FEDERAL ELECTION COMMISSION

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

THIS IS THE END OF MUR # 1468

Date Filmed 11/5/82 Camera No. --- 2

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FEDERAL ELECTION COMMISSION

Routing Slips

12 Day Report and comment sheets

The above-described material was removed from this file pursuant to the following exemption provided in the Freedom of Information Act, 5 U.S.C. Section 552(b):

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| ____ | (1) Classified Information | ____ | (6) Personal privacy |
| ____ | (2) Internal rules and practices | ____ | (7) Investigatory files |
| ____ | (3) Exempted by other statute | ____ | (8) Banking Information |
| ____ | (4) Trade secrets and commercial or financial information | ____ | (9) Well Information (geographic or geophysical) |
| X | (5) Internal Documents | | |

Signed Stephen W. Mims

date 10/28/82

FEC 9-21-77

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MAILGRAM SERVICE CENTER
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western union Mailgram

Gen A 8787

4-0432988298002 10/25/82 ICS IPMMTZZ CSP WSHB
1 2025234073 MGM TDMT WASHINGTON DC 10-25 0326P EST

'82 A9:53

FEDERAL ELECTION COMMISSION
1325 K STREET NORTHWEST
WASHINGTON DC 20463

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2025234073 MGM TDMT WASHINGTON DC 78 10-25 0326P EST
ZIP
MR WILLIAM C OLDAKER
EPSTEIN BECKER BORSODY AND GREEN
1140 19TH ST NORTHWEST
WASHINGTON DC 20036
RE:MUR 1468
ON OCTOBER 25, 1982 THE FEDERAL ELECTION COMMISSION DETERMINED ON THE BASIS OF THE COMPLAINT FILED AGAINST YOUR CLIENTS IN MUR 1468 THERE IS NO REASON TO BELIEVE A VOLATION THE FEDERAL ELECTION CAMPAIGN ACT HAS OCCURRED AND ACCORDINGLY HAS CLOSED THE FILE. AN EXPANATORY LETTER WILL FOLLOW.
CHARLES N STEELE GENERAL COUNCIL BY KENNETH A GROSS ASSOCIATE GENERAL COUNCIL

15:27 EST

MGMCOMP

5241 (R1/78)

TO REPLY BY MAILGRAM, SEE REVERSE SIDE FOR WESTERN UNION'S TOLL - FREE PHONE NUMBERS

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Western Union Mailgram

THIS MAILGRAM WAS TRANSMITTED ELECTRONICALLY BY WESTERN UNION TO A POST OFFICE NEAR YOU FOR DELIVERY

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MAILGRAM SERVICE CENTER
MIDDLETOWN, VA. 22645

western union Mailgram

Gcc# 8785

4-042929S298002 10/25/82 ICS IPMMTZZ CSP WSHB
1 2025234073 MGM TDMT WASHINGTON DC 10-25 0323P EST

2001128 A9:53

FEDERAL ELECTION COMMISSION
1325 K STREET NORTHWEST
WASHINGTON DC 20463

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2025234073 MGM TDMT WASHINGTON DC 65 10-25 0323P EST
ZIP
ALWIN E HOPFMANN
29 TUTTLE ROAD
STERLING MA 01564
RE:MUR 146A
ON OCTOBER 25, 1982 THE FEDERAL ELECTION COMMISSION DETERMINED ON THE BASIS OF YOUR COMPLAINT THERE IS N REASON TO BELIEVE THE VIOLATION OF THE FEDERAL ELECTION CAMPAIGN ACT HAS OCCURRED AND ACCORDINGLY HAS CLOSED THE FILE. AN EXPLANATORY LETTER WILL FOLLOW.
CHARLES N STEELE GENERAL COUNCIL BY KENNETH A GROSS ASSOCIATE GENERAL COUNCIL

15:23 EST

MGMCOMP

5241 (R1/78)

TO REPLY BY MAILGRAM, SEE REVERSE SIDE FOR WESTERN UNION'S TOLL - FREE PHONE NUMBERS

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82 OCT 27 A 9:48

51

Mailgram

THIS MAILGRAM WAS TRANSMITTED ELECTRONICALLY BY WESTERN UNION TO A POST OFFICE NEAR YOU FOR DELIVERY

82040

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

October 25, 1982

Mr. Alwin E. Hopfmann
29 Tuttle Road
Sterling, Massachusetts

Re: MUR 1468(82)

Dear Mr. Hopfmann:

The Federal Eection Commission has reviewed the allegations of your complaint dated September 13, 1982, and determined on the basis of the information provided in your complaint there is no reason to believe that a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), has been committed.

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

Should additional information come to your attention which you believe establishes a violation of the Act, you may file a complaint pursuant to the requirements set forth in 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4.

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

Enclosure
Expedited First General Counsel's Report

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

82 OCT 22 A10: 48

MUR # 1468(82)
Date Complaint Received
By OGC 9/13/82
Date of Notification
To Respondent 9/16/82
Staff Member Mims

**EXPEDITED FIRST GENERAL COUNSEL'S REPORT**

COMPLAINANT'S NAME: ALWIN E. HOPFMANN

RESPONDENTS' NAMES: SENATOR EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

INTERNAL REPORTS CHECKED: NONE

FEDERAL AGENCIES CHECKED: NONE

**SUMMARY OF ALLEGATIONS**

On September 13, 1982, Alwin Hopfmann filed a complaint alleging numerous violations by the respondents. Complainant's principle assertion is that the Massachusetts state Democratic Party's convention held during May 21-22, 1982, for the purpose of "endorsing candidates" should have been treated as the primary election. Complainant argues that the Charter of the Democratic Party of Massachusetts which provides for the endorsement of a candidate who receives more than fifteen percent of the vote of the convention delegates 1/ establishes a de facto nominating

