activity. Violations of this section are subject to the criminal penalties provided in section 311 of the Act." 11 C.F.R. § 20.3 (1972); 37 Fed. Reg. 6167 (1972).

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This regulation purported to proscribe activity of the type that is at issue in this case, but its proscription of contributions exceeded the scope of the Act, and its definition of "commercial purpose" conflicted with First Amendment principles protecting commercial speech, which the Supreme Court has clarified since 1972. The Commission apparently recognized the infirmity of the 1972 regulation when, in 1977, it promulgated the substantially less restrictive provisions of 11 C.F.R. § 104.13, in supersession of 11 C.F.R. § 20.3 (1972). And the Journal was certainly justified in assuming that the 1977 regulation represented a substantial change away from the Commission's interpretation of the Act in the 1972 regulation. The Commission's present vacillation in the direction of the Comptroller's 1972 regulation is wrong as a matter of administrative procedure,

proper interpretation of the intent of Congress, and proper application of First Amendment principles.^{*/}

D. A Finding That the Journal Violated the Act Would Be Improper as a Matter of Administrative Procedure.

Irrespective of the merits of the new interpretation that the Commission has placed on § 438(a)(4), a finding that a violation had occurred in this case would be a denial of due process. While it is proper for an agency to alter its policies and approaches, e.g., Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App. D.C. 175, 183 (1971), due process indicates that sanctions be applied only prospectively. Having fundamentally altered its interpretation of § 438(a)(4) in its August 3 letter, the Commission cannot now expose the Journal to the possibility of a civil penalty that would attend a finding of violation of the Act, on the basis of the Journal's actions taken prior to August 3 in good faith reliance on the

*/ In transmitting its proposed general regulations to Congress on January 11, 1977, the Commission did not indicate that it intended to interpret 11 C.F.R. § 104.13 as merely a restatement of 11 C.F.R. § 20.3 (1972). In its only relevant comment, the Commission said that 11 C.F.R. § 104.13 "defines commercial use to exclude use in news media and books." H. Doc. No. 95-44 at 48. This statement is too cryptic to be helpful in resolving the present issue. But even if it were more precise, it could not have the effect of altering the plain meaning of the regulation itself.

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Commission's prior interpretation. In this respect, the observation of Judge Friendly in NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966), is relevant: "the [judicial] hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known"

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If the Commission wishes to alter its interpretation of § 438(a)(4), it should do so either in a separate rulemaking proceeding, or by the crafting in this proceeding of a rule of prospective application. See, e.g., NLRB v. Beech-Nut Life Savers, Inc., 406 F.2d 253, 257 (2d Cir. 1968), cert. denied, 394 U.S. 1012 (1969). Indeed, the Commission's revision of its interpretation of § 438(a)(4) in a contemplated enforcement action indicates that its regulations, which it presented to Congress as a "readable and practical guide" for the public, Letter of Hon. Vernon W. Thompson, to Hon. Thomas P. O'Neill, Jan. 11, 1977, served in fact as a snare for the Journal. See generally, Moser v. United States, 341 U.S. 41 (1951).

E. The Commission's Interpretation of § 438(a)(4), as Expressed in Its August 3 Letter, Is Not Mandated by the Act or Its Legislative History Because the Journal Is Not a Commercial Organization and Its Mailings Did Not Harass Recipients.

In passing a proscription against use of campaign filings for "commercial purposes," without defining that term,

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Congress implicitly gave the Commission broad discretion to define the term in particular circumstances. Where First Amendment problems are raised by the "commercial purpose" proscription, the Commission has a duty to define it in a way that preserves the validity of the Act. For the reasons stated in subsequent paragraphs, the application of § 438(a)(4) to the Journal indicated by the Commission in its August 3 letter violates the First Amendment. Moreover, if the Commission's interpretation prohibits use of the donor lists on file at the Commission for any type of solicitation, that interpretation is overbroad in light of the First Amendment. It is therefore especially significant that the Act itself does not require such application or interpretation.

The "commercial purpose" proscription in the proviso to § 438(a)(4) was added as a floor amendment by Senator Bellmon without discussion in hearings. By contrast, the public disclosure provision to which the proscription was belatedly attached had been a keystone of the legislative scheme from its inception. Thus as the fabric of the Act was woven, the assumption of Congress was that campaign donor lists would be made public without

restriction,^{*/} and the intent of Congress to restrict the use of information once publicized was at best pale and secondary in relation to the paramount intent to require public disclosure.^{**/} The attitude of Congress reflected the approach of earlier campaign disclosure acts, which placed no restriction

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^{*/} It was the judgment of Congress that its objectives, the promotion of honesty and the appearance of honesty in election campaigns and the increase in information relevant to voting decisions, justified disclosure and publicization of donors' names, even though the result was to invade the donors' privacy of association and to deter future contributions to a significant extent, Buckley v. Valeo, 424 U.S. 1, 68, 83 (1976); see also id. at 237 (dissenting opinion of Burger, C.J.).

^{**/} Indeed, the relative insouciance with which Congress treated its restrictions on the use of public information is indicated by its failure to provide any restriction on the use of information filed with state officials. See 2 U.S.C. § 439(b)(3). The absence of such a restriction was filled by the Commission's Advisory Opinion No. AO 1975-124, CCH Fed. Election Campaign Financing Guide ¶ 5191. Moreover, in light of the regulatory scheme it had crafted, Congress itself was doubtful about its ability to control the use of information in the public domain. When Senator Bellmon, the sponsor of the floor amendment that became the proviso to § 438(a)(4), argued for his amendment, the leader of the floor debate of the Act, Senator Cannon, responded:

"Mr. President, this is certainly a laudable objective. I do not know how we are going to prevent it from being done. I think as long as we are going to make the lists available, some people are going to use them to make solicitations. But as far as it can be made effective, I am willing to accept the amendment . . ." 117 Cong. Rec. 30057 (1971).

In stating that, in light of the Act's scheme, the achievement of Senator Bellmon's objectives could not be guaranteed, Senator Cannon in effect stated that Congress did not consider those objectives to be a primary part of the legislative scheme.

on the use of disclosed lists of contributors once they were in the public domain. See, e.g., 37 Stat. 25, 26 (§ 5) (1911).

The floor discussion of Senator Bellmon's amendment is significant. It indicates that his purpose was primarily to protect contributors from the practice of list-brokering for profit. Additionally, he intended to protect the privacy of contributors from harassment of the sort that would deter their making future contributions to candidates for political office. 117 Cong. Rec. 30057-58 (1971). It is the position of the Journal that it has not committed either of the practices that disturbed Senator Bellmon.

First, it has not engaged in list-brokering. List brokering involves collection and dissemination of names for profit, as distinguished from the use of a list of names with the hope of producing profitable transactions. Indeed, the Journal's use of the Reagan list is far removed from either practice; as a not-for-profit organization, it neither sold the Reagan list nor used it for profit. Consequently, the Journal did not use the list for a "commercial purpose," as Congress intended to define that term.

Second, the Journal's mailing of a solicitation letter to persons on the Reagan list is not an invasion of privacy or harassment that will deter future contributions, ^{*/}

^{*/} The Journal has not engaged in more intrusive forms of solicitation, such as telephone calls and door-to-door solicitation of persons on the donor list. Whether the Commission

for the following reasons. From a general point of view, householder attitude surveys in 1972 and 1974 by the U.S. Postal Service show that persons receiving unsolicited mail do not consider it either an invasion of privacy or harassment.^{*/} Moreover, unsolicited mailings are a prevalent form of advertising that, it is reasonable to assume, is directed with special frequency toward persons sufficiently affluent to contribute more than \$100 to a political candidate.^{**/} If campaign contributors are already accustomed to receiving unsolicited mailings from other sources, it is unreasonable to assert that the receipt of additional mailings as a result of their campaign contribution will so annoy them that they will stop making contributions. With respect to the Journal letter

(footnote continued)

would be justified in placing time, place or manner restraints on telephone or door-to-door solicitations using campaign donor lists is therefore a question that is not comprehended by this dispute.

^{*/} The persons surveyed in 1974 stated that 66% of the unsolicited mailings they had received were "the kind of information that I like to receive" or "interesting and enjoyable, but not especially useful to me." In 1972 the figure was 64%. In 1974, 20% of the mailings were described as "neither interesting, enjoyable nor useful." In 1972 the figure was 21%. In both survey years, only 4% of the mailings were described as "objectionable." No opinion or no answer was given regarding 10% of the mailings in 1974 and 11% of the mailings in 1972. U.S. Postal Service, Office of Public Information, "The Household Advertising Mailstream," 1972 and 1974, reprinted in B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 5.

^{**/} In B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 7, it is stated that persons with "higher income" tend to receive an above-average number of pieces of unsolicited mail.

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in particular, there are strong reasons for assuming that their message would be even more favorably received by the persons on the Reagan list than average unsolicited mailings are received by the average householder. The Journal's letter both informed recipients of the existence of the Journal and asked for subscriptions and donations. Most Reagan supporters would be interested to learn about the existence and objectives of the Journal even if they did not subscribe or donate to it. Additionally, the content and form of the Journal's letter was inoffensive, and its format -- a letter in an envelope -- meant that it could be readily discarded if unwanted.

Thus, the Act, as illuminated by its legislative history, does not require the interpretation expressed by the Commission in its August 3 letter.

F. The Commission's August 3 Interpretation of § 438(a)(4), as It Is Proposed to Be Applied to the Journal, Violates the First Amendment.

A finding by the Commission that the Journal violated § 438(a)(4) by soliciting subscriptions or donations would construe the section in a way that violates the First Amendment. The First Amendment value at stake here is protection of commercial speech.^{*/} The

^{*/} 2 U.S.C. § 438(a)(4) and 11 C.F.R. 104.13 do not on their face proscribe, and therefore do not raise an issue concerning, the use of lists of donors to the campaign of one candidate by other candidates for the purpose of soliciting votes or work from individuals. The Act

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relevant principles were declared by the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Virginia Pharmacy decision makes it clear that the First Amendment protects commercial speech in the form of a proposal of a commercial transaction, even though "the advertiser's interest is a purely economic one." Id. at 762. According to the Court:

"Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." Id. at 765.

The Journal's solicitation of subscriptions fits this standard for First Amendment protection; moreover, the facts that the

(footnote continued)

and regulation do prohibit a candidate's use of donor lists to solicit contributions. The question whether this prohibition is consonant with the First Amendment's protection of speech, and the corollary right effectively to participate in the electoral process, however, is not raised by the facts of the present controversy. That the Journal is a printed periodical and a forum for discussion of ideas implicates the First Amendment's protection of the press, but freedom of the press is not the primary element of the Journal's position.

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Journal's solicitation was for the purpose of giving notice of the existence of a medium for discussion of ideas, and that its impetus was education, not profits, strengthen the protection afforded by the First Amendment.

Moreover, the First Amendment requires access to the mails for the transmission of inoffensive communications. "[T]he use of the mails is almost as much a part of free speech as the right to use our tongues" United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting), quoted with approval, Blount v. Rizzi, 400 U.S. 410, 416 (1971). See also Taylor v. Sterrett, 532 F.2d 462, 480 (5th Cir. 1976). The mails, of course, are the medium of communication used by the Journal.

However the Commission's burden of justifying its proscription of the Journal's activities is defined, the Commission cannot meet it. The Journal has strong grounds for contending that the Commission's prohibition of its use of the Reagan list effectively denies the Journal all communication. The Journal's meager budget permits only a small amount of advertising directed toward a discrete group likely to support the Journal's purposes. In the opinion of the Journal's editors, the Reagan list includes the persons who are most likely to subscribe or make a donation. Thus, the Commission's prohibition squelches the only economically feasible form of commercial speech,

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which in turn will force the Journal to close down.^{*/} In Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (8-0 decision), the Court stated that whether "sellers realistically are relegated", by a proscription against one form of speech, to alternatives that are "more cost[ly]," involve "less autonomy," "are less likely to reach persons not deliberately seeking sales information," or are "less effective media" determine whether the alternatives are "satisfactory" and therefore whether the existence of the alternatives is a persuasive basis for sustaining the proscription. Id. at 93.

In the present case, there is no realistic alternative method of communication open to the Journal if mail solicitation of the persons on the Reagan list is prohibited. Thus, it is at least arguable that the Commission must meet the heavy burden of showing that a compelling public interest justifies its prohibition, because the effect of the prohibition is to prevent speech.^{**/}

Indulging the assumption, however, that if the Journal is denied use of the Reagan list, other means of commercial speech will realistically remain open to it, the Commission's prohibition of the Journal's solicitation of persons by means of the Reagan list might be characterized as a restriction on the manner of its speech. The Commission may impose reasonable time, place and manner

^{*/} The Journal receives no financial support from Harvard University.

^{**/} "After Virginia Pharmacy Bd. it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental'." Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 92 n.6. (1977) (emphasis added).

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restrictions on the exercise of speech, provided that the restriction is "narrowly tailored to further the [government's] legitimate interest." Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). But the First Amendment requires that the Commission justify its prohibition.^{*/} Thus, even if the interpretation of § 438(a)(4) announced in the Commission's August 3 letter is a restraint on only the manner of speech, the Commission must nonetheless show that its interpretation of § 438(a)(4) "is needed to assure" a legitimate governmental interest. Linmark Associates, Inc. v. Township of Willingboro, supra, 431 U.S. at 95. The Journal contends that the Commission's interpretation is not necessary for that purpose.

The only governmental interest that is asserted in the legislative history of the Act as the basis for its "commercial purpose" proscription is protection of election campaign contributors from harassment of the sort that will significantly deter their contribution to future campaigns. It may be assumed that this interest is legitimate and substantial. But the Commission must show clearly that its proscription of inoffensive mail solicitations furthers this interest.

^{*/} That justification cannot be simply that "ample alternate channels of communication," Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976), remain available to the Journal. "Restraint on expression may not generally be justified by the fact that there may be other times, places or circumstances available for such expression." Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976). See also Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Kleindest v. Mandel, 408 U.S. 753, 765 (1972).

The Journal contends that the Commission cannot make this showing for the reasons stated in section E of its argument, supra at pages 12-14. ^{*/} Therefore it cannot justify its proscription against the inoffensive mail solicitation of persons named in a donor list on file at the Commission by a tax-exempt, non-commercial organization not involved in influencing the outcome of political campaigns.