1/ Charter of the Democratic Party of the Commonwealth of Massachusetts, Article Six, Section III (adopted April 11, 1981).

process which concludes whenever only one candidate emerges from the convention with at least fifteen percent of the vote. Under Massachusetts law, no candidate for a primary election will be placed upon the ballot who does not comply with the fifteen percent rule of the party. 2/ In this instance, only Senator Kennedy emerged from the convention with at least fifteen percent of the delegate votes for the Democratic Party's endorsement for Senate. Complainant rationalizes that since no other candidates were allowed to be placed on the ballot, the action taken by the Party's convention delegates amounted to more than a mere endorsement of Senator Kennedy's candidacy and was, in fact, a nomination.

If, as complainant urges, the convention completed the nomination process, Senator Kennedy's committee violated numerous reporting requirements 3/ as well as the contribution limitations. 4/

---

2/ Mass. Gen. Laws Ann., ch. 53, § 44 (West 1975).

3/ 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A) and 434(b).

4/ This allegation is based upon the presumption that if the primary election occurred with the vote of the convention delegates on May 22, 1982, rather than on September 14, 1982, then all contributions received subsequent to May 22, 1982, would count against the general election limitations to the extent that they were not designated to retire primary campaign debts.

**FACTUAL AND LEGAL ANALYSIS**

Article 6, Section III of the Charter of the Democratic Party of Massachusetts which is entitled "Endorsing Candidates" provides:

> There shall be a State convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated by the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular vote may challenge the Convention endorsement in the State Primary Election.

Chapter 53, Section 44 of the Massachusetts General Laws provides, in pertinent part, that "[t]he nomination of candidates for nomination at state primaries shall be by nomination papers." On April 5, 1982, Massachusetts Governor King had before him Massachusetts House Bill No. 5852 which, if approved by him would have added an additional sentence following the first sentence of Chapter 53, Section 44, supra, stating "[n]otwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary." Clearly, the effect of this Bill would have been to allow candidates, in addition to those who had received at least 15 percent of the convention vote, to challenge the convention's endorsement on the primary election ballot. Due to constitutional questions perceived by the Governor in the effect of the proposed legislation, he

requested, and received, an Advisory Opinion from the Supreme Judicial Court of Massachusetts. Opinion of the Justices, 385 Mass. 1201 (1982).

Two question were put before the court:

1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of the General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

2. Would enactment of H. 5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

The court declined to render an opinion to question one due to the lack of a "solemn occasion authorizing [the court] to answer" (the standard utilized by the Massachusetts Court for rendering Advisory Opinions).

As to the second question, the Court concluded that "[i]f House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic Party and its members to associate by allowing candidates to be placed on the state primary ballot in contravention of the party's charter." Governor King declined to sign the Bill after having received this Opinion.

Complainant asserts, then, that the Democratic Party's Charter is given the full effect of state law, and because no other candidate at the convention received at least fifteen percent of the convention vote for the endorsement for the party's nomination for the U.S. Senate seat, the nomination effectively occurred with that vote by the convention delegates. Complainant has attempted to draw a parallel between the situation in Massachusetts and that in Connecticut. In that regard, he points to the analysis set forth in Advisory Opinion 1976-58.

There, the party had adopted a twenty percent rule for convention voting. The state's statute provided that whenever only one candidate received at least twenty percent of the convention vote "no primary shall be held by such party for such office and the party-endorsed candidate for such office shall be deemed [emphasis added] to have been lawfully chosen as the nominee of such party for such office." Massachusetts, on the other hand, is not so restrictive. The primary election contest in Massachusetts does not in any circumstances terminate with the vote of the party's convention delegates. Massachusetts still holds a primary election. Certification that a candidate is his or her party's nominee must await the results of the primary contest. The contest is not a hollow procedure because the Massachusetts General Laws provide for write-in campaigns. 5/ In the present case, therefore, although Senator Kennedy was the

5/ "A person whose name is not printed on a state primary ballot as a candidate for an office, but who receives sufficient votes to nominate him therefore" and who accepts the nomination shall be placed on the ballot for the ensuing election. Mass. Gen. Laws Ann., ch. 53, § 3 (West 1975).

only Senate candidate to emerge from the convention with at least fifteen percent of the vote, he still was not the Democratic Party's nominee. The powers provided the convention by the Democratic Charter do not include the power to nominate candidates; it may merely endorse a candidate. Until the voters spoke at the polls in September, there was no Democratic Party nominee for the United States Senate from Massachusetts. There was, until the balloting was completed, a possibility that a write-in campaign could be mounted to effectively challenge the action of the convention which endorsed Senator Kennedy. 6/ Because the convention is merely a "winnowing-out" process and does not under any circumstances result in the nomination of a candidate until after the primary election is held, the convention should not be considered as an election for purposes of the Federal Election Campaign Act of 1971, as amended. 7/

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6/ The United States Supreme Court has recognized the interests of the state in limiting the number of persons on the ballot in order to avoid voter confusion, American Party of Texas v. White, 415 U.S. 767(1974), and the associational rights of a political party to determine who will appear on a general election ballot as the candidate of that party, Democratic Party of U.S. v. Wisconsin, 450 U.S. 107(1978). Although the Massachusetts Democratic Party has not chosen to nominate a candidate at the convention, it has chosen to reduce the number of candidates who may appear as having its endorsement in the primary election. The state's acquiesence in this process would appear to further the interests of the state as well as the associational rights of the party.

7/ Indeed, in AO 1978-79, the Commission considered the effect of Louisiana's statute which provided for the termination of the general election process where a candidate, in an open primary contest, received a majority of the vote in the primary. Because the state did not certify that candidate as the winner of the general election until after the scheduled date of the general election, the Commission concluded that the candidate could,

Accordingly, the General Counsel recommends that the Commission determine that there is no reason to believe that Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 441a(f).

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7/ (cont'd.)
although unopposed, still qualify for separate contribution limitations. In addition, the Commission has previously noted that the question of whether a party convention is an "election" with "authority to nominate a candidate" turns on an analysis of state law regarding the power and role of such a convention in the nomination of candidates for Federal office. See also Advisory Opinion 1976-58 (Connecticut statute providing that no primary shall be held when only one candidate receives at least twenty percent of the vote; "the 'endorsed candidate'...shall be deemed to have been lawfully chosen as the nominee of such party for such office."); AO 1978-25 (Colorado and Minnestota's political conventions are not elections since they "do not have authority under state law to nominate candidates..."); and AO 1978-30 (Utah's party primary convention was held to be an election due to a statutory provision which stated that whenever one candidate receives at least seventy percent of the votes cast "he shall become the party's candidate in the next general election without the necessity of running in the primary election.")

Recommendation - MUR 1468(82)

1. Find no reason to believe that respondents Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 441a(f).

2. Approve the attached letters to Alwin E. Hopfmann, Senator Kennedy, and the Committee to Re-Elect Senator Kennedy.

3. Close the file.

Charles N. Steele
General Counsel

Oct 22, 1982
Date

BY: Kenneth A. Gross
Associate General Counsel

Attachments
1. Letter to complainant
2. Letter to respondents

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, hereby certify that the Commission, on October 25, 1982, by a vote of 5 to 0 , adopted the above recommendation of the General Counsel in MUR 1468.

Date: 10-25-82

Marjorie W. Emmons

Voting for the Recommendation: Commissioners Aikens, Harris McDonald, McGarry and Reiche

Voting Against the Recommendation: None

Absences or Abstentions (Indicate): Commissioner Elliott (Ballot indicates not voting in this matter).

12049350560

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

Mr. Alwin E. Hopfmann
29 Tuttle Road
Sterling, Massachusetts

Re: MUR 1468(82)

Dear Mr. Hopfmann:

The Federal Eection Commission has reviewed the allegations of your complaint dated September 13, 1982, and determined on the basis of the information provided in your complaint there is no reason to believe that a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), has been committed.

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

Should additional information come to your attention which you believe establishes a violation of the Act, you may file a complaint pursuant to the requirements set forth in 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4.

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

Attachment 1
page 1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mr. William C. Oldaker, Esquire
Epstein Becker Borsody & Green, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036

Re: MUR 1468(82)

Dear Mr. Oldaker:

On September 16, 1982, the Commission notified you of a complaint alleging that your clients had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

The Commission, on October , 1982, determined that on the basis of the information in the complaint there is no reason to believe that a violation of any statute within its jurisdiction has been committed. Accordingly, the Commission closed its file in this matter. (This matter will become a part of the public record within 30 days.)

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

Attachment 2
page 1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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29 Tuttle Road
Sterling, Massachusetts

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Should additional information come to your attention which you believe establishes a violation of the Act, you may file a complaint pursuant to the requirements set forth in 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4.

Sincerely,

Charles N. Steele
General Counsel

BY: _____
Kenneth A. Gross
Associate General Counsel

2204035063

SAM
10/25/82

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 25, 1982

Mr. William C. Oldaker, Esquire
Epstein Becker Borsody & Green, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036

Re: MUR 1468(82)

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The Commission, on October 25, 1982, determined that on the basis of the information in the complaint there is no reason to believe that a violation of any statute within its jurisdiction has been committed. Accordingly, the Commission closed its file in this matter. (This matter will become a part of the public record within 30 days.)

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

Enclosure

Expedited First General Counsel's Report

22040556 4

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

82 OCT 22 A10: 48

MUR # 1468(82)
Date Complaint Received
By OGC 9/13/82
Date of Notification
To Respondent 9/16/82
Staff Member Mims

**EXPEDITED FIRST GENERAL COUNSEL'S REPORT**

COMPLAINANT'S NAME: ALWIN E. HOPFMANN

RESPONDENTS' NAMES: SENATOR EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

INTERNAL REPORTS CHECKED: NONE

FEDERAL AGENCIES CHECKED: NONE

**SUMMARY OF ALLEGATIONS**

On September 13, 1982, Alwin Hopfmann filed a complaint alleging numerous violations by the respondents. Complainant's principle assertion is that the Massachusetts state Democratic Party's convention held during May 21-22, 1982, for the purpose of "endorsing candidates" should have been treated as the primary election. Complainant argues that the Charter of the Democratic Party of Massachusetts which provides for the endorsement of a candidate who receives more than fifteen percent of the vote of the convention delegates 1/ establishes a de facto nominating

1/ Charter of the Democratic Party of the Commonwealth of Massachusetts, Article Six, Section III (adopted April 11, 1981).

process which concludes whenever only one candidate emerges from the convention with at least fifteen percent of the vote. Under Massachusetts law, no candidate for a primary election will be placed upon the ballot who does not comply with the fifteen percent rule of the party. 2/ In this instance, only Senator Kennedy emerged from the convention with at least fifteen percent of the delegate votes for the Democratic Party's endorsement for Senate. Complainant rationalizes that since no other candidates were allowed to be placed on the ballot, the action taken by the Party's convention delegates amounted to more than a mere endorsement of Senator Kennedy's candidacy and was, in fact, a nomination.