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In contrast with the legitimate governmental interest in protecting contributors from harassment that will deter future contributions, two putative "interests" are not legitimate and therefore cannot justify abridgment of the First Amendment interests of the Journal and its addressees. First, the government has no legitimate interest in paternalistically insulating the public from advertising messages in order to minimize the possibility of annoyance. As the Supreme Court stated in the Virginia Pharmacy case, supra, 425 U.S. at 770, the First Amendment requires that government:

*/ Additionally, if the Journal's position regarding Congress' definition of "contributions" (see subsection A of this argument) is correct, it is clearly proper for the Journal to solicit donations from the persons named on the Reagan list. Consequently, there can be no justification for prohibiting the solicitation of subscriptions. Surely it is not likely that the recipients of a letter from the Journal will be deterred from making future campaign contributions simply because a solicitation of a subscription has been added to the solicitation of a donation.

"assume that this [advertisement] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them."

Furthermore, in Cohen v. California, 403 U.S. 15, 21 (1971), the Court stated:

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." (Emphasis added.)

Indeed, the assumption is that the public has an interest in receiving -- indeed, a right to receive -- advertising. Virginia Pharmacy, supra, 425 U.S. at 757.

It is true that when communications are mailed to a residence, the householder's privacy interests must be considered along with the interests of mailer and householder in communication by mail. A householder has the right to exclude offensive mail from his home. Rowan v. Post Office Department, 397 U.S. 728 (1970). But the Court and Congress have made it clear that the decision as to what shall be deemed offensive and therefore excluded from an individual's home is to be made by the individual himself,

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id. at 736; see also Martin v. City of Struthers, 319 U.S. 141, 144 (1943), not by a government agency sitting "astride the flow of mail." Lamont v. Postmaster General, 381 U.S. 301, 306 (1965). The statutory mechanism for such exclusion exists in 39 U.S.C. § 3008 (1976).^{*/} Moreover, the businesses that are the primary users of unsolicited mail advertising operate a centralized "Mail Preference Service" that invites persons who receive their mail to ask that their names be removed from active solicitation lists.^{**/}

Second, there is no legitimate interest in protecting the proprietary interest of candidates in donor lists filed with the Commission. The assertion of such an interest follows an assumption that if the public may use campaign donor lists filed with the Commission for solicitations, the value of those lists to candidates will be dissipated.^{*/} But this assumption, even if it is accurate,

^{*/} While the statute refers only to mail that is "erotically arousing or sexually provocative," in practice "the power of the householder under the statute is unlimited; he may prohibit the mailing [to himself] of a dry goods catalog because he objects to the contents" Rowan v. Post Office Department, 397 U.S. 728, 737 (1970).

^{**/} This voluntary approach was recommended by the Privacy Protection Study Commission in its 1976 Report to Congress. Interestingly, "[c]onsumer response to MPS [Mail Preference Service] has yielded more requests to get on than off mailing lists." B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 9.

^{***/} The rationale behind this assumption is apparently as follows: the more frequently the persons on a mailing list are solicited, the less likely it is that they will respond to a particular solicitation; in other words, the more a list is used, the less effective it becomes.

cannot support the Commission's position. The legislative history of the Act affords no basis for the Commission's assertion of a mandate to protect such an "interest." In adopting the proviso to § 438(a)(4), Congress adverted only to the objective of protecting contributors from harassment. There is no mention of an objective of protecting candidates' interests in maximizing the effectiveness of their campaign donor lists for their future use or for sale or loan to other persons.

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There is a more fundamental flaw in the assertion of this putative "interest." At bottom, it must be justified by the rationale that additional solicitations by the public will cause persons on candidates' donor lists to direct some of their money and loyalty to new causes. But the prohibition of this effect is not a legitimate governmental interest. The Commission cannot stifle the free flow of truthful and inoffensive information because it assumes that recipients will act directly and lawfully on that information to their detriment or to that of the general public.^{*/} Such a

^{*/} In the Linmark case, the Court concluded that the regulatory proscription was based on the "content" of the communications at issue because the Township "fears their 'primary' effect -- that they will cause those receiving the information to act upon it." "The [Township] Council has sought to restrict the free flow of these data because it fears that otherwise [the recipients of the data] will make decisions inimical to what the Council views as the [recipients'] self-interest and the corporate interest of the township. . . ." The Court characterized the "constitutional defect" in such a regulation as "basic." 431 U.S. at 94, 96.

rationale involves a prohibition of speech on the basis of its content, the most suspect type of restraint on First Amendment rights.

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Finally, the interpretation that the Commission adopted in its August 3 letter is not necessary to protect the government's legitimate interest in assuring the proper use of public records. If the Commission asserts such an interest, the assertion cannot strengthen the Commission's position. Such an assertion would simply beg the question of what constitutes proper use of the campaign donor lists on file with the Commission. Statutes other than the Act itself do not answer this question; ^{*/} and reference to the Act itself raises the questions of proper interpretation of § 438(a)(4) in light of its legislative history and the limitations of the First Amendment, which have already been discussed in this brief.

*/ Statutes relating to the disclosure of information, such as the Privacy Act, 5 U.S.C. § 552a, the exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b), and the criminal proscription of disclosure by officials of confidential information, 18 U.S.C. § 1905, are not relevant to the duties of the Commission with respect to the campaign donor lists in its files, because these lists are not secret or confidential. Congress has required that they be disclosed to the public. The present dispute about the meaning of § 438(a)(4) concerns the ways in which the public may use lists already in the public domain.

For the foregoing reasons, the Commission has not shown and cannot show that its new interpretation of § 438 (a) (4), which abridges First Amendment rights, is necessary to protect a compelling, or even a legitimate, governmental interest, or that its interpretation involves a proscription of a manner of speech that is narrowly tailored to further such an interest.

IV. Conclusion.

The Journal respectfully submits that the plain meaning of the Act and the regulations promulgated by the Commission for its implementation, the legislative history of the Act principles of due process, and First Amendment principles require the conclusion that the Journal has not violated § 438(a) (4) of the Act as that section must be construed, and that the Commission lacks the authority to prohibit the Journal's mail solicitation of the persons whose names appear on the Reagan list for the purpose of establishing its circulation.

Respectfully submitted,

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Journal of Law and Public
Policy

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In The
FEDERAL ELECTION COMMISSION

In the Matter of the)
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Harvard Journal of Law) MUR - 592(78)
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and Public Policy)

AFFIDAVIT OF E. SPENCER ABRAHAM

E. SPENCER ABRAHAM, being duly sworn according to law and authorized to make this affidavit on behalf of the HARVARD JOURNAL OF LAW AND PUBLIC POLICY does depose and say:

1. I am the President of the Harvard Journal of Law and Public Policy.

2. The Harvard Journal of Law and Public Policy is a non-profit Massachusetts corporation formed in Massachusetts. Its membership is comprised of students at Harvard Law School. Its function is the publication of a journal of ideas. The format of the Journal follows that of a law review, including articles by outside contributors and student-written notes and comments. The Journal does not receive financial support from Harvard University. It is a new publication without an established list of subscribers. One issue has been printed.

3. To attempt to establish a circulation, the Journal contacted both by letter and phone the Federal Election Commission in March of 1978 in an effort to obtain a list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, which was on file in the public records of the Commission. The Journal apprised the Commission of the purposes for which it requested the list. In subsequent discussions between Mr. Abraham and

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Mr. Michael Malone of the FEC's public documents section, the Journal reiterated its purpose for requesting a copy of the Reagan list. Mr. Malone of the Commission furnished the records to Mr. Thomas Klunzinger on April 17, 1978. During discussions prior to the obtaining of such lists Mr. Malone indicated that he felt the use of the lists for commercial purposes was in violation of 2 U.S.C. section 438 (a) (4). Mr. Malone was then informed of the existence of 11 C.F.R. section 104.13. Mr. Malone was unfamiliar with this provision and made no further comment with regard to the legality of using the Reagan lists after notification of the existence of this regulation (a copy of the regulation was sent to Mr. Malone).

4. After the Journal obtained the Reagan list, it mailed letters to approximately 2,500 of the persons named in the list. The letters were mailed on the following dates: June 21 - 721; June 27- 675; June 30 - 550; July 3 - 531.

5. In mid-July, 1978, Mr. Gary Christian of the Enforcement Division of the Commission called Mr. Abraham and said that the Commission considered the Journal's mailings to be violations of § 438 (a) (4). Thereupon the Journal ceased mailing letters to persons named in the Reagan list since that time.

6. The Journal has an extremely limited budget. It must advertise if it is to continue in business, but it can afford to advertise only to a discrete group that is likely to be sympathetic to the Journal's purpose. In the opinion of the Journal's editors, the Reagan list includes the names of persons most likely to support the Journal with subscriptions or contributions.

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I have read the foregoing and it is true to the best of my knowledge, information and belief.

E. Spencer Abraham

E. Spencer Abraham
President, Harvard Journal
of Law and Public Policy

Sworn and Subscribed to before me this
20th day of September, 1978

Wilma Jean Hammond
Notary Public
Wayne Co
aug 20, 1979

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September 25, 1978

HAND DELIVERED

Mr. Gary Christian
Enforcement Division
Federal Election Commission
Fourth Floor
1325 K Street, N.W.
Washington, D.C. 20463

Re: Harvard Journal of Law and Public Policy:
MUR 592(78)

Dear Mr. Christian:

I have enclosed three copies of the "Response of the Journal to the Commission's Notice That It Has Reason to Believe That the Journal May Have Violated 2 U.S.C. § 438(a)(4)." This Response reflects recently received comments and affidavit from E. Spencer Abraham, the President of the Journal.

With kind regards:

Sincerely,

Lawrence T. MacNamara, Jr.
Lawrence T. MacNamara, Jr.

LTM/jab
Enclosures

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In The
FEDERAL ELECTION COMMISSION

In the Matter of the)
)
Harvard Journal of Law) MUR - 592(78)
)
and Public Policy)

RESPONSE OF THE JOURNAL TO THE COM-
MISSION'S NOTICE THAT IT HAS REASON
TO BELIEVE THAT THE JOURNAL MAY HAVE
VIOLATED 2 U.S.C. § 438(a)(4).

Lawrence T. MacNamara, Jr.
888 Sixteenth Street, N.W.
Washington, D.C. 20006
452-6770

Attorney for the Harvard
Journal of Law and Public
Policy

September 25, 1978

According to agreement between the Journal and the Commission
this response supersedes the "Preliminary Statement of the
Dispute by the Journal" dated September 18, 1978.

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I. Facts.^{*/}

The Harvard Journal of Law and Public Policy is a new periodical published by a not-for-profit, tax exempt organization comprised of students at Harvard Law School. In the one issue its editors have produced, the Journal follows the law review format of articles from outside authors supplemented by student-written notes and comments. It does not support or oppose candidates for election, expressly or otherwise, or attempt to influence the outcome of elections in any other way.

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Stating that their purpose was to establish a circulation for the Journal, its editors asked the Commission in the early Spring of 1978 to provide a copy of the list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, on file in the Commission's public records ("Reagan List"). The Commission furnished to the Journal, in April 1978, a list of some 20,000 names. Thereafter the Journal began to mail, in batches of several hundred envelopes at a time, a letter that solicited subscriptions and donations to the Journal.^{**/} By July 1978, the letter had been

^{*/} This recitation of facts is supported by the attached affidavit of E. Spencer Abraham, President of the Journal.

^{**/} The letter requesting subscriptions and donations was short and polite. After explaining the objectives of the Journal, it stated:

"If you wish to subscribe to the
Harvard Journal of Law and Public

(footnote continued)

sent to approximately 2500 persons named in the Reagan list. At that time the Commission informally told the Journal that it had reason to believe that the Journal's use of the Reagan list may have violated a section of the Federal Election Campaign Act of 1971 as amended ("Act"), 2 U.S.C. § 438(a)(4), and as implemented by the Commission's relevant regulation, 11 C.F.R. § 104.13.^{*/} The Journal thereupon ceased using the list and has not used it since. The Commission's informal communication was confirmed by a letter of August 3, 1978 from Mr. Oldaker to Mr. Abraham, the President of the Journal ("August 3 letter").

II. Scope of the Dispute.

This dispute concerns the proper interpretation of the proviso of 2 U.S.C. § 438(a)(4), which states that "any information copied from such reports and statements [filed

(footnote continued)

Policy, please send the four dollar subscription fee in the enclosed self-addressed stamped envelope. And, if you can, please join the Journal's Patrons Program by donating \$50 to the cause of academic diversity and freedom of thought. Since the Journal is a non-profit making educational organization, of course, such contribution will be tax deductible."

^{*/} The Commission submitted 11 C.F.R. § 104.13 to Congress on January 11, 1977 and, pursuant to 2 U.S.C. § 438(c), the regulation became effective thirty legislative days thereafter. Thus 11 C.F.R. § 104.13 is the regulation that governs the present dispute.

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with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose." The Journal's position is that its use of the Reagan list did not violate any of the elements of this proscription, and that the Commission acted correctly in April 1978 when it gave the Journal the Reagan list, with the apparent understanding that it would be used for the purpose of soliciting contributions to establish the Journal's circulation.

There appears to be no dispute about whether the Journal "sold" the Reagan list. The Journal has not done so. The Commission did not contend in its August 3 letter that the Journal may have violated the Act by "soliciting contributions,"^{*/} and the Journal assumes that this issue is not in dispute in this matter.

^{*/} In his letter to the Journal of August 3, 1978, Mr. Oldaker stated that:

"[T]he use of names obtained from the FEC reports to solicit subscriptions to a magazine such as the Journal is considered to be for commercial purposes and prohibited by the Act."

There is no reference to suspect violations of the prohibition against soliciting contributions.

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There is a clear dispute between the Journal and the Commission as to whether the Journal violated the Act's proscription against utilizing the list "for any commercial purpose." The Journal's position, explained in the following paragraphs, is that it did not violate this proscription or the proscription against soliciting contributions.

III. Argument.

A. The Plain Meaning of 2 U.S.C. § 431(e) and 11 C.F.R. § 100.4(a)(1) Permits the Journal's Solicitation for Donations.

The Journal solicited donations for a purpose that has nothing to do with political election campaigns. Thus its solicitations were not included within the proscription in § 438(a)(4) against "soliciting contributions." Section 431(e) states unequivocally that "[w]hen used in this subchapter," which includes § 438(a)(4), the definition of "contribution" is limited to a contribution for the purpose of influencing the result of a political election campaign. The Commission's own regulations, at 11 C.F.R. § 100.4(a)(1), properly adopt the limited definition of the Act. That limited definition is exclusive, and no special definition of the term "contribution" applies exclusively to § 438(a)(4). Thus there can be no question that the proscription against "soliciting contributions"

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in § 438(a)(4) does not extend to the donations that the Journal solicited.^{*/} The Commission cannot contravene the terms of the Act it enforces on the basis of its belief that it would have been wise for Congress to have defined its terms differently.

B. The Plain Meaning of 11 C.F.R.
§ 104.13 Permits the Activities
by the Journal That Are the Sub-
ject of This Dispute.

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"Commercial purpose" is a phrase of broad and uncertain scope. It is not defined in the Act; nor is it a term of art with a settled meaning. The Commission's regulations do not define the term, but 11 C.F.R. § 104.13 includes an exception to the "commercial purpose" proscription. According to that exception, "'any commercial purpose' does not include the sale of newspapers, magazines, books or other similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above." Thus, according to the regulation, the Act does not proscribe utilization of campaign donor lists for the purpose of sale of magazines the principal purpose of which is not to communicate the lists. The activities of the Journal which precipitated this MUR clearly fit within the express exception of 11 C.F.R. § 104.13. The Journal is a periodical similar to a magazine; its principal purpose is not

^{*/} Moreover, the prohibition against use of donor lists for a "commercial purpose" does not prohibit requests for donations to a not-for-profit entity. Whatever the meaning of "commercial purpose," it does not comprehend gifts.

to publish campaign donor lists; and its use of the Reagan list to invite subscriptions was for the purpose of "sale" of the Journal. The Journal contends that, for this reason alone, the Commission lacks reason to believe that the Journal may have violated the Act by using the list for a "commercial purpose." The Journal also contends that it was fully justified in relying on the plain meaning of the Commission's regulations when it determined that the "commercial purpose" proscription would not apply to its activities.

C. The Commission's August 3 Letter Represents an Invalid Repudiation of the Plain Meaning of 11 C.F.R. § 104.13.

In its August 3 letter, however, the Commission stated that the Journal's activities were within the "commercial purpose" proscription. The letter must be considered as representing a substantial change in the Commission's interpretation of § 438(a)(4) that repudiates the plain meaning of 11 C.F.R. § 104.13. The Commission apparently is harkening back to a 1972 regulation of the Comptroller General,^{*/} which provides:

^{*/} Regulatory authority under the Act was vested in the Comptroller General until 1974.

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"No information copied or obtained from reports and statements shall be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose. For purposes of this subchapter, 'soliciting contributions' means requesting gifts or donations of money, or anything of value for any cause or organization -- political, social, charitable, religious, or otherwise. For purposes of this subchapter, 'any commercial purpose' means any sale, trade, or barter of any list of names or addresses taken from such reports and statements and surveys or sales promotion activity. Violations of this section are subject to the criminal penalties provided in section 311 of the Act." 11 C.F.R. § 20.3 (1972); 37 Fed. Reg. 6167 (1972).

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This regulation purported to proscribe activity of the type that is at issue in this case, but its proscription of contributions exceeded the scope of the Act, and its definition of "commercial purpose" conflicted with First Amendment principles protecting commercial speech, which the Supreme Court has clarified since 1972. The Commission apparently recognized the infirmity of the 1972 regulation when, in 1977, it promulgated the substantially less restrictive provisions of 11 C.F.R. § 104.13, in supersession of 11 C.F.R. § 20.3 (1972). And the Journal was certainly justified in assuming that the 1977 regulation represented a substantial change away from the Commission's interpretation of the Act in the 1972 regulation. The Commission's present vacillation in the direction of the Comptroller's 1972 regulation is wrong as a matter of administrative procedure,

proper interpretation of the intent of Congress, and proper application of First Amendment principles.^{*/}

D. A Finding That the Journal Violated the Act Would Be Improper as a Matter of Administrative Procedure.

Irrespective of the merits of the new interpretation that the Commission has placed on § 438(a)(4), a finding that a violation had occurred in this case would be a denial of due process. While it is proper for an agency to alter its policies and approaches, e.g., Columbia Broadcasting System, Inc. v. F.C.C., 147 U.S. App. D.C. 175, 183 (1971), due process indicates that sanctions be applied only prospectively. Having fundamentally altered its interpretation of § 438(a)(4) in its August 3 letter, the Commission cannot now expose the Journal to the possibility of a civil penalty that would attend a finding of violation of the Act, on the basis of the Journal's actions taken prior to August 3 in good faith reliance on the

^{*/} In transmitting its proposed general regulations to Congress on January 11, 1977, the Commission did not indicate that it intended to interpret 11 C.F.R. § 104.13 as merely a restatement of 11 C.F.R. § 20.3 (1972). In its only relevant comment, the Commission said that 11 C.F.R. § 104.13 "defines commercial use to exclude use in news media and books." H. DOC. No. 95-44 at 48. This statement is too cryptic to be helpful in resolving the present issue. But even if it were more precise, it could not have the effect of altering the plain meaning of the regulation itself.

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Commission's prior interpretation. In this respect, the observation of Judge Friendly in N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966), is relevant: "the [judicial] hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known"

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If the Commission wishes to alter its interpretation of § 438(a)(4), it should do so either in a separate rulemaking proceeding, or by the crafting in this proceeding of a rule for prospective application. See, e.g., N.L.R.B. v. Beech-Nut Life Savers, Inc., 406 F.2d 253 (2d Cir. 1968). Indeed, the Commission's revision of its interpretation of § 438(a)(4) in a contemplated enforcement action indicates that its regulations, which it presented to Congress as a "readable and practical guide" for the public, Letter of Hon. Vernon W. Thompson, to Hon. Thomas P. O'Neill, Jan. 11, 1977, served in fact as a snare for the Journal. See generally, Moser v. United States, 341 U.S. 41 (1951).

E. The Commission's Interpretation of § 438(a)(4), as Expressed in Its August 3 Letter, Is Not Mandated by the Act or Its Legislative History Because the Journal Is not a Commercial Organization and Its Mailings Did Not Harass Recipients.

In passing a proscription against use of campaign filings for "commercial purposes," without defining that term,

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Congress implicitly gave the Commission broad discretion to define the term in particular circumstances. Where First Amendment problems are raised by the "commercial purpose" proscription, the Commission has a duty to define it in a way that preserves the validity of the Act. For the reasons stated in subsequent paragraphs, the application of § 438(a)(4) to the Journal indicated by the Commission in its August 3 letter violates the First Amendment. Moreover, if the Commission's interpretation prohibits use of the donor lists on file at the Commission for any type of solicitation, that interpretation is overbroad in light of the First Amendment. It is therefore especially significant that the Act itself does not require such application or interpretation.

The "commercial purpose" proscription in the proviso to § 438(a)(4) was added as a floor amendment by Senator Bellmon without discussion in hearings. By contrast, the public disclosure provision to which the proscription was belatedly attached had been a keystone of the legislative scheme from its inception. Thus as the fabric of the Act was woven, the assumption of Congress was that campaign donor lists would be made public without

on the use of disclosed lists of contributors once they were in the public domain. See, e.g., 37 Stat. 25, 26 (§ 5) (1911).

The floor discussion of Senator Bellmon's amendment is significant. It indicates that his purpose was primarily to protect contributors from the practice of list-brokering for profit. Additionally, he intended to protect the privacy of contributors from harassment of the sort that would deter their making future contributions to candidates for political office. 117 Cong. Rec. 30057-58 (1971). It is the position of the Journal that it has not committed either of the practices that disturbed Senator Bellmon.

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First, it has not engaged in list-brokering. List brokering involves collection and dissemination of names for profit, as distinguished from the use of a list of names with the hope of producing profitable transactions. Indeed, the Journal's use of the Reagan list is far removed from either practice; as a not-for-profit organization, it neither sold the Reagan list nor used it for profit. Consequently, the Journal did not engage in a "commercial transaction," as Congress intended to define that term.

Second, the Journal's mailing of a solicitation letter to persons on the Reagan list is not an invasion of privacy or harassment that will deter future contributions, ^{*/}

*/ The Journal has not engaged in more intrusive forms of solicitation, such as telephone calls and door-to-door solicitation of persons on the donor list. Whether the Commission

for the following reasons. From a general point of view, householder attitude surveys in 1972 and 1974 by the U.S. Postal Service show that persons receiving unsolicited mail do not consider it either an invasion of privacy or harassment.^{*/} Moreover, unsolicited mailings are a prevalent form of advertising that, it is reasonable to assume, is directed with special frequency toward persons sufficiently affluent to contribute more than \$100 to a political candidate.^{**/} If campaign contributors are already accustomed to receiving unsolicited mailings from other sources, it is unreasonable to assert that the receipt of additional mailings as a result of their campaign contribution will so annoy them that they will stop making contributions. With respect to the Journal letter

(footnote continued)

would be justified in placing time, place or manner restraints on telephone or door-to-door solicitations using campaign donor lists is therefore a question that is not comprehended by this dispute.

^{*/} The persons surveyed in 1974 stated that 66% of the unsolicited mailings they had received were "the kind of information that I like to receive" or "interesting and enjoyable, but not especially useful to me." In 1972 the figure was 64%. In 1974, 20% of the mailings were described as "neither interesting, enjoyable nor useful." In 1972 the figure was 21%. In both survey years, only 4% of the mailings were described as "objectionable." No opinion or no answer was given regarding 10% of the mailings in 1974 and 11% of the mailings in 1972. U.S. Postal Service, Office of Public Information, "The Household Advertising Mailstream," 1972 and 1974, reprinted in B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 5.

^{**/} In B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 7, it is stated that persons with "higher income" tend to receive an above-average number of pieces of unsolicited mail.

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in particular, there are strong reasons for assuming that its message would be even more favorably received by the persons on the Reagan list than average unsolicited mailings are received by the average householder. The Journal's letter both informed recipients of the existence of the Journal and asked for subscriptions and donations. Most Reagan supporters would be interested to learn about the existence and objectives of the Journal even if they did not subscribe or donate to it. Additionally, the content and form of the Journal's letter was inoffensive, and its format -- a letter in an envelope -- meant that it could be readily discarded if unwanted.

Thus, the Act, as illuminated by its legislative history, does not require the interpretation expressed by the Commission in its August 3 letter.

F. The Commission's August 3 Interpretation of § 438(a)(4), as It Is Proposed to Be Applied to the Journal, Violates the First Amendment.

A finding by the Commission that the Journal violated § 438(a)(4) by soliciting subscriptions or donations would construe the section in a way that violates the First Amendment. The First Amendment value at stake here is protection of commercial speech. The

*/ 2 U.S.C. § 438(a)(4) and 11 C.F.R. 104.13 do not on their face proscribe, and therefore do not raise an issue concerning, the use of lists of donors to the campaign of one candidate by other candidates for the purpose of soliciting votes or work from individuals. The Act

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relevant principles were declared by the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Virginia Pharmacy decision makes it clear that the First Amendment protects commercial speech in the form of a proposal of a commercial transaction, even though "the advertiser's interest is a purely economic one." Id. at 762. According to the Court:

"Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." Id. at 765.

The Journal's solicitation of subscriptions fits this standard for First Amendment protection; moreover, the facts that the

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and regulation do prohibit a candidate's use of donor lists to solicit contributions. The question whether this prohibition is consonant with the First Amendment's protection of speech, and the corollary right effectively to participate in the electoral process, however, is not raised by the facts of the present controversy. That the Journal is a printed periodical and a forum for discussion of ideas implicates the First Amendment's protection of the press, but freedom of the press is not the primary element of the Journal's position.

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Journal's solicitation was for the purpose of giving notice of the existence of a medium for discussion of ideas, and that its impetus was education, not profits, strengthen the protection afforded by the First Amendment.

Moreover, the First Amendment requires access to the mails for the transmission of inoffensive communications. "The use of the mails is almost as much a part of free speech as the right to use our tongues." United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting), quoted with approval, Blount v. Rizzi, 400 U.S. 410, 416 (1971). See also Taylor v. Sterrett, 532 F.2d 462, 480 (5th Cir. 1976). The mails, of course, are the medium of communication used by the Journal.

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However the Commission's burden of justifying its proscription of the Journal's activities is defined, the Commission cannot meet it. The Journal has strong grounds for contending that the Commission's prohibition of its use of the Reagan list effectively denies the Journal all communication: The Journal's meager budget permits only a small amount of advertising directed toward a discrete group likely to support the Journal's purposes. In the opinion of the Journal's editors, the Reagan list includes the persons who are most likely to subscribe or make a donation. Thus, the Commission's prohibition squelches the only economically feasible form of commercial speech,

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which in turn will force the Journal to close down.^{*/} In Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (8-0 decision), the Court stated that whether "sellers realistically are relegated", by a proscription against one form of speech, to alternatives that are "more cost[ly]," involve "less autonomy," "are less likely to reach persons not deliberately speaking sales information," or are "less effective media" determine whether the alternatives are "satisfactory" and therefore a persuasive basis for sustaining the proscription. Id. at 93 (emphasis added).

In the present case, there is no realistic alternative method of communication open to the Journal if mail solicitation of the persons on the Reagan list is prohibited. Thus, it is at least arguable that the Commission must meet the heavy burden of showing that a compelling public interest justifies its prohibition, because the effect of the prohibition is to prevent speech.^{**/}

Indulging the assumption, however, that if the Journal is denied use of the Reagan list, other means of commercial speech will realistically remain open to it, the Commission's prohibition of the Journal's solicitation of persons by means of the Reagan list might be characterized as a restriction on the manner of its speech. The Commission may impose reasonable time, place and manner

^{*/} The Journal receives no financial support from Harvard University.

^{**/} "After Virginia Pharmacy Bd. it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental." Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 92 m.6. (1977) (emphasis added).

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restrictions on the exercise of speech, provided that the restriction is "narrowly tailored to further the [government's] legitimate interest." Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). But the First Amendment requires that the Commission justify its prohibition.^{*/} Thus, even if the interpretation of § 438(a)(4) announced in the Commission's August 3 letter is a restraint on only the manner of speech, the Commission must nonetheless show that its interpretation of § 438(a)(4) "is needed to assure" a legitimate governmental interest. Linmark Associates, Inc. v. Township of Willingboro, supra, 431 U.S. at 95. The Journal contends that the Commission's interpretation is not necessary for that purpose.

The only governmental interest that is asserted in the legislative history of the Act as the basis for its "commercial purpose" proscription is protection of election campaign contributors from harassment of the sort that will significantly deter their contribution to future campaigns. It may be assumed that this interest is legitimate and substantial. But the Commission must show clearly that its proscription of inoffensive mail solicitations furthers this interest. The

^{*/} That justification cannot be simply that "ample alternate channels of communication," Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 771 (1976), remain available to the Journal. "Restraint on expression may not generally be justified by the fact that there may be other times, places or circumstances available for such expression." Minarcini v. Strongville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976). See also, Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Kleininst v. Mandel, 408 U.S. 753, 765 (1972).

interest. The Journal contends that the Commission cannot make this showing for the reasons stated in section E of its argument, supra at pages 12-14. ^{*/} Therefore it cannot justify its proscription against the inoffensive mail solicitation of persons named in a donor list on file at the Commission by a tax-exempt, non-commercial organization not involved in influencing the outcome of political campaigns.