If, as complainant urges, the convention completed the nomination process, Senator Kennedy's committee violated numerous reporting requirements 3/ as well as the contribution limitations. 4/

---

2/ Mass. Gen. Laws Ann., ch. 53, § 44 (West 1975).

3/ 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A) and 434(b).

4/ This allegation is based upon the presumption that if the primary election occurred with the vote of the convention delegates on May 22, 1982, rather than on September 14, 1982, then all contributions received subsequent to May 22, 1982, would count against the general election limitations to the extent that they were not designated to retire primary campaign debts.

**FACTUAL AND LEGAL ANALYSIS**

Article 6, Section III of the Charter of the Democratic Party of Massachusetts which is entitled "Endorsing Candidates" provides:

> There shall be a State convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated by the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular vote may challenge the Convention endorsement in the State Primary Election.

Chapter 53, Section 44 of the Massachusetts General Laws provides, in pertinent part, that "[t]he nomination of candidates for nomination at state primaries shall be by nomination papers." On April 5, 1982, Massachusetts Governor King had before him Massachusetts House Bill No. 5852 which, if approved by him would have added an additional sentence following the first sentence of Chapter 53, Section 44, supra, stating "[n]otwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary." Clearly, the effect of this Bill would have been to allow candidates, in addition to those who had received at least 15 percent of the convention vote, to challenge the convention's endorsement on the primary election ballot. Due to constitutional questions perceived by the Governor in the effect of the proposed legislation, he

requested, and received, an Advisory Opinion from the Supreme Judicial Court of Massachusetts. Opinion of the Justices, 385 Mass. 1201 (1982).

Two question were put before the court:

1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of the General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

2. Would enactment of H. 5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

The court declined to render an opinion to question one due to the lack of a "solemn occasion authorizing [the court] to answer" (the standard utilized by the Massachusetts Court for rendering Advisory Opinions).

As to the second question, the Court concluded that "[i]f House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic Party and its members to associate by allowing candidates to be placed on the state primary ballot in contravention of the party's charter." Governor King declined to sign the Bill after having received this Opinion.

3 2 0 4 0 3 6 0 7 5 3

Complainant asserts, then, that the Democratic Party's Charter is given the full effect of state law, and because no other candidate at the convention received at least fifteen percent of the convention vote for the endorsement for the party's nomination for the U.S. Senate seat, the nomination effectively occurred with that vote by the convention delegates. Complainant has attempted to draw a parallel between the situation in Massachusetts and that in Connecticut. In that regard, he points to the analysis set forth in Advisory Opinion 1976-58.

There, the party had adopted a twenty percent rule for convention voting. The state's statute provided that whenever only one candidate received at least twenty percent of the convention vote "no primary shall be held by such party for such office and the party-endorsed candidate for such office shall be deemed [emphasis added] to have been lawfully chosen as the nominee of such party for such office." Massachusetts, on the other hand, is not so restrictive. The primary election contest in Massachusetts does not in any circumstances terminate with the vote of the party's convention delegates. Massachusetts still holds a primary election. Certification that a candidate is his or her party's nominee must await the results of the primary contest. The contest is not a hollow procedure because the Massachusetts General Laws provide for write-in campaigns. 5/ In the present case, therefore, although Senator Kennedy was the

5/ "A person whose name is not printed on a state primary ballot as a candidate for an office, but who receives sufficient votes to nominate him therefore" and who accepts the nomination shall be placed on the ballot for the ensuing election. Mass. Gen. Laws Ann., ch. 53, § 3 (West 1975).

only Senate candidate to emerge from the convention with at least fifteen percent of the vote, he still was not the Democratic Party's nominee. The powers provided the convention by the Democratic Charter do not include the power to nominate candidates; it may merely endorse a candidate. Until the voters spoke at the polls in September, there was no Democratic Party nominee for the United States Senate from Massachusetts. There was, until the balloting was completed, a possibility that a write-in campaign could be mounted to effectively challenge the action of the convention which endorsed Senator Kennedy. 6/ Because the convention is merely a "winnowing-out" process and does not under any circumstances result in the nomination of a candidate until after the primary election is held, the convention should not be considered as an election for purposes of the Federal Election Campaign Act of 1971, as amended. 7/

---

6/ The United States Supreme Court has recognized the interests of the state in limiting the number of persons on the ballot in order to avoid voter confusion, American Party of Texas v. White, 415 U.S. 767(1974), and the associational rights of a political party to determine who will appear on a general election ballot as the candidate of that party, Democratic Party of U.S. v. Wisconsin, 450 U.S. 107(1978). Although the Massachusetts Democratic Party has not chosen to nominate a candidate at the convention, it has chosen to reduce the number of candidates who may appear as having its endorsement in the primary election. The state's acquiesence in this process would appear to further the interests of the state as well as the associational rights of the party.

7/ Indeed, in AO 1978-79, the Commission considered the effect of Louisiana's statute which provided for the termination of the general election process where a candidate, in an open primary contest, received a majority of the vote in the primary. Because the state did not certify that candidate as the winner of the general election until after the scheduled date of the general election, the Commission concluded that the candidate could,

Accordingly, the General Counsel recommends that the Commission determine that there is no reason to believe that Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 44la(f).