In contrast with the legitimate governmental interest in protecting contributors from harassment that will deter future contributions, two putative "interests" are not legitimate and therefore cannot justify abridgment of the First Amendment interests of the Journal and its addressees. First, the government has no legitimate interest in paternalistically insulating the public from advertising messages in order to minimize the possibility of annoyance. As the Supreme Court stated in Virginia Pharmacy case, supra, 425 U.S. at 770, the First Amendment requires that government:

*/ Additionally, if the Journal's position regarding Congress' definition of "contributions" (see subsection A of this argument) is correct, it is clearly proper for the Journal to solicit donations from the persons named on the Reagan list. Consequently, there can be no justification for prohibiting the solicitation of subscriptions. Surely it is not likely that the recipients of a letter from the Journal will be deterred from making future campaign contributions simply because a solicitation of a subscription has been added to the solicitation of a donation.

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"assume that this [advertisement] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them."

Furthermore:

"The ability of government, consistent with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." Cohen v. California, 403 U.S. 15, 21 (1971) (emphasis added).

Indeed, the assumption is that the public has an interest in receiving -- indeed, a right to receive -- advertising. Virginia Pharmacy case, supra, 425 U.S. at 757.

It is true that when communications are mailed to a residence, the householder's privacy interests must be considered along with the interests of mailer and householder in communication by mail. A householder has the right to exclude offensive mail from his home. Rowan v. Post Office Department, 397 U.S. 728 (1970). But the Court and Congress have made it clear that the decision as to what shall be deemed offensive and therefore excluded from an individual's home is to be made by the individual himself,

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id. at 736; see also Martin v. City of Struthers, 319 U.S. 141, 144 (1942), not by a government agency "sitting astride the flow of mail." Lamont v. Postmaster General, 381 U.S. 301, 306 (1965). The statutory mechanism for such exclusion exists in 39 U.S.C. § 3008 (1976).^{*/} Moreover, the businesses that are the primary users of unsolicited mail advertising operate a centralized "Mail Preference Service" that invites persons who receive their mail to ask that their names be removed from active solicitation lists.^{**/}

Second, there is no legitimate interest in protecting the proprietary interest of candidates in donor lists filed with the Commission. The assertion of such an interest follows an assumption that if the public may use campaign donor lists filed with the Commission for solicitations, the value of those lists to candidates will be dissipated.^{*/} But this assumption, even if it is accurate,

^{*/} While the statute refers only to mail that is "erotically arousing or sexually provocative," in practice "the power of the householder under the statute is unlimited; he may prohibit the mailing [to himself] of a dry goods catalog because he objects to the contents" Rowan v. Post Office Department, 397 U.S. 728, 737 (1970).

^{**/} This voluntary approach was recommended by the Privacy Protection Study Commission in its 1976 Report to Congress. Interestingly, "[c]onsumer response to MPS [Mail Preference Service] has yielded more requests to get on than off mailing lists." B. Rodriguez, "Fact Book on Direct Response Marketing" (1978) at 9.

^{***/} The rationale behind this assumption is apparently as follows: the more frequently the persons on a mailing list are solicited, the less likely it is that they will respond to a particular solicitation; in other words, the more a list is used, the less effective it becomes.

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cannot support the Commission's position. The legislative history of the Act affords no basis for the Commission's assertion of a mandate to protect such an "interest." In adopting the proviso to § 438(a)(4), Congress adverted only to the objective of protecting contributors from harassment. There is no mention of an objective of protecting candidates' interests in maximizing the effectiveness of their campaign donor lists for their future use or for sale or loan to other persons.

There is a more fundamental flaw in the assertion of this putative "interest." At bottom, it must be justified by the rationale that additional solicitations by the public will cause persons on candidates' donor lists to direct some of their money and loyalty to new causes. But the prohibition of this effect is not a legitimate governmental interest. The Commission cannot stifle the free flow of truthful and inoffensive information because it assumes that recipients will act directly and lawfully on that information to their detriment or to that of the general public.^{*/} Such a

^{*/} In the Linmark case, the Court concluded that the regulatory proscription was based on the "content" of the communications at issue because the Township "fears their 'primary' effect -- that they will cause those receiving the information to act upon it." "The [Township] Council has sought to restrict the free flow of these data because it fears that otherwise [the recipients of the data] will make decisions inimical to what the Council views as the [recipients'] self-interest and the corporate interest of the township. . . ." The Court characterized the "constitutional defect" in such a regulation as "basic." 431 U.S. at 94, 96.

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rationale involves a prohibition of speech on the basis of its content, the most suspect type of restraint on First Amendment rights.

Finally, the interpretation that the Commission adopted in its August 3 letter is not necessary to protect the government's legitimate interest in assuring the proper use of public records. If the Commission asserts such an interest, the assertion cannot strengthen the Commission's position. Such an assertion would simply beg the question of what constitutes proper use of the campaign donor lists on file with the Commission. Statutes other than the Act itself do not answer this question;^{*/} and reference to the Act itself raises the questions of proper interpretation of § 438(a)(4) in light of its legislative history and the limitations of the First Amendment, which have already been discussed in this brief.

^{*/} Statutes relating to the disclosure of information, such as the Privacy Act, 5 U.S.C. § 552a, the exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b), and the criminal proscription of disclosure by officials of confidential information, 18 U.S.C. § 1905, are not relevant to the duties of the Commission with respect to the campaign donor lists in its files, because these lists are not secret or confidential. Congress has required that they be disclosed to the public. The present dispute about the meaning of § 438(a)(4) concerns the ways in which the public may use lists already in the public domain.

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For the foregoing reasons, the Commission has not shown and cannot show that its new interpretation of § 438 (a)(4), which abridges First Amendment rights, is necessary to protect a compelling, or even a legitimate, governmental interest, or that its interpretation involves a proscription of a manner of speech that is narrowly tailored to further such an interest.

IV. Conclusion.

The Journal respectfully submits that the plain meaning of the Act and the regulations promulgated by the Commission for its implementation, the legislative history of the Act, principles of due process, and First Amendment principles, require the conclusion that the Journal has not violated § 438(a)(4) of the Act as that section must be construed, and that the Commission lacks the authority to prohibit the Journal's mail solicitation of the persons whose names appear on the Reagan list for the purpose of establishing its circulation.

Respectfully submitted,

Lawrence T. MacNamara, Jr.

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888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorney for the Harvard
Journal of Law and Public
Policy

7934011653

In The
FEDERAL ELECTION COMMISSION

In the Matter of the)
)
Harvard Journal of Law) MUR - 592(78)
)
and Public Policy)

AFFIDAVIT OF E. SPENCER ABRAHAM

E. SPENCER ABRAHAM, being duly sworn according to law and authorized to make this affidavit on behalf of the HARVARD JOURNAL OF LAW AND PUBLIC POLICY does depose and say:

1. I am the President of the Harvard Journal of Law and Public Policy.

2. The Harvard Journal of Law and Public Policy is a non-profit Massachusetts corporation formed in Massachusetts. Its membership is comprised of students at Harvard Law School. Its function is the publication of a journal of ideas. The format of the Journal follows that of a law review, including articles by outside contributors and student-written notes and comments. The Journal does not receive financial support from Harvard University. It is a new publication without an established list of subscribers. One issue has been printed.

3. To attempt to establish a circulation, the Journal contacted both by letter and phone the Federal Election Commission in March of 1978 in an effort to obtain a list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, which was on file in the public records of the Commission. The Journal apprised the Commission of the purposes for which it requested the list. In subsequent discussions between Mr. Abraham and

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Mr. Michael Malone of the FEC's public documents section, the Journal reiterated its purpose for requesting a copy of the Reagan list. Mr. Malone of the Commission furnished the records to Mr. Thomas Klunzinger on April 17, 1978. During discussions prior to the obtaining of such lists Mr. Malone indicated that he felt the use of the lists for commercial purposes was in violation of 2 U.S.C. section 438 (a) (4). Mr. Malone was then informed of the existence of 11 C.F.R. section 104.13. Mr. Malone was unfamiliar with this provision and made no further comment with regard to the legality of using the Reagan lists after notification of the existence of this regulation (a copy of the regulation was sent to Mr. Malone).

4. After the Journal obtained the Reagan list, it mailed letters to approximately 2,500 of the persons named in the list. The letters were mailed on the following dates: June 21 - 721; June 27- 675; June 30 - 550; July 3 - 531.

5. In mid-July, 1978, Mr. Gary Christian of the Enforcement Division of the Commission called Mr. Abraham and said that the Commission considered the Journal's mailings to be violations of § 438 (a) (4). Thereupon the Journal ceased mailing letters to persons named in the Reagan list since that time.

6. The Journal has an extremely limited budget. It must advertise if it is to continue in business, but it can afford to advertise only to a discrete group that is likely to be sympathetic to the Journal's purpose. In the opinion of the Journal's editors, the Reagan list includes the names of persons most likely to support the Journal with subscriptions or contributions.

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I have read the foregoing and it is true to the best of my knowledge, information and belief.

E. Spencer Abraham

E. Spencer Abraham
President, Harvard Journal
of Law and Public Policy

Sworn and Subscribed to before me this
20th day of September, 1978

Wilma Jean Hammond
Notary Public
Wayne Dy
aug 20, 1979

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COVINGTON & BURLING

888 SIXTEENTH STREET, N. W.

WASHINGTON, D. C. 20006

FEDERAL ELECTION

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September 18, 1978

806282

Mr. Gary Christian
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: Harvard Journal of Law and Public Policy:
MUR 592(78)

Dear Mr. Christian:

I have attached a "Preliminary Statement of the Dispute by the Journal in Response to the Commission's Notice That It Has Reason to Believe That the Journal May Have Violated 2 U.S.C. § 438(a)(4)." After our discussion on Friday, in which we agreed that the Preliminary Statement should be filed this morning, followed by a Memorandum of Law on September 22, I expanded the Preliminary Statement somewhat. I still plan to submit additional legal support on September 22. The most practical form for the September 22 submission may be a substitute Statement rather than a supplemental memorandum. For that reason, and because the Journal's editor has not seen this Preliminary Statement, I request that formal circulation of the Journal's position among the Commission await submission of the amplified Statement on September 22.

With kind regards:

Sincerely,

Lawrence T. MacNamara, Jr.
Lawrence T. MacNamara, Jr.

LTM/jab
Attachment

79040114667

In The
FEDERAL ELECTION COMMISSION

In the Matter of the)
)
Harvard Journal of Law) MUR - 592 (78)
)
and Public Policy)

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PRELIMINARY STATEMENT OF THE DISPUTE
BY THE JOURNAL IN RESPONSE TO THE
COMMISSION'S NOTICE THAT IT HAS REASON
TO BELIEVE THAT THE JOURNAL MAY HAVE
VIOLATED 2 U.S.C. § 438(a)(4).

Lawrence T. MacNamara, Jr.
888 Sixteenth Street, N.W.
Washington, D.C. 20006
452-6770

Attorney for the Harvard
Journal of Law and Public
Policy

September 18, 1978

I. Facts.

The Harvard Journal of Law and Public Policy is a new periodical published by a not-for-profit, tax exempt organization comprised of students at Harvard Law School. In the one issue its editors have produced, the Journal follows the law review format of articles from outside authors supplemented by student-written notes and comments. It does not support or oppose candidates for election, expressly or otherwise, or attempt to influence the outcome of elections in any other way.

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Stating that their purpose was to establish a circulation for the Journal, its editors asked the Commission in the Spring of 1978 to provide a copy of the list of donors to the 1976 Presidential Primary Campaign of Ronald Reagan, on file in the Commission's public records ("Reagan List"). The Commission furnished to the Journal, in April 1978, a list of some 20,000 names. Thereafter the Journal began to mail, in batches of several hundred envelopes at a time, a letter that solicited subscriptions and donations to the Journal.*/
By July 1978, the letter had been sent to approximately

*/ The letter requesting subscriptions and donations was short and polite. It stated in part:

"If you wish to subscribe to the
Harvard Journal of Law and Public
Policy, please send the four dollar

(footnote continued)

2500 persons named in the Reagan list. At that time the Commission informally told the Journal that it had reason to believe that the Journal's use of the Reagan list may have violated a section of the Federal Election Campaign Act of 1971 as amended ("Act"), 2 U.S.C. § 438(a)(4), and as implemented by the Commission's relevant regulation, 11 C.F.R. § 104.13.^{*/} The Journal thereupon ceased using the list and has not used it since. The Commission's informal communication was confirmed by a letter of August 3, 1978 from Mr. Oldaker to Mr. Abraham, the President of the Journal ("August 3 letter").

II. Scope of the Dispute.

This dispute concerns the proper interpretation of the proviso of 2 U.S.C. § 438(a)(4), which states that "any information copied from such reports and statements

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subscription fee in the enclosed self-addressed stamped envelope. And, if you can, please join the Journal's Patrons Program by donating \$50 to the cause of academic diversity and freedom on thought. Since the Journal is a non-profit making educational organization, of course, such contribution will be tax deductible."

^{*/} The Commission submitted 11 C.F.R. § 104.13 to Congress on January 11, 1977 and, pursuant to 2 U.S.C. § 438(c), the regulation became effective thirty legislative days thereafter. Thus 11 C.F.R. § 104.13 is the regulation that governs the present dispute.

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[filed with the Commission and required to be made available for public inspection and copying] shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose." The Journal's position is that its use of the Reagan list did not violate any of the elements of this proscription, and that the Commission acted correctly in April 1978 when it gave the Journal the Reagan list, with the apparent understanding that it would be used for the purpose of soliciting contributions to establish the Journal's circulation.

There appears to be no dispute about whether the Journal "sold" the Reagan list. The Journal has not done so. Nor does the Commission appear to contend that the Journal solicited "contributions," as that term is defined for the purposes of the Act in 2 U.S.C. § 431(e) and 11 C.F.R. § 100.4(a)(1).^{*/} In any event, there would

^{*/} In his letter to the Journal of August 3, 1978, Mr. Oldaker stated that:

"[T]he use of names obtained from the FEC reports to solicit subscriptions to a magazine such as the Journal is considered to be for commercial purposes and prohibited by the Act."

There is no reference to suspected violation of the prohibition against soliciting contributions.

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be no grounds for the Commission to assert that the Journal had done so: the Journal has not requested or used donations for the purpose of influencing election results; therefore its requests for donations and subscriptions from persons whose names were on the Reagan list did not constitute "soliciting contributions" within the meaning of the Act.

Thus the nub of the matter is whether the Journal violated the Act's proscription against utilizing the list "for any commercial purpose." The Journal's position, explained in the following paragraphs, is that it did not violate this proscription.