---

7/ (cont'd.)
although unopposed, still qualify for separate contribution limitations. In addition, the Commission has previously noted that the question of whether a party convention is an "election" with "authority to nominate a candidate" turns on an analysis of state law regarding the power and role of such a convention in the nomination of candidates for Federal office. See also Advisory Opinion 1976-58 (Connecticut statute providing that no primary shall be held when only one candidate receives at least twenty percent of the vote; "the 'endorsed candidate'...shall be deemed to have been lawfully chosen as the nominee of such party for such office."); AO 1978-25 (Colorado and Minnestota's political conventions are not elections since they "do not have authority under state law to nominate candidates..."); and AO 1978-30 (Utah's party primary convention was held to be an election due to a statutory provision which stated that whenever one candidate receives at least seventy percent of the votes cast "he shall become the party's candidate in the next general election without the necessity of running in the primary election.")

Recommendation - MUR 1468(82)

1. Find no reason to believe that respondents Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 441a(f).

2. Approve the attached letters to Alwin E. Hopfmann, Senator Kennedy, and the Committee to Re-Elect Senator Kennedy.

3. Close the file.

Charles N. Steele
General Counsel

Oct 22, 1982
Date

BY: Kenneth A. Gross
Associate General Counsel

Attachments
1. Letter to complainant
2. Letter to respondents

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, hereby certify that the Commission, on October 25, 1982, by a vote of 5 to 0 , adopted the above recommendation of the General Counsel in MUR 1468.

Date: 10-25-82

Marjorie W. Emmons

Voting for the Recommendation: Commissioners Aikens, Harris McDonald, McGarry and Reiche

Voting Against the Recommendation: None

Absences or Abstentions (Indicate): Commissioner Elliott (Ballot indicates not voting in this matter).

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mr. Alwin E. Hopfmann
29 Tuttle Road
Sterling, Massachusetts

Re: MUR 1468(82)

Dear Mr. Hopfmann:

The Federal Eection Commission has reviewed the allegations of your complaint dated September 13, 1982, and determined on the basis of the information provided in your complaint there is no reason to believe that a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), has been committed.

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

Should additional information come to your attention which you believe establishes a violation of the Act, you may file a complaint pursuant to the requirements set forth in 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4.

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

Attachment 1
page 1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mr. William C. Oldaker, Esquire
Epstein Becker Borsody & Green, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036

Re: MUR 1468(82)

Dear Mr. Oldaker:

On September 16, 1982, the Commission notified you of a complaint alleging that your clients had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

The Commission, on October , 1982, determined that on the basis of the information in the complaint there is no reason to believe that a violation of any statute within its jurisdiction has been committed. Accordingly, the Commission closed its file in this matter. (This matter will become a part of the public record within 30 days.)

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

Attachment 2
page 1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mr. William C. Oldaker, Esquire
Epstein Becker Borsody & Green, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036

Re: MUR 1468(82)

Dear Mr. Oldaker:

On September 16, 1982, the Commission notified you of a complaint alleging that your clients had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

The Commission, on October , 1982, determined that on the basis of the information in the complaint there is no reason to believe that a violation of any statute within its jurisdiction has been committed. Accordingly, the Commission closed its file in this matter. (This matter will become a part of the public record within 30 days.)

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

3 2 0 4 0 3 5 0 5 7 3

October 22, 1982

MEMORANDUM TO: Marjorie W. Emmons

FROM: Phyllis A. Kayson

SUBJECT: MUR 1468

Please have the attached Expedited First General Counsel's Report distributed to the Commission on PINK paper in accordance with the expedited compliance procedures. Thank you.

Attachment

cc: Mims

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

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

82 OCT 22 A10: 48

MUR # 1468(82)
Date Complaint Received
By OGC 9/13/82
Date of Notification
To Respondent 9/16/82
Staff Member Mims

**EXPEDITED FIRST GENERAL COUNSEL'S REPORT**

COMPLAINANT'S NAME: ALWIN E. HOPFMANN

RESPONDENTS' NAMES: SENATOR EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

INTERNAL REPORTS CHECKED: NONE

FEDERAL AGENCIES CHECKED: NONE

**SUMMARY OF ALLEGATIONS**

On September 13, 1982, Alwin Hopfmann filed a complaint alleging numerous violations by the respondents. Complainant's principle assertion is that the Massachusetts state Democratic Party's convention held during May 21-22, 1982, for the purpose of "endorsing candidates" should have been treated as the primary election. Complainant argues that the Charter of the Democratic Party of Massachusetts which provides for the endorsement of a candidate who receives more than fifteen percent of the vote of the convention delegates 1/ establishes a de facto nominating

1/ Charter of the Democratic Party of the Commonwealth of Massachusetts, Article Six, Section III (adopted April 11, 1981).

process which concludes whenever only one candidate emerges from the convention with at least fifteen percent of the vote. Under Massachusetts law, no candidate for a primary election will be placed upon the ballot who does not comply with the fifteen percent rule of the party. 2/ In this instance, only Senator Kennedy emerged from the convention with at least fifteen percent of the delegate votes for the Democratic Party's endorsement for Senate. Complainant rationalizes that since no other candidates were allowed to be placed on the ballot, the action taken by the Party's convention delegates amounted to more than a mere endorsement of Senator Kennedy's candidacy and was, in fact, a nomination.

If, as complainant urges, the convention completed the nomination process, Senator Kennedy's committee violated numerous reporting requirements 3/ as well as the contribution limitations. 4/

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2/ Mass. Gen. Laws Ann., ch. 53, § 44 (West 1975).

3/ 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A) and 434(b).

4/ This allegation is based upon the presumption that if the primary election occurred with the vote of the convention delegates on May 22, 1982, rather than on September 14, 1982, then all contributions received subsequent to May 22, 1982, would count against the general election limitations to the extent that they were not designated to retire primary campaign debts.

**FACTUAL AND LEGAL ANALYSIS**

Article 6, Section III of the Charter of the Democratic Party of Massachusetts which is entitled "Endorsing Candidates" provides:

> There shall be a State convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated by the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular vote may challenge the Convention endorsement in the State Primary Election.

Chapter 53, Section 44 of the Massachusetts General Laws provides, in pertinent part, that "[t]he nomination of candidates for nomination at state primaries shall be by nomination papers." On April 5, 1982, Massachusetts Governor King had before him Massachusetts House Bill No. 5852 which, if approved by him would have added an additional sentence following the first sentence of Chapter 53, Section 44, supra, stating "[n]otwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary." Clearly, the effect of this Bill would have been to allow candidates, in addition to those who had received at least 15 percent of the convention vote, to challenge the convention's endorsement on the primary election ballot. Due to constitutional questions perceived by the Governor in the effect of the proposed legislation, he

requested, and received, an Advisory Opinion from the Supreme Judicial Court of Massachusetts. Opinion of the Justices, 385 Mass. 1201 (1982).

Two question were put before the court:

1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of the General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

2. Would enactment of H. 5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

The court declined to render an opinion to question one due to the lack of a "solemn occasion authorizing [the court] to answer" (the standard utilized by the Massachusetts Court for rendering Advisory Opinions).

As to the second question, the Court concluded that "[i]f House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic Party and its members to associate by allowing candidates to be placed on the state primary ballot in contravention of the party's charter." Governor King declined to sign the Bill after having received this Opinion.

Complainant asserts, then, that the Democratic Party's Charter is given the full effect of state law, and because no other candidate at the convention received at least fifteen percent of the convention vote for the endorsement for the party's nomination for the U.S. Senate seat, the nomination effectively occurred with that vote by the convention delegates. Complainant has attempted to draw a parallel between the situation in Massachusetts and that in Connecticut. In that regard, he points to the analysis set forth in Advisory Opinion 1976-58.

There, the party had adopted a twenty percent rule for convention voting. The state's statute provided that whenever only one candidate received at least twenty percent of the convention vote "no primary shall be held by such party for such office and the party-endorsed candidate for such office shall be deemed [emphasis added] to have been lawfully chosen as the nominee of such party for such office." Massachusetts, on the other hand, is not so restrictive. The primary election contest in Massachusetts does not in any circumstances terminate with the vote of the party's convention delegates. Massachusetts still holds a primary election. Certification that a candidate is his or her party's nominee must await the results of the primary contest. The contest is not a hollow procedure because the Massachusetts General Laws provide for write-in campaigns. 5/ In the present case, therefore, although Senator Kennedy was the

5/ "A person whose name is not printed on a state primary ballot as a candidate for an office, but who receives sufficient votes to nominate him therefore" and who accepts the nomination shall be placed on the ballot for the ensuing election. Mass. Gen. Laws Ann., ch. 53, § 3 (West 1975).

only Senate candidate to emerge from the convention with at least fifteen percent of the vote, he still was not the Democratic Party's nominee. The powers provided the convention by the Democratic Charter do not include the power to nominate candidates; it may merely endorse a candidate. Until the voters spoke at the polls in September, there was no Democratic Party nominee for the United States Senate from Massachusetts. There was, until the balloting was completed, a possibility that a write-in campaign could be mounted to effectively challenge the action of the convention which endorsed Senator Kennedy. 6/ Because the convention is merely a "winnowing-out" process and does not under any circumstances result in the nomination of a candidate until after the primary election is held, the convention should not be considered as an election for purposes of the Federal Election Campaign Act of 1971, as amended. 7/

---

6/ The United States Supreme Court has recognized the interests of the state in limiting the number of persons on the ballot in order to avoid voter confusion, American Party of Texas v. White, 415 U.S. 767(1974), and the associational rights of a political party to determine who will appear on a general election ballot as the candidate of that party, Democratic Party of U.S. v. Wisconsin, 450 U.S. 107(1978). Although the Massachusetts Democratic Party has not chosen to nominate a candidate at the convention, it has chosen to reduce the number of candidates who may appear as having its endorsement in the primary election. The state's acquiesence in this process would appear to further the interests of the state as well as the associational rights of the party.

7/ Indeed, in AO 1978-79, the Commission considered the effect of Louisiana's statute which provided for the termination of the general election process where a candidate, in an open primary contest, received a majority of the vote in the primary. Because the state did not certify that candidate as the winner of the general election until after the scheduled date of the general election, the Commission concluded that the candidate could,

Accordingly, the General Counsel recommends that the Commission determine that there is no reason to believe that Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 44la(f).

---

7/ (cont'd.)
although unopposed, still qualify for separate contribution limitations. In addition, the Commission has previously noted that the question of whether a party convention is an "election" with "authority to nominate a candidate" turns on an analysis of state law regarding the power and role of such a convention in the nomination of candidates for Federal office. See also Advisory Opinion 1976-58 (Connecticut statute providing that no primary shall be held when only one candidate receives at least twenty percent of the vote; "the 'endorsed candidate'...shall be deemed to have been lawfully chosen as the nominee of such party for such office."); AO 1978-25 (Colorado and Minnestota's political conventions are not elections since they "do not have authority under state law to nominate candidates..."); and AO 1978-30 (Utah's party primary convention was held to be an election due to a statutory provision which stated that whenever one candidate receives at least seventy percent of the votes cast "he shall become the party's candidate in the next general election without the necessity of running in the primary election.")