III. Argument.

A. The Plain Meaning of 11 C.F.R. § 104.13 Permits the Activities by the Journal That Are the Subject of This Dispute.

"Commercial purpose" is a phrase of broad and uncertain scope. It is not defined in the Act; nor is it a term of art with a settled meaning. The Commission's regulations do not define the term, but 11 C.F.R. § 104.13 includes an exception to the "commercial purpose" proscription. According to that exception, "'any commercial purpose' does not include the sale of newspapers, magazines, books or other similar communications, the principal purpose of which is not to communicate lists

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or other information obtained from a report filed as noted above." Thus, according to the regulation, the Act does not proscribe utilization of campaign donor lists for the purpose of sale of magazines the principal purpose of which is not to communicate the lists. The activities of the Journal which precipitated this MUR clearly fit within the express exception of 11 C.F.R. § 104.13. The Journal is a periodical similar to a magazine; its principal purpose is not to publish campaign donor lists; and its use of the Reagan list to invite subscriptions was for the purpose of "sale" of the Journal. The Journal contends that, for this reason alone, the Commission lacks reason to believe that the Journal may have violated the Act by using the list for a "commercial purpose." The Journal also contends that it was fully justified in relying on the plain meaning of the Commission's regulations when it determined that the "commercial purpose" proscription would not apply to its activities.

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B. The Commission's August 3 Letter Represents an Invalid Repudiation of the Plain Meaning of 11 C.F.R. § 104.13.

In its August 3 letter, however, the Commission stated that the Journal's activities were within the "commercial purpose" proscription. The letter must be considered as representing a substantial change in the Commission's interpretation of § 438(a)(4) that repudiates the plain meaning of 11 C.F.R. § 104.13. The Commission apparently is harkening back to a 1972 regulation of the Comptroller General,^{*/} which provided:

"No information copied or obtained from reports and statements shall be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose. For purposes of this subchapter, 'soliciting contributions' means requesting gifts or donations of money, or anything of value for any cause or organization -- political, social, charitable, religious, or otherwise. For purposes of this subchapter, 'any commercial purpose' means any sale, trade, or barter of any list of names or addresses taken from such reports and statements and surveys or sales promotion activity. Violations of this section are subject to the criminal penalties provided in section 311 of the Act." 11 C.F.R. §20.3 (1972); 37 Fed. Reg. 6167 (1972).

This regulation purported to proscribe activity of the type that is at issue in this case, but its proscription of contributions exceeded the scope of the Act, and its

^{*/} Regulatory authority under the Act was vested in the Comptroller General until 1974.

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definition of "commercial purpose" conflicted with First Amendment principles protecting commercial speech, which the Supreme Court has clarified since 1972. The Commission apparently recognized the infirmity of the 1972 regulation when, in 1977, it promulgated the substantially less restrictive provisions of 11 C.F.R. § 104.13, in supersession of 11 C.F.R. § 20.3 (1972). The Commission's present vacillation in the direction of the Comptroller's 1972 regulation is wrong as a matter of administrative procedure, proper interpretation of the intent of Congress, and proper application of First Amendment principles.*/

C. A Finding That the Journal Violated the Act Would Be Improper as a Matter of Administrative Procedure.

Irrespective of the merits of the new interpretation that the Commission has placed on § 438(a)(4), a finding that a violation had occurred in this case would be a denial of due process. While it is proper for an agency to alter its policies and approaches, e.g., Columbia Broadcasting System,

*/ In transmitting its proposed general regulations to Congress on January 11, 1977, the Commission did not indicate that it intended to interpret 11 C.F.R. § 104.13 as merely a restatement of 11 C.F.R. § 20.3 (1972). In its only relevant comment, the Commission said that 11 C.F.R. § 104.13 "defines commercial use to exclude use in news media and books." This statement is too cryptic to be helpful in resolving the present issue. But even if it were more precise, it could not have the effect of altering the plain meaning of the regulation itself.

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Inc. v. F.C.C., 147 U.S. App. D.C. 175, 183 (1971), due process indicates that sanctions be applied only prospectively. Having fundamentally altered its interpretation of § 438(a)(4) in its August 3 letter, the Commission cannot now expose the Journal to the possibility of a civil penalty that would attend a finding of violation of the Act, on the basis of the Journal's actions taken prior to August 3 in good faith reliance on the Commission's prior interpretation. In this respect, the observation of Judge Friendly in N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966), is relevant: "the [judicial] hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known"

If the Commission wishes to alter its interpretation of § 438(a)(4), it should do so either in a separate rulemaking proceeding, or by the crafting in this proceeding of a rule for prospective application. See, e.g., N.L.R.B. v. Beech-Nut Life Savers, Inc., 406 F.2d 253 (2d Cir. 1968). Indeed, the Commission's revision of its interpretation of § 438(a)(4) in a contemplated enforcement action indicates that its regulations, which it presented to Congress as a "readable

and practical guide" for the public, Letter of Hon. Vernon W. Thompson, to Hon. Thomas P. O'Neill, Jan. 11, 1977, served in fact as a snare for the Journal.

D. The Commission's Interpretation of § 438(a)(4), as Expressed in Its August 3 Letter, Is Not Mandated by the Act or Its Legislative History.

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In passing a proscription against use of campaign filings for "commercial purposes," without defining that term, Congress implicitly gave the Commission broad discretion to define the term in particular circumstances. Where First Amendment problems are raised by the "commercial purpose" proscription, the Commission has a duty to define it in a way that preserves the validity of the Act. For the reasons stated in subsequent paragraphs, the application of § 438(a)(4) indicated by the Commission in its August 3 letter violates the First Amendment. Moreover, if the Commission's interpretation prohibits use of the donor lists on file at the Commission for any type of solicitation that is colorably commercial, that interpretation is overbroad in light of the First Amendment. It is therefore especially significant that the Act itself does not require such application or interpretation.

The "commercial purpose" proscription in the proviso to § 438(a)(4) was added as a floor amendment by Senator Bellmon without discussion in hearings. By contrast, the public disclosure provision to which the proscription was belatedly attached had been a keystone of the legislative scheme from its inception. Thus as

the fabric of the Act was woven, the assumption of Congress was that campaign donor lists would be made public without restriction, and the intent of Congress to restrict the use of information once publicized was at best pale and secondary in relation to the paramount intent to require public disclosure.*/

The attitude of Congress reflected the approach of earlier campaign disclosure acts, which placed no restriction on the use of disclosed lists of contributors once they were in the public domain. See, e.g., 37 Stat. 25, 26 (§ 5) (1911).

The floor discussion of Senator Bellmon's amendment is significant. It indicates that his purpose was primarily to protect contributors from the practice

*/ Indeed, the relative insouciance with which Congress treated its restrictions on the use of public information is indicated by its failure to provide any restriction on the use of information filed with state officials. See 2 U.S.C. § 439(b)(3). The absence of such a restriction was filled by the Commission's Advisory Opinion No. AO 1975-124, CCH Fed. Election Campaign Financing Guide, ¶ 5191. Moreover, in light of the regulatory scheme it had crafted, Congress itself was doubtful about its ability to control the use of information in the public domain. When Senator Bellmon, the sponsor of the floor amendment that became the proviso to § 438(1)(4), argued for his amendment, the leader of the floor debate of the Act, Senator Cannon, responded:

"Mr. President, this is certainly a laudable objective. I do not know how

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of list-brokering for profit. Additionally, he intended to protect the privacy of contributors from harrassment of the sort that would deter their making future contributions to candidates for political office. 117 Cong. Rec. 30057-58 (1971). It is the position of the Journal that it has not committed either of the practices that disturbed Senator Bellmon. It has not engaged in list-brokering. And its mailing of a solicitation letter to persons on the Reagan list is not an invasion of privacy or harrassment that will deter future contributions.*
Moreover, although the Journal is not now in possession of such evidence, it believes that attitude surveys exist that prove that persons receiving unsolicited mail do not consider it either an invasion of privacy or harrassment so grave that it would deter future contributions.

(footnote continued)

we are going to prevent it from being done. I think as long as we are going to make the lists available, some people are going to use them to make solicitations. But as far as it can be made effective, I am willing to accept the amendment."
117 Cong. Rec. 30057 (1971).

In stating that, in light of the Act's scheme, the achievement of Senator Bellmon's objectives could not be guaranteed, Senator Cannon in effect stated that Congress did not consider those objectives to be a primary part of the legislative scheme.

*/ The Journal has not engaged in more intrusive forms of solicitation, such as telephone calls and door-to-door

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Thus, the Act, as illuminated by its legislative history, does not require the interpretation expressed by the Commission in its August 3 letter.

E. The Commission's August 3 Interpretation of § 438(a)(4), as It Is Proposed to Be Applied to the Journal, Violates the First Amendment.

A finding by the Commission that the Journal violated § 438(a)(4) by soliciting subscriptions would construe the section in a way that violates the First Amendment. The First Amendment value at stake here is protection of commercial speech.^{*/} The relevant principles were declared by the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,

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solicitation of persons on the donor list. Whether the Commission would be justified in placing time, place or manner restraints on telephone or door-to-door solicitations using campaign donor lists is therefore a question that is not comprehended by this dispute.

^{*/} 2 U.S.C. § 438(a)(4) and 11 C.F.R. 104.13 do not on their face proscribe, and therefore do not raise an issue concerning, the use of campaign donor lists by other candidates for the purpose of soliciting votes or work from individuals. The Act and regulation do prohibit a candidate's use of donor lists to solicit contributions. The question whether this prohibition is consonant with the First Amendment's protection of speech, and the corollary right effectively to participate in the electoral process, however, is not raised by the facts of the present controversy. That the Journal is a printed periodical and a forum for discussion of ideas implicates the First

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425 U.S. 748 (1976). The Virginia Pharmacy decision makes it clear that the First Amendment protects commercial speech in the form of a proposal of a commercial transaction, even though "the advertiser's interest is a purely economic one." Id. at 762.

According to the Court:

"Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." Id. at 765.

The Journal's solicitation of subscriptions fits this standard for First Amendment protection; moreover, if they are relevant at all, the facts that the Journal's solicitation was for the purpose of preserving a medium for discussion of ideas, and that its impetus was

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Amendment's protection of the press, but freedom of the press is not the primary element of the Journal's position.

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education, not profits, strengthen the protection afforded by the First Amendment.

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The Journal has strong grounds for a contending that the Commission's prohibition of its use of the Reagan list effectively denies the Journal all communication: The Journal's meager budget permits only a small amount of advertising directed toward a discrete group likely to support the Journal's purposes. In the opinion of the Journal's editors, the Reagan list includes the persons who are most likely to subscribe or make a donation. Thus, the Commission's prohibition squelches the only economically feasible form of commercial speech, which in turn will force the Journal to close down.* / Consequently, the Commission would be required to meet the heavy burden of showing that a compelling public interest justifies its prohibition, when the effect of that prohibition is to prevent speech.

Indulging the assumption, however, that if the Journal is denied use of the Reagan list, other means of commercial speech will remain open to it, the Commission's prohibition might be characterized as a restriction on the manner of its commercial speech. If that be so, the First

* / The Journal receives no financial support from Harvard University.

Amendment would shift the burden to the Commission to justify its prohibition. At the same time, however, the Commission may impose reasonable time, place and manner restrictions on the exercise of speech, provided that the restriction is "narrowly tailored to further the [government's] legitimate interest." Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). The question would thus become whether the Commission can show that its prohibition against commercial solicitation by mail of persons whose names appear on a donor list filed with the Commission clearly furthers a legitimate governmental interest. The Journal's position is that it does not.

It may be assumed that the protection of election campaign contributors from harrassment of the sort that will significantly deter their contributions to future campaigns is a legitimate governmental interest. But it cannot be contended that the receipt of unsolicited letters harrasses their recipients, when the content of the letters is inoffensive. Such communications can be readily discarded. Indeed, the Journal believes that empirical data exist that support the conclusion that most persons are flattered rather than repelled by the receipt of inoffensive unsolicited mail. Unsolicited mailings are a prevalent form of advertising that, it is reasonable to assume, is directed with special frequency toward persons sufficiently affluent to contribute more than \$100 to a political candidate. If campaign contributors are already accustomed to receiving

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unsolicited mailings from other sources, it is unreasonable to assert that the receipt of additional mailings as a result of their campaign contribution will so annoy them that they will stop making contributions.

The government has no legitimate interest in paternalistically insulating the public from advertising messages in order to minimize the possibility of annoyance. As the Supreme Court stated in the Virginia Pharmacy case, supra, 425 U.S. at 770, the First Amendment requires that government:

"assume that this [advertisement] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them."

Indeed, the assumption is that the public has an interest in receiving -- indeed, a right to receive -- advertising. Id. at 757. And the First Amendment limits the power of Congress to control what may be sent through the mails. E.g., Lamont v. Postmaster General, 361 U.S. 301 (1965).

Thus the Commission's prohibition is not supported by a compelling interest. In fact there is no rational basis for concluding that the prohibition of mail solicitation of persons on the Reagan list is necessary to preserve their willingness to contribute to future elections.

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Moreover, the Commission's August 3 letter apparently recognizes that Congress has not proscribed use of campaign filings for the purpose of soliciting donations to recipients unrelated to political election campaigns.^{*/} This position is significant because the solicitation letter that is the subject of this dispute requests both subscriptions and donations for a purpose not related to a political election campaign. The Commission is thus in the awkward position of agreeing that the mailings of the Journal's letter without a request for subscriptions was permissible, while contending that the insertion of a request for subscriptions violated the Act. But surely it is not likely that the recipients of the Journal's letter will be deterred from making future campaign contributions because a solicitation of a sub- has been added to the solicitation of a donation.

Finally, in light of the judgment of Congress that its objectives, the promotion of honesty and the appearance of honesty in election campaigns and the increase in information relevant to voting decisions, justified disclosure and publicization of donors' names, even though the result was to invade the donors' privacy of association and to deter future contributions to a significant extent, Buckley v. Valeo, 424 U.S. 1, 68, 83 (1976), Congress' faint desire to afford what is at most a modicum of protection of

^{*/} Such donations are not "contributions" within the meaning of the Act, 2 U.S.C. § 438(e), and, whatever the meaning of the undefined term "commercial transaction," it appears clearly not to include a gift.

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donors' privacy and incentives to contribute cannot justify the sacrifice of the Journal's First Amendment interests. Indeed, given the lack of any support for the assumption that sacrifice of the Journal's First Amendment interests will protect donors' interests, that sacrifice is completely unwarranted.

For the foregoing reasons, the Journal respectfully submits that it has not violated § 438(a)(4) of the Act as it must be construed, and that the Commission lacks the authority to prohibit the Journal's mail solicitation of the persons whose names appear on the Reagan list for the purpose of establishing its circulation.

Respectfully submitted,

Lawrence T. MacNamara, Jr.
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorney for the Harvard
Journal of Law and Public
Policy

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FIRST CLASS

Lawrence T. MacNamara, Jr., Esq.
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Mr. Gary Christian
Federal Election Commission
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September 15, 1978

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WRITER'S DIRECT DIAL NUMBER

452-6770

Mr. William C. Oldaker,
General Counsel
Federal Election Commission
1325 K Street N.W.
Washington, D.C. 20463

Re: Harvard Journal of Law and Public Policy: MUR 592(78)

Dear Mr. Oldaker:

I shall represent the Journal in this matter.

I am uncertain about the Journal editors' desire to press this matter in order to attempt to persuade the Commission to accept their interpretation of 2 U.S.C. § 438(a)(4) and 11 C.F.R. § 104.13. That uncertainty comes from my recent appointment to this case, and my inability to reach the Journal's editor-in-chief, Steven J. Eberhard, who is on field maneuvers with the Army Reserve.

Today I shall file with the Commission a statement of the Journal's position on the facts and the law pertaining to this matter. I request, however, your consent to an extension until September 22 to file either a detailed memorandum of law or a proposal of settlement, depending on the decision of the Journal's editors.

Sincerely,

Lawrence T. MacNamara Jr.

Lawrence T. MacNamara, Jr.

cc: Mr. Gary Christian

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Lawrence T. MacNamara, Jr.
COVINGTON & BURLING

888 SIXTEENTH STREET, N. W.

WASHINGTON, D. C. 20006

HAND DELIVERY.

Mr. William C. Oldaker,
General Counsel
Federal Election Commission
1325 K Street N.W.
Washington, D.C. 20463



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

MEMORANDUM TO: CHARLES STEELE
FROM: MARJORIE W. EMMONS *MWE*
DATE: AUGUST 25, 1978
SUBJECT: MUR 592 - Interim Report dated 8-21-78
Signed: 8 24-78, Received in
Office of Commission Secretary
8-24- 78. 1 22

The above-named document was circulated to
the Commission on a 24-hour no-objection basis
at 4:30 p.m., August 24, 1978.

There were no objections to the Interim Report.

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August 24, 1978

MEMORANDUM TO: Marge Emmons
FROM: Elissa F. Carr
SUBJECT: MUR 592

Please have the attached Interim Report on MUR 592
distributed to the Commission.

thank you.

79040114690

BEFORE THE FEDERAL ELECTION COMMISSION
August 21, 1978

In the Matter of)
)
Harvard Journal of Law &) MUR 592 (78)
Public Policy)

INTERIM REPORT

Mr. Steven Eberhard of the Harvard Journal of Law & Public Policy ("Journal") called our office in response to our letter notifying the Journal of the Commission's finding of reason to believe. He stated that they have an attorney who is willing to represent them in this matter, but who will be on vacation until after Labor Day. They therefore requested, and were granted, an extension until September 15 in which to file a response to the reason to believe letter.

8/24/78
Date


William C. Oldaker
General Counsel

7901011671



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

August 3, 1978

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. David W. Leebron, President
Harvard Law Review Association
Gannet House
Cambridge, Massachusetts 02138

Re: MUR 592 (78)

Dear Mr. Leebron:

This is to notify you that on August 1, 1978, the Commission found no reasonable cause to believe the Harvard Law Review Association violated 2 U.S.C. §438(a)(4) in connection with the alleged use of FEC reports to compile a mailing list to solicit subscriptions to the Review.

Accordingly the Commission has closed its file in this matter insofar as it pertains to your organization.

The Commission thanks you for your cooperation in the investigation of this matter. Should you have any questions, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4161.

Sincerely,

William C. Oldaker
General Counsel

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75 Form 3811, Apr. 1977

RETURN RECEIPT, REGISTERED, REGISTERED, INSURED AND CERTIFIED MAIL

Christian
MUR 592(78)

1. The following service is requested (check one):
 Show to whom and date delivered
 Show to whom, date, and address of delivery
 RESTRICTED DELIVERY
 Show to whom and date delivered
 RESTRICTED DELIVERY
 Show to whom, date, and address of delivery
 (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO: *David Leebron*
Harvard Law Review
Gannet House
Cambridge, Mass. 02138

3. ARTICLE DESCRIPTION:
 REGISTERED NO. *92198* INSURED NO.

1. I have received the article described above.
 Signature of addressee or agent
 Signature of addressee or agent
 DATE OF DELIVERY *8-7-78*

4. ADDRESSES (Canada only if requested)
 1511 MASS ST
 C-02138

5. SHALBE TO DELIVER BECAUSE:

POSTMARK: CA ALLIG 7 1978

6. POSTAL ACCOUNT NO.



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

August 3, 1978

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Spencer Abraham, President
Harvard Journal of Law and
Public Policy
c/o Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 592(78)

Dear Mr. Abraham:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, the Federal Election Commission has found reason to believe that the Harvard Journal of Law and Public Policy ("Journal") may have violated certain provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). Specifically, it appears that the Association used information copied from FEC reports obtained on April 17, 1978, to create a mailing list to solicit subscriptions to the Journal in violation of 2 U.S.C. §438(a)(4). We have numbered this matter MUR 592 (78).

2 U.S.C. §438(a)(4) prohibits the use of information copied from FEC reports to solicit contributions or for any commercial purpose. In this context the use of names obtained from FEC reports to solicit subscriptions to a magazine such as the Journal is considered to be for commercial purposes and prohibited by the Act. The Commission considers the exemption contained in 11 C.F.R. §104.13 not to extend to using FEC reports to solicit subscriptions to periodicals.

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 analysis of this matter. Where appropriate, statements should be submitted under oath.



The Commission is under a duty to investigate this matter expeditiously. Therefore, your response should be submitted within ten days after your receipt of this notification.

If you have any questions, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4161.

This matter will remain confidential in accordance with 2 U.S.C. §437g(a) (3) (B) unless you notify the Commission in writing that you wish the investigation to be made public.

If you intend to be represented by counsel in this matter, please have such counsel so notify us in writing.

Sincerely yours,

William C. Oldaker
General Counsel

Christian *MUR-592(78)*

PS Form 3811, Apr. 1977

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
 Show to whom and date delivered. _____
 Show to whom, date, and address of delivery. _____
 RESTRICTED DELIVERY
 Show to whom and date delivered. _____
 RESTRICTED DELIVERY.
 Show to whom, date, and address of delivery. \$ _____
 (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO: *Spencer Abraham, c/o Kirkhead, Ellis + Bowe, 1776 K Street, N.W., Wash, D.C. 20006*

3. ARTICLE DESCRIPTION:
 REGISTERED NO. CERTIFIED NO. INSURED NO.
 943986

(Always obtain signature of addressee or agent)

I have received the article described above.
 SIGNATURE Addressee Authorized agent
Anthony Williams

4. DATE OF DELIVERY: *AUG 7 1978* POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

BEFORE THE FEDERAL ELECTION COMMISSION

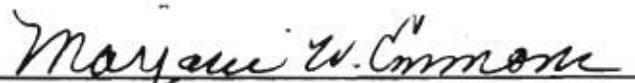
In the Matter of)
) MUR 592 (78)
Harvard Law Review)
Association)
Harvard Journal of Law)
Public Policy)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on August 1, 1978, the Commission approved by a vote of 4-0 the recommendations of the General Counsel to take the following actions in the above-captioned matter:

1. Find no reasonable cause to believe the Harvard Law Review Association violated 2 U.S.C. §438(a) (4) in connection with the use of FEC reports to compile a mailing list to solicit subscriptions to the Review. The letters attached to the General Counsel's Report, dated July 24, 1978 should be sent.
2. Find reason to believe the Harvard Journal of Law and Public Policy violated 2 U.S.C. §438(a) (4) in connection with the use of FEC reports to compile a mailing list to solicit subscriptions to the Journal. The letters attached to the General Counsel's Report, dated July 24, 1978 should be sent.

Commissioners Harris and Aikens abstained from voting in this matter.



Marjorie W. Emmons
Secretary to the Commission

Date: 8/2/78

79040114693

July 28, 1978

MEMORANDUM TO: Marge Emmons
FROM: Klissa T. Carr
SUBJECT: MUR 592

Please have the attached General Council's Report on
MUR 592 distributed to the Commission on a 48 hour tally basis.
Thank you.

79040114695

BEFORE THE FEDERAL ELECTION COMMISSION
July 24, 1978

In the Matter of)
)
Harvard Law Review) MUR 592 (78)
Association)
Harvard Journal of Law &)
Public Policy)

GENERAL COUNSEL'S REPORT

BACKGROUND

200101146??

This matter arose from a referral from the Public Records Office concerning an order for reports of the Citizens for Reagan Committee placed by Mr. Spencer Abraham on March 16, 1978. The referral stated that Mr. Abraham had placed the order on behalf of the Harvard Law Review ("Review") for the purpose of compiling a mailing list to solicit subscriptions to the Review. When informed of the provisions of 2 U.S.C. §438(a)(4), Mr. Abraham said he believed his publication to be exempt from the provisions of the statute. The order was filled on April 17, 1978, and the matter referred to OGC for investigation of a possible violation of 2 U.S.C. §438(a)(4).

The Commission found reason to believe on June 7, 1978, that the Harvard Law Review Association ("Association") violated 2 U.S.C. §438(a)(4) in connection with the use of FEC reports to compile a mailing list to solicit subscriptions to the Review.

EVIDENCE

The Association was notified of the Commission's finding in a letter received on June 26, 1978. On July 7, 1978, Mr. R. Michael Peterson, the outgoing President of the Association,

called the OGC staff member assigned to this matter. The points discussed are set out in Mr. Peterson's attached sworn statement (Attachment I).

In his statement Mr. Peterson avers that the Association has not used any information from FEC reports during the period 1977-78 for any purpose, that no member of the Association was authorized to obtain information from FEC reports, and that Messrs. Abraham and Eberhard are not now and never have been associated with the Association.

We located Mr. Abraham at a Washington, D.C. law firm where he is employed as a law clerk. From him we ascertained that the referral from Public Records was in error in stating that the order was placed on behalf of the Review. It was in fact made on behalf of the Harvard Journal of Law and Public Policy, of which Mr. Abraham is President.

Mr. Abraham confirmed that the intended use of the reports was to compile a mailing list to solicit subscriptions to the Journal. He again stated that he believed the Journal was exempt from the "commercial use" prohibition of 2 U.S.C. §438(a)(4) under the exemption set forth in 11 C.F.R. §104.13.

Subsequently Mr. Abraham requested we contact Mr. Eberhard, Editor-in-Chief of the Journal. An OGC staff member did so and Eberhard requested time to consider whether or not the Journal would cease the mailing of solicitations based on FEC reports.

On July 18 Mr. Eberhard called to inform us that a mailing of perhaps 2 - 3,000 pieces (out of a total of 25,000) was conducted on June 8 using the FEC list. He said the Journal

would cease further mailings until the Commission decided what action should be taken in this matter.

ANALYSIS

We believe Mr. Peterson's sworn statement, and the information provided by Messrs. Abraham and Eberhard, constitute conclusive proof that the Harvard Law Review Association has no involvement in this matter. Accordingly we recommend the Commission find no reasonable cause to believe the Association violated the Act.

2 U.S.C. §438(a)(4) provides that information copied from FEC reports "shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose." 11 C.F.R. §104.13 exempts from the definition of "any commercial purpose" "the sale of newspapers, magazines, books, or other similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report filed as noted above."

According to our conversations with Messrs. Abraham and Eberhard, the Journal believes that the exemption for magazines contained in 11 C.F.R. §104.13 extends to the use of information copied from FEC reports to compile a mailing list to solicit subscriptions. We believe such an interpretation to be inconsistent with 2 U.S.C. §438(a)(4), the statute on which the regulation is based, and therefore incorrect.

A regulation issued by a government agency may not go beyond the statute upon which it is based. As Mr. Justice Brandeis stated in Campbell v. Galeno Chemical Co., 281 U.S. 599, at 610, 50 S. Ct. 412, at 215 (1930): "The limits of the power to issue regulations are well settled. International Railway Co. v.

79040114697

Davidson, 257 U.S. 506, 514, 42 S.Ct. 179, 66 L.Ed. 341. They may not extend a statute or modify its provisions." "A regulation which ... operates to create a rule out of harmony with the statute, is a mere nullity." Manhattan General Electric Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134, 56 S.Ct. 397, 400 (1936).

In cases where a regulation is prone to differing interpretations, one must adopt the interpretation which is closest to the intent of Congress in enacting the statute. "In interpreting a regulation courts will ordinarily avoid a construction which raises doubt as to the validity of the regulation."

Northern Natural Gas Co. v. O'Malley, 277 F.2d 128, 134 (1960), citing Newman v. Commissioner of Internal Revenue, 76 F.2d 449, 452 (1935).

11 C.F.R. §104.13 should therefore be considered in light of the Congressional intent in enacting 2 U.S.C. §438(a)(4) as well as administrative intent in prescribing the regulation. 2 U.S.C. §438(a)(4) was a floor amendment to the 1971 Act introduced on August 5, 1971, by Senator Bellmon. Its stated purpose was "to protect the privacy of ... citizens who may make a contribution to a political campaign or a political party." 117 Cong. Rec. 30057 (1971). The media exemption from commercial use contained in 11 C.F.R. §104.13 is based on the following colloquy:

MR. NELSON: Do I understand that the only purpose is to prohibit the lists from being used for commercial purposes?

MR. BELLMON: That is correct.

MR. NELSON: The list is a public document, however.

MR. BELLMON: That is correct.

MR. NELSON: And newspapers may, if they wish, run lists of contributions and amounts.

MR. BELLMON: That is right; but the list brokers, under this amendment would be prohibited from selling

79040114707

the list or using it for commercial solicitation.
117 Cong. Rec. 30058 (1971).

The above indicates that the only exemption from commercial use intended by the Congress is use by the press for legitimate journalistic purposes of dissemination of public information.

The history of 11 C.F.R. §104.13 bears out this interpretation. The predecessor regulations issued by the three supervisory officers under the 1971 Act defined "any commercial purpose" as "any sale, trade, or barter of any list of names or addresses taken from such reports and statements and any use of such lists for any surveys or sales promotion activity" (page 61, Election Law Guidebook 1974, S.Doc. 93 - 84). Additional guidance is provided by the Chairman's Communication transmitting the proposed FEC regulations (H.R. Doc. 94 - 573) in which the exemption in 11 C.F.R. §104.13 is explained as follows: "It defines commercial use to exclude use in newspapers and books" (emphasis added).