Recommendation - MUR 1468(82)

1. Find no reason to believe that respondents Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. §§ 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 441a(f).

2. Approve the attached letters to Alwin E. Hopfmann, Senator Kennedy, and the Committee to Re-Elect Senator Kennedy.

3. Close the file.

Charles N. Steele
General Counsel

Oct 22, 1982
Date

BY: Kenneth A. Gross
Associate General Counsel

Attachments
1. Letter to complainant
2. Letter to respondents

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, hereby certify that the Commission, on October 25, 1982, by a vote of 5 to 0 , adopted the above recommendation of the General Counsel in MUR 1468.

Date: 10-25-82

Marjorie W. Emmons

Voting for the Recommendation: Commissioners Aikens, Harris McDonald, McGarry and Reiche

Voting Against the Recommendation: None

Absences or Abstentions (Indicate): Commissioner Elliott (Ballot indicates not voting in this matter).

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mr. Alwin E. Hopfmann
29 Tuttle Road
Sterling, Massachusetts

Re: MUR 1468(82)

Dear Mr. Hopfmann:

The Federal Eection Commission has reviewed the allegations of your complaint dated September 13, 1982, and determined on the basis of the information provided in your complaint there is no reason to believe that a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), has been committed.

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

Should additional information come to your attention which you believe establishes a violation of the Act, you may file a complaint pursuant to the requirements set forth in 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4.

Sincerely,

Charles N. Steele
General Counsel

BY: _____
Kenneth A. Gross
Associate General Counsel

Attachment 1
page 1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mr. William C. Oldaker, Esquire
Epstein Becker Borsody & Green, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036

Re: MUR 1468(82)

Dear Mr. Oldaker:

On September 16, 1982, the Commission notified you of a complaint alleging that your clients had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

The Commission, on October , 1982, determined that on the basis of the information in the complaint there is no reason to believe that a violation of any statute within its jurisdiction has been committed. Accordingly, the Commission closed its file in this matter. (This matter will become a part of the public record within 30 days.)

Sincerely,

Charles N. Steele
General Counsel

BY: Kenneth A. Gross
Associate General Counsel

Attachment 2
page 1

EPSTEIN BECKER BORSODY & GREEN, P.C.
1140 19TH STREET, N.W.
WASHINGTON, D.C. 20036

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

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MICHAEL L. ZIEGLER*

DONALD PARTLAND*
OF COUNSEL

*NOT ADMITTED WASHINGTON
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'P.C. NEW YORK AND WASHINGTON, D.C. ONLY


October 7, 1982

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

Re: MUR 1468

Dear Mr. Steele:

In accordance with the instructions of Kenneth A. Gross, Esq., in his letter of September 16, 1982 and the requirements of 2 U.S.C. § 437g(a)(1), the Committee to Re-Elect Senator Kennedy (the "Committee") submits this letter in support of its position that no action should be taken against it on the basis of the complaint. The complaint which precipitated this MUR can be distilled down to one underlying allegation; the nominating procedure of the Massachusetts Democratic Party for United States Senator was completed at the party's convention of May 21 and 22, 1982 and not by the September 14, 1982 primary election when Senator Kennedy was nominated as the Democratic party nominee for United States Senator. Based on this premise, the complainant asserts that the Committee has violated just about every reporting requirement, and contribution and expenditure limitation governing Federal elections.

The Complaint is utterly without merit in that it misconstrues Massachusetts law, the Federal Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. §§ 431 et seq., and the regulations promulgated thereunder, 11 C.F.R. §§ 100.1

et seq. Hence, the Commission is urged to find that there is no reason to believe that a violation of the Act has been committed.

The Commission has consistently held that in order to determine whether a party convention has authority to nominate a candidate and thus be deemed an "election" within the meaning of 2 U.S.C. § 431(1)(B) hinges on an analysis of state law pertaining to the power and role of political party conventions in the nominating of candidates for Federal office. See Adivsory Opinions 1978-30, Fed. Elec. Camp. Guide (CCH) ¶5325; 1978-25, Fed. Elec. Camp. Guide (CCH) ¶5320; 1976-58, Fed. Elec. Camp. Guide (CCH) ¶5211. Massachusetts law recognizes that the Democratic party and its members enjoy a constitutionally protected right of political association. Opinion of the Justices of the Massachusetts Supreme Judicial Court, at 4 (April 23, 1982). The affairs of the Democratic party, therefore, must be under final authority of the State Convention, the highest authority of that party. See Charter and Platform of the Democratic Party of the Commonwealth of Massachusetts, Article Six, Section I.

This authority, however, does not extend to nomination of the individual who will run in the general election as the Democratic party nominee for the United States Senate. Under Massachusetts law, it is the winner by a plurality of the Democratic party primary who becomes the party's candidate for the Senate. G.L. c. 53 § 2. Since it is the registered Democrats and Independants who select the party's candidate in Massachusetts, and not the State Convention, that convention does not have authority to nominate candidates for the United States Senate and does not constitute a separate election within the meaning of 2 U.S.C. §§ 431(1)(B). See Advisory Opinion 1978-25, Fed. Elec. Camp. Guide (CCH) ¶5320.

It is irrelevant that the name of no other candidate appeared on the Democaratic party primary ballot. The reporting, contribution and expenditure limitations apply with respect to each election in which a candidate for the U.S. Senate seeks nomination or election. See 2 U.S.C. § 441a(a)6; 11 C.F.R. § 110.1(j)(1). Indeed, the regulations go on to provide that an election in which a candidate is unopposed is still a separate election. 11 C.F.R. § 110.1(j)(2). It is of no consequence that the candidate has received the endorsement of his party prior to running unopposed in the primary. Advisory Opinion 1978-41, Fed. Elec. Camp. Guide (CCH) ¶5331.