To adopt an interpretation of 11 C.F.R. §104.13 which permits publishers to compile mailing lists based on FEC reports would be inconsistent with the intent of Congress and therefore would render the regulation invalid. Furthermore, the administrative history of the regulation noted above demonstrates that such an interpretation was not intended by either the supervisory officers or the Commission in prescribing their respective regulations.

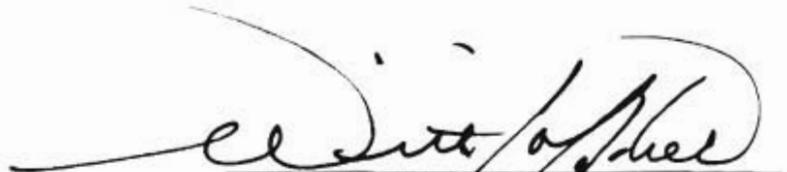
It is therefore recommended the Commission find reason to believe the Harvard Journal of Law and Public Policy violated 2 U.S.C. §438(a)(4) in connection with the use of information contained in FEC reports to solicit subscriptions to the magazine.

79040114701

RECOMMENDATION

1. Find no reasonable cause to believe the Harvard Law Review Association violated 2 U.S.C. §438(a)(4) in connection with the use of FEC reports to compile a mailing list to solicit subscriptions to the Review. Send attached letter.
2. Find reason to believe the Harvard Journal of Law and Public Policy violated 2 U.S.C. §438(a)(4) in connection with the use of FEC reports to compile a mailing list to solicit subscriptions to the Journal. Send attached letter.

7/28/78
Date


William C. Oldaker
General Counsel

79040114703

2004075

Christian

HARVARD LAW REVIEW

PUBLISHED BY

THE HARVARD LAW REVIEW ASSOCIATION

CAMBRIDGE, MASSACHUSETTS 02138

FEDERAL ELECTION COMMISSION

'78 JUL 11 PM 2:13

July 7, 1978

Mr. Gary Christian
General Counsel's Office
Federal Election Commission
1325 K Street NW
Washington, DC 20463

834369

Re: MUR 592 (78)

Dear Mr. Christian:

Pursuant to our phone conversation of July 7, 1978, I am writing with regard to the FEC investigation of the matter numbered MUR 592 (78). As President of the Harvard Law Review Association for 1977-1978, I hereby swear to the following statements:

(a) The Harvard Law Review Association has not sought or used information copied from FEC reports for any purpose, commercial or otherwise, at any time during the years 1977-1978, or -- to the best of my knowledge -- at any time earlier.

(b) No member of the Harvard Law Review Association was authorized to obtain information from FEC reports for any purpose, commercial or otherwise, during the years 1977-1978, nor -- to the best of my knowledge -- has any member done so without authorization.

(c) Messrs. Spencer Abraham and Steven Eberhard are not currently, nor have they ever been, associated with the Harvard Law Review Association.

Sworn and subscribed to before me
this 7th day of July 1978 at
Cambridge, Middlesex, Massachusetts

R. Michael (Stearns)

Suzanne O'Sullivan
Notary Public
Commission expires 5-15-81

ATTACHMENT I (1 of 2)

7904011470

Needless to say, the Harvard Law Review Association is disturbed by the possibility that its name is being used for any purpose, either legal or illegal, by people who are not associated with it, and the Association is therefore anxious to cooperate with the FEC in all respects in the investigation of this matter. Since my tenure as President of the Association has now ceased, however, any future communications would best be addressed to my successor, Mr. David W. Leebron.

Sincerely,

R. Michael Peterson

R. Michael Peterson
President, Harvard Law Review Association
1977-1978

72041111701

ATTACHMENT I (2 of 2)



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Spencer Abraham, President
Harvard Journal of Law and
Public Policy
c/o Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 592(78)

Dear Mr. Abraham:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, the Federal Election Commission has found reason to believe that the Harvard Journal of Law and Public Policy ("Journal") may have violated certain provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). Specifically, it appears that the Association used information copied from FEC reports obtained on April 17, 1978, to create a mailing list to solicit subscriptions to the Journal in violation of 2 U.S.C. §438(a)(4). We have numbered this matter MUR 592 (78).

2 U.S.C. §438(a)(4) prohibits the use of information copied from FEC reports to solicit contributions or for any commercial purpose. In this context the use of names obtained from FEC reports to solicit subscriptions to a magazine such as the Journal is considered to be for commercial purposes and prohibited by the Act. The Commission considers the exemption contained in 11 C.F.R. §104.13 not to extend to using FEC reports to solicit subscriptions to periodicals.

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 analysis of this matter. Where appropriate, statements should be submitted under oath.



7904101470

The Commission is under a duty to investigate this matter expeditiously. Therefore, your response should be submitted within ten days after your receipt of this notification.

If you have any questions, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4161.

This matter will remain confidential in accordance with 2 U.S.C. §437g(a)(3)(B) unless you notify the Commission in writing that you wish the investigation to be made public.

If you intend to be represented by counsel in this matter, please have such counsel so notify us in writing.

Sincerely yours,

William C. Oldaker
General Counsel



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. David W. Leebron, President
Harvard Law Review Association
Gannet House
Cambridge, Massachusetts 02138

Re: MUR 592 (78)

Dear Mr. Leebron:

This is to notify you that on _____, 1978, the Commission found no reasonable cause to believe the Harvard Law Review Association violated 2 U.S.C. §438(a)(4) in connection with the alleged use of FEC reports to compile a mailing list to solicit subscriptions to the Review.

Accordingly the Commission has closed its file in this matter insofar as it pertains to your organization.

The Commission thanks you for your cooperation in the investigation of this matter. Should you have any questions, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4161.

Sincerely,

William C. Oldaker
General Counsel



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. David W. Leebron, President
Harvard Law Review Association
Gannet House
Cambridge, Massachusetts 02138

Re: MUR 592 (78)

Dear Mr. Leebron:

This is to notify you that on _____, 1978, the Commission found no reasonable cause to believe the Harvard Law Review Association violated 2 U.S.C. §438(a)(4) in connection with the alleged use of FEC reports to compile a mailing list to solicit subscriptions to the Review.

Accordingly the Commission has closed its file in this matter insofar as it pertains to your organization.

The Commission thanks you for your cooperation in the investigation of this matter. Should you have any questions, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4161.

Sincerely,

William C. Oldaker
General Counsel

acc # 4390

mur 59

RECEIVED
FEDERAL ELECTION
COMMISSION

HARVARD JOURNAL of LAW AND PUBLIC POLICY
HARVARD LAW SCHOOL
CAMBRIDGE, MASSACHUSETTS 02138
233 Langdell Hall
Telephone: (617) 495-3105

AUG 7 PM 12:46

August 3, 1978

Federal Election Commission
Enforcement Division
1325 K Street, N.W.
Washington, D.C.
Attention: Mr. Gary Christian

865115

Gentlemen:

As of this date, I have instructed the Journal office in Cambridge to cease the mailings in question pending further resolution of this matter by the FEC. To the best of my knowledge, the Journal acquired a list of approximately 20,000 names in April, 1978, and has, to this time, mailed letters to approximately 2,500 of those people. The letters were mailed on the following dates: June 21 - 721; June 27 - 675; June 30 - 550; July 3 - 531; Total - 2477. All of these letters were mailed prior to our initial contact with the FEC Enforcement Division.

It is our position that our use of the list was not a violation of 2 U.S.C. Section 438(a)(4) or 11 C.F.R. Section 104.13, and we wish to challenge the Commission's contrary interpretation. We have voluntarily suspended the mailings in question pending further resolution of the matter by the FEC. Should the Commission contemplate any rule-making proceedings which might affect the use of such lists in the future, we request that the Journal be personally notified of such proceedings and any proposed regulations.

Sincerely yours,

E. Spencer Abraham

E. Spencer Abraham
President

ESA:djd

7 9 7 1 0 1 1 0 1 0 2

825 New Hampshire Ave., N.W.
Apartment 313
Washington, D.C. 20037

FEDERAL ELECTION COMMISSION

'78 AUG 7 PM 12:46

Federal Election Commission
Enforcement Division
1325 K Street, N.W.
Washington, D.C.
Attention: Mr. Gary Christian

Dec 4095-

HARVARD LAW REVIEW

PUBLISHED BY

THE HARVARD LAW REVIEW ASSOCIATION
CAMBRIDGE, MASSACHUSETTS 02138

RECEIVED
FEDERAL ELECTION
COMMISSION

'78 JUL 11 PM 2:13

July 7, 1978

Mr. Gary Christian
General Counsel's Office
Federal Election Commission
1325 K Street NW
Washington, DC 20463

804369

Re: MUR 592 (78)

Dear Mr. Christian:

Pursuant to our phone conversation of July 7, 1978, I am writing with regard to the FEC investigation of the matter numbered MUR 592 (78). As President of the Harvard Law Review Association for 1977-1978, I hereby swear to the following statements:

(a) The Harvard Law Review Association has not sought or used information copied from FEC reports for any purpose, commercial or otherwise, at any time during the years 1977-1978, or -- to the best of my knowledge -- at any time earlier.

(b) No member of the Harvard Law Review Association was authorized to obtain information from FEC reports for any purpose, commercial or otherwise, during the years 1977-1978, nor -- to the best of my knowledge -- has any member done so without authorization.

(c) Messrs. Spencer Abraham and Steven Eberhard are not currently, nor have they ever been, associated with the Harvard Law Review Association.

Sworn and subscribed to before me
this 7th day of July 1978 at
Cambridge, Middlesex, Massachusetts

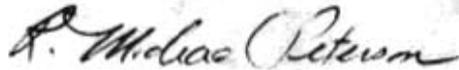
R. Michael (Return)

Suzanne O'B Connell
Notary Public
Commission expires 5-15-81

79040114711

Needless to say, the Harvard Law Review Association is disturbed by the possibility that its name is being used for any purpose, either legal or illegal, by people who are not associated with it, and the Association is therefore anxious to cooperate with the FEC in all respects in the investigation of this matter. Since my tenure as President of the Association has now ceased, however, any future communications would best be addressed to my successor, Mr. David W. Leebron.

Sincerely,



R. Michael Peterson
President, Harvard Law Review Association
1977-1978

79040114712

HARVARD LAW REVIEW ASSOCIATION

Gannett House

CAMBRIDGE, MASSACHUSETTS

02138



JUL 3 1975 2:19

CERTIFIED
No. 12454
MAIL

Mr. Gary Christian
General Counsel's Office
Federal Election Commission
1325 K Street NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

MEMORANDUM TO: CHARLES STEELE
FROM: MARJORIE W. EMMONS *MWE*
SUBJECT: MUR 592 - Interim Report dated 7-5-78
Signed 7-6-78
Received in Office of Commission
Secretary 7-6-78, 3:41

The above-mentioned document was circulated on a 24
hour no-objection basis at 9:00 a.m., July 7, 1978.

As of 9:30 a.m. this date, no objections have been
received in the Office of Commission Secretary to the
Interim Report.

79040114711

July 6, 1978

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Carr
SUBJECT: MUR 592

Please have the attached Interim Report on MUR 592 distributed to the Commission.

Thank you.

79040114715



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

June 15, 1978

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. Michael Peterson, President
Harvard Law Review Association
Gannett House
Cambridge, MA 02138

Re: MUR 592(78)

Dear Mr. Peterson:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, the Federal Election Commission has found reason to believe that the Harvard Law Review Association ("Association") may have violated certain provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). Specifically, it appears that the Association used information copied from FEC reports obtained on April 6, 1978, to create a mailing list to solicit subscriptions to the Harvard Law Review in violation of 2 U.S.C. §438(a)(4). We have numbered this matter MUR 592(78).

2 U.S.C. §438(a)(4) prohibits the use of information copied from FEC reports to solicit contributions or for any commercial purpose. In this context the use of names obtained from FEC reports to solicit subscriptions to a magazine such as the Harvard Law Review is considered to be use for commercial purposes and prohibited by the Act.

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 analysis of this matter. Where appropriate, statements should be submitted under oath.



The Commission is under a duty to investigate this matter expeditiously. Therefore, your response should be submitted within ten days after your receipt of this notification.

If you have any questions, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4001.

This matter will remain confidential in accordance with 2 U.S.C. §437g(a) (3) (B) unless you notify the Commission in writing that you wish the investigation to be made public.

If you intend to be represented by counsel in this matter, please have such counsel so notify us in writing.

Sincerely yours,

William C. Oldaker
General Counsel

Christian MUA-522

PS Form 3811, Apr. 1977

RETURN RECEIPT, REGISTERED, RESTRICTED, INSURED, SAID CERTIFIED MAIL

1. The following service is requested (check one).
 Show to whom and date delivered.
 Show to whom, date, and address of delivery.
 RESTRICTED DELIVERY
 Show to whom and date delivered.
 RESTRICTED DELIVERY.
 Show to whom, date, and address of delivery. \$
 (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO: *Michael Peterson
Harvard Law School
Summit House
Cambridge, MA. 02138*

3. ARTICLE DESCRIPTION:
 REGISTERED NO. *943224* CERTIFIED NO. INSURED NO.
 (Always obtain signature of addressee or agent)

I have received the article described above.
 SIGNATURE Addressee Authorized Agent
MIKE PETERSON

4. DATE OF DELIVERY: *JUN 26 1978*

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

STAMP: JUN 26 1978

17 590 - 107 - O-234-237

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Harvard Law Review Association)

MUR 592 (78)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on June 7, 1978, the Commission determined by a vote of 4-2 to adopt the recommendation of the General Counsel to take the following actions in the above-captioned matter:

1. Find reason to believe the Harvard Law Review Association violated 2 U.S.C. Section 438(a)(4) by using information copied from FEC reports to create a mailing list to solicit new subscriptions to the Harvard Law Review.
2. Send the draft letter attached to the First General Counsel's Report in this matter.

Voting for this determination were Commissioners Aikens, Staebler, Thomson, and Tiernan. Commissioners Harris and Springer dissented.

Marjorie W. Emmons

Marjorie W. Emmons
Secretary to the Commission

Date: June 9, 1978

79740114711

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of
Harvard Law Review Association }

MUR 592 (78)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on June 1, 1978, the Commission determined by a vote of 5-0 to table until June 7, 1978, the consideration of the General Counsel's First Report on the above-captioned matter.

Commissioner Staebler, was not present at the time of the vote.

Marjorie W. Emmons

Marjorie W. Emmons
Secretary to the Commission

Date: June 2, 1978

70010114720



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

May 23, 1978

MEMORANDUM TO: CHARLES STEELE
FROM: MARJORIE W. EMMONS *MWE*
SUBJECT: OBJECTION - MUR 592 (78) - First General Counsel's
Report, dated 5-19-78

The above-mentioned document was circulated on a 48 hour
vote basis at 12:30 p.m., May 23, 1978.

Commissioner Harris submitted an objection at 3:02, May 23,
1978, thereby placing MUR 592 (78) on the Executive Session
Agenda for June 1, 1978.

7 9 0 4 0 1 1 4 7 2 1

May 19, 1978

MEMORANDUM TO: Marge Emmons
FROM: Elisen T. Gorr
SUBJECT: MUR 592

Please have the attached 7 day report on MUR 592 distributed to the Commission on a 48 hour tally basis.

Thank you.

79040114722

FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

DATE AND TIME OF TRANSMITTAL MAY 19 1978
BY OGC TO COMMISSION _____

MUR NO. 592(78)
STAFF MEMBER(S) _____

Christian

SOURCE OF MUR: INTERNALLY GENERATED

RESPONDENT'S NAME: Harvard Law Review Association

RELEVANT STATUTE: 2 U.S.C. §438(a)(4), 11 C.F.R. §104.13

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

GENERATION OF MATTER

This matter arose from an order placed with the Public Records Office for copies of the Reagan for President Committee's reports. The order was placed by Mr. Spence Abraham on behalf of the Harvard Law Review ("Review") on March 16, 1978. The stated purpose of obtaining the reports was to use them to create a mailing list to solicit subscriptions to the Review. Mr. Abraham was informed of the provisions of 2 U.S.C. §438(a)(4) but he said he believed the Review to be exempt from that section. The order was subsequently filled and the matter referred to the Office of General Counsel by Mr. Kent Cooper (Attachment 1) for investigation of a possible violation of 2 U.S.C. §438(a)(4).

PRELIMINARY ANALYSIS

2 U.S.C. §438(a)(4) prohibits the use of information copied from FEC reports "for the purpose of soliciting contributions or for any commercial purpose." 11 C.F.R. §104.13 defines "any commercial purpose" as not including "the sale of newspapers, magazines, books, or other similar communications, the principal purpose of which is not to communicate lists or other information obtained from a report ..." (In the Chairman's communication transmitting the proposed regulations (House Doc. 94-573, August 3, 1976) this exemption is explained as follows: "It defines commercial use to exclude use in news media and books.")

7904011473

When Mr. Abraham placed his order for the Reagan reports, he stated that he believed his organization was exempt from the provisions of 2 U.S.C. §438(a)(4) but did not state the basis for this opinion. We have considered two possible arguments for considering the Harvard Law Review Association ("Association") exempt from 2 U.S.C. §438(a)(4): (1) as a non-profit organization the Association cannot be said to be using the reports for a "commercial purpose," and (2) the exclusion of the sale of newspapers, magazines, and books from the definition of commercial purpose in 11 C.F.R. §104.13 permits the use of names in FEC reports to solicit subscriptions to periodicals. We find neither of these arguments persuasive.

Although the Association is a non-profit educational membership corporation, its publishing and sale of the Review is clearly a commercial activity. It is noted the Review has a paid circulation of 9,559 copies per issue generating an annual revenue of more than \$200,000 (Attachment II). In interpreting the interstate commerce clause of the Constitution, the U.S. District Court for Maryland held in the case of State of Maryland v. Wirtz that "'Commerce' is not confined to 'business' activity in a conventional sense; it includes non-business and non-profit activities, ... private ... in nature, and irrespective of whether they compete with or may be substituted for by private enterprise," 269 F.Supp. 826, 832 (1967), affirmed, 392 U.S. 183 (1968). (It should be noted that the Court later reversed Maryland inasmuch as it applied to Congressional exercise of the commerce power to regulate State governmental activities, but did not change the decision with respect to private corporations. See National League of Cities v. Usery, 96 S.Ct. 2465, 2475, (1976)) (See also N.L.R.B. v. Central Dispensary & Emergency Hospital, 145 F.2d. 852, 853, (1944) cert. denied 324 U.S. 847 (1945), where the U.S. Court of Appeals for the District of Columbia held that the activities of a charitable hospital employing 230 persons were considered to be commerce irrespective of the non-profit nature of the hospital.) In light of the above definition, it would seem then that in defining "commercial purpose" the controlling factor is not the nature of the organization engaging in the particular activity but the nature of the activity in which an organization is engaged. Under this definition, the use of names from FEC reports to solicit new subscriptions to the Review would be a "commercial purpose" under the Act and prohibited by 2 U.S.C. §438(a)(4).

Likewise we do not find the argument that 11 C.F.R. §104.13 permits the use of names from FEC reports to solicit subscriptions to a magazine compelling. While a casual reading of the regulation might lead one to such a conclusion the legislative history of the statute and the explanation transmitted to Congress with the proposed regulation make it clear that the intent of the regulation is to permit the use of FEC reports in the news media for journalistic purposes and not to allow publishers a special use of names in FEC reports denied to other individuals and corporations.

The use of information copied from FEC reports by the Review to create a mailing list to solicit new subscriptions therefore appears to be a violation of 2 U.S.C. §438(a)(4).

RECOMMENDATION

Find reason to believe the Harvard Law Review Association violated 2 U.S.C. §438(a)(4) by using information copied from FEC reports to create a mailing list to solicit new subscriptions to the Harvard Law Review. Send attached letter.

7901011472;

MIR 592
Christian P-65



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

May 1, 1978

MEMORANDUM

TO: Staff Director

JBL 10GC

FROM: Kent *kc*

SUBJECT: Possible Violation of Sec. 438(a)(4)

Please find enclosed a memo regarding one of our recent orders. In this order the requestor indicated that a mailing list was involved. We stated the restriction notice and gave him the page count. Recently he stopped by the office and purchased copies of campaign finance reports. A copy of the receipt is attached.

Although he stated that he thought the Harvard Law Review was exempt and therefore he could use the names for a mailing list, I do not share that view. I believe the legislative history clearly indicates that the prohibition is against mailing lists of any kind. I also believe that the definition of commercial purpose in the FEC Regulations was meant to only exempt stories or research about the campaign finance figures, not mailing lists by those organizations.



ATTACHMENT I (2 pages)



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

3/16/78

I had two phone conversations with a Mr. Spence Abraham regarding a request for the Reagan for President reports. I stated on two occasions the law regarding solicitation and commercial use of FEC documents. He stated that his organization (The Harvard Law Review) was exempt, and that he wanted to form a mailing list for a law magazine. I told him we would send a page count to the following address:

Stephen Eberhard
320 Ames Hall
Harvard Law School
Cambridge, MA 02138

I reported the phone conversations to Michael Heisey and Kent Cooper.

P.S. Filled request and again reminded Mr. Abrahams of the law concerning solicitation. 4/6/78.

M J Maloney



ATTACHMENT I ~~XXXXXXXXXX~~

U.S. POSTAL SERVICE
STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION
 (Required by 39 U.S.C. 3685)

1. TITLE OF PUBLICATION: **HARVARD LAW REVIEW** 2. DATE OF FILING: **11-28-77**

3. FREQUENCY OF ISSUE: **Monthly November through June** 4. NO. OF ISSUES PUBLISHED ANNUALLY: **8** 5. ANNUAL SUBSCRIPTION PRICE: **\$ 25.00**

6. LOCATION OF HEADQUARTERS OFFICE OF PUBLICATION (Street, City, County, State and ZIP Code) (Not printer):
Gannett House, Cambridge, MA 02138

7. LOCATION OF THE HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS (Not printer):
Gannett House, Cambridge, MA 02138

8. NAMES AND COMPLETE ADDRESSES OF PUBLISHER, EDITOR AND MANAGING EDITOR

PUBLISHER (Name and address):
Harvard Law Review Association

EDITOR (Name and address):
 President **R. Michael Peterson, 134 Oxford St., Cambridge, MA 02138**

MANAGING EDITOR (Name and address):
 Treasurer **Henry C. Dinger, 1246 Commonwealth Ave., Allston, MA 02134**

9. OWNER (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given.)

NAME	ADDRESS
The Harvard Law Review Association is a non-profit educational membership corporation with no stockholders. The Board of Trustees includes the student president and treasurer, Albert M. Sacks, Dean, and Professors Wm. D. Andrews and Andrew L. Kaufman of Harvard Law School, Cambridge, MA 02138 and Ernest A. Young, Bondholders, Mortgages and Other Securities, Inc., Boston, MA 02110.	
TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES (If there are none, so state)	
NAME	ADDRESS

10. FOR COMPLETION BY NON-PROFIT ORGANIZATIONS AUTHORIZED TO MAIL AT SPECIAL RATES (Section 132.122, PSN). The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes (See 26 CFR 1.1361-1).

HAVE NOT CHANGED DURING PRECEDING 12 MONTHS HAVE CHANGED DURING PRECEDING 12 MONTHS (If changed, publisher must submit explanation of change with this statement.)

A. EXTENT AND NATURE OF CIRCULATION	AVERAGE NO. COPIES EACH ISSUE DURING PRECEDING 12 MONTHS	ACTUAL NO. COPIES OF SINGLE ISSUE PUBLISHED NEAREST TO FILING DATE
1. TOTAL NO. COPIES PRINTED (Net Press Run)	11,587	10,800
2. PAID CIRCULATION		
a. SALES THROUGH DEALERS AND CARRIERS, STREET VENDORS AND COUNTER SALES	142	31
b. MAIL SUBSCRIPTIONS	9,417	9,363
3. TOTAL PAID CIRCULATION (Sum of 2b and 2c)	9,559	9,394
4. FREE DISTRIBUTION BY MAIL, CARRIER OR OTHER MEANS, SAMPLES, COMPLIMENTARY, AND OTHER FREE COPIES	213	184
5. TOTAL DISTRIBUTION (Sum of 2b and 4)	9,772	9,578
6. COPIES NOT DISTRIBUTED		
a. OFFICE USE, LEFT OVER, UNACCOUNTED, SPOILED AFTER PRINTING	1,815	1,222
b. RETURNS FROM NEWS AGENTS	0	0
7. TOTAL (Sum of 5, 6a and 6b should equal net press run shown in A1)	11,587	10,800

11. I certify that the statements made by me above are correct and complete. SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER: *Henry C. Dinger*
Henry C. Dinger, Treasurer

12. FOR COMPLETION BY PUBLISHERS MAILING AT THE REGULAR RATES (Section 132.121, Postal Notice Manual). 39 U.S.C. 3626 provides in pertinent part: "No person who would have been entitled to mail matter under former section 435B of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates."

13. Consistent with the provisions of this statute, I hereby request permission to mail the publication named in item 1 of this statement at the special postage rates presently authorized by 39 U.S.C. 3626.

SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER: *Henry C. Dinger*
Henry C. Dinger, Treasurer

ATTACHMENT II



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

7 0 9 1 0 1 4 7 2 0
Mr. R. Michael Peterson, President
Harvard Law Review Association
Gannett House
Cambridge, MA 02138

Re: MUR 592(78)

Dear Mr. Peterson:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, the Federal Election Commission has found reason to believe that the Harvard Law Review Association ("Association") may have violated certain provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). Specifically, it appears that the Association used information copied from FEC reports obtained on April 6, 1978, to create a mailing list to solicit subscriptions to the Harvard Law Review in violation of 2 U.S.C. §438(a)(4). We have numbered this matter MUR 592(78).

2 U.S.C. §438(a)(4) prohibits the use of information copied from FEC reports to solicit contributions or for any commercial purpose. In this context the use of names obtained from FEC reports to solicit subscriptions to a magazine such as the Harvard Law Review is considered to be use for commercial purposes and prohibited by the Act.

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 analysis of this matter. Where appropriate, statements should be submitted under oath.



The Commission is under a duty to investigate this matter expeditiously. Therefore, your response should be submitted within ten days after your receipt of this notification.

If you have any questions, please contact Gary Christian, the staff member assigned to this matter, at (202) 523-4001.

This matter will remain confidential in accordance with 2 U.S.C. §437g(a)(3)(B) unless you notify the Commission in writing that you wish the investigation to be made public.

If you intend to be represented by counsel in this matter, please have such counsel so notify us in writing.

Sincerely yours,

William C. Oldaker
General Counsel

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FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

May 1, 1978

MEMORANDUM

TO: Staff Director

JBP. 106C

FROM: Kent *KC*

SUBJECT: Possible Violation of Sec. 438(a)(4)

Please find enclosed a memo regarding one of our recent orders. In this order the requestor indicated that a mailing list was involved. We stated the restriction notice and gave him the page count. Recently he stopped by the office and purchased copies of campaign finance reports. A copy of the receipt is attached.

Although he stated that he thought the Harvard Law Review was exempt and therefor he could use the names for a mailing list, I do not share that view. I believe the legislative history clearly indicates that the prohibition is against mailing lists of any kind. I also believe that the definition of commercial purpose in the FEC Regulations was meant to only exempt stories or research about the campaign finance figures, not mailing lists by those organizations.

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PUBLIC RECORDS/REQUEST FORM

DISCLOSURE SERIES

ADVISORY OPINION

ADVISORY OPINION REQUEST

HOUSE
Candidate:
Committee:

SENATE
Candidate:
Committee:

PRESIDENTIAL
Candidate:
Committee:

PAC:

PARTY:

COMPUTER INDEX

*party to spend
\$250.00 to
get the most
names for
solicitation.
send on 3/5/78*

NAME: SPENCE ABRAHAM

617-492-8628.

NAME: _____

ADDRESS: STEPHEN EBERHARD

320 AMES HALL HARVARD LAW SCHOOL
CAMBRIDGE, MASS. 02138

PHONE: _____

REQUEST RECEIVED BY: SM DATE: 3/16



FEDERAL ELECTION COMMISSION

1125 K STREET N.W.
WASHINGTON, D.C. 20463

3/16/78

I had two phone conversations with a Mr. Spence Abraham regarding a request for the Reagan for President reports. I stated on two occasions the law regarding solicitation and commercial use of FEC documents. He stated that his organization (The Harvard Law Review) was exempt, and that he wanted to form a mailing list for a law magazine. I told him we would send a page count to the following address:

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P.S. Filled request and again reminded Mr. Abrahams of the law concerning solicitation. 4/6/78.

M J Malone



6650

RECEIPT
FEDERAL ELECTION COMMISSION

1325 K Street, N. W.
Washington, D. C. 20463

4-17-78

Date

The Federal Election Commission has received \$ 158.10 for the purchase of 1581 pages
 (\$.10 per page) of statements and/or reports filed with the Commission.

M. White

for

Public Records Office
Federal Election Commission

Purchaser understands any information copied from reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose. 2 USC Sec. 438