Finally, it must be noted that Senator Kennedy was not the only candidate eligible voters could cast their bal-

lot for on September 14, 1982. Nothing in the Democratic Party Charter, nor the laws of Massachusetts preclude write-in voting. In that same view, there is nothing in the Charter or State law which prohibits an individual who does not receive an endorsement of the party within the meaning of Article Six, Section III of the Charter, from mounting such a campaign.

Senator Edward M. Kennedy was nominated on September 14, 1982 to be the Democratic party candidate for the general election to the United States Senate. As such, all contributions received by the Committtee to Re-Elect Senator Kennedy, prior to that date were for the primary election. Furthermore, compliance with the filing and reporting requirements of the Federal Election Laws must be viewed from that date.

Respectfully submitted,

William C. Oldaker

EPSTEIN BECKER BORSODY & GREEN, P.C.
1140 19TH STREET, N.W.
WASHINGTON, D.C. 20036

Mr. Stephen Mims
Office of General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

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# EPSTEIN BECKER BORSODY & GREEN, P.C.

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DONALD PARTLAND°
OF COUNSEL

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°°ADMITTED TEXAS ONLY
'P.C. NEW YORK AND WASHINGTON, D.C. ONLY


September 29, 1982

82 SEP 30 P3:08

Mr. Stephen Mims
Office of General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: MUR 1468

Dear Mr. Mims: Steve

The Committee to Re-Elect Senator Kennedy is in receipt of the Commission's letter dated September 16, 1982, indicating that a Complaint has been filed against the Committee. The Committee hereby requests that an extension until October 8, 1982, be granted within which to file its response.

Thank you for your consideration of this matter.

Sincerely,

Bill

William C. Oldaker

WCO/DSP:jsk

Bcc# 8562

82 SEP 30 A11:41

# STATEMENT OF DESIGNATION OF COUNSEL

NAME OF COUNSEL: William C. Oldaker

ADDRESS: 1140 19th Street, N.W., Suite 900
Washington, D.C. 20036

TELEPHONE: (202)861-0900

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

September 29, 1982
Date

Signature

NAME: Senator Edward M. Kennedy

ADDRESS: 140 Federal Building
Boston, Massachusetts 02110

HOME PHONE:

BUSINESS PHONE: (617)482-1982

92040565963

EPSTEIN BECKER BORSODY & GREEN, P.C.
1140 19TH STREET, N.W.
WASHINGTON, D.C. 20036

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Stephen Mims
Office Of General Counsel
Federal Election Commission
7th Floor
1325 K Street, N.W.
Washington, D.C. 20463

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ROUTING SLIP

____ Improper Complaint ltr.

____ No Jurisdiction ltr.

X Respondent Notification ltr (2)

X Complainant Notification ltr.

____ Other:

To HAG from SB on 9/16/82 for signature

To Docket from ~~[illegible]~~ on ~~9/16~~ for mailing

Mark the envelope to the Senator Confidential

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 16, 1982

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Committee to Re-Elect Senator Kennedy
140 Federal Street
Boston, MA 02110

Re: MUR 1468

Dear Sir/Madam:

This letter is to notify you that on September 13, 1982, the Federal Election Commission received a complaint which alleges that your committee may have violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 1468. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate, in writing, that no action should be taken against you in connection with this matter. Your response must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

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.

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

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

If you have any questions, please contact Stephen Mims, the staff member assigned to this matter at (202) 523-4039. For your information, we have attached a brief description of the Commission's procedure for handling complaints.

Sincerely,

Charles N. Steele
General Counsel

By Kenneth A. Gross
Associate General Counsel

2204035097

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

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 16, 1982

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Senator Edward M. Kennedy
109 Russell Senate Office Building
Washington, D.C. 20510

Re: MUR 1468

Dear Senator Kennedy:

This letter is to notify you that on September 13, 1982, the Federal Election Commission received a complaint which alleged that you have violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 1468. Please refer to this number in all future correspondence.

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Sincerely,

Charles N. Steele
General Counsel

By Kenneth A. Gross
Associate General Counsel

9204050599

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

MUR # 1468

DATE 9/15/82

rec'd 10:00 am 9/16

PLEASE PROVIDE THE NAMES AND ADDRESSES OF ALL RESPONDENTS WHICH ARE TO BE SENT A COPY OF THE COMPLAINT. IF A PRINCIPAL CAMPAIGN COMMITTEE IS A RESPONDENT, A CARBON COPY IS TO BE SENT TO THE CANDIDATE. PLEASE PROVIDE THE NAME AND ADDRESS OF THE CANDIDATE AND PUT A "CC" BESIDE THE CANDIDATE'S NAME. IF A CANDIDATE IS A RESPONDENT, A CARBON COPY IS TO BE SENT TO THE CANDIDATE'S PRINCIPAL CAMPAIGN COMMITTEE. PLEASE PROVIDE THE NAME AND ADDRESS OF THE PRINCIPAL CAMPAIGN COMMITTEE AND PUT A "CC" BESIDE THE COMMITTEE'S NAME. PLEASE PROVIDE THIS INFORMATION, ON THIS SHEET, WITHIN 24 HOURS OF RECEIPT OF THIS NOTICE. THANK YOU.

1. Senator Edward M. Kennedy
   109 ~~Senate~~ Russell Senate Office Building
   Washington, DC 20510

2. Committee to Re-Elect Senator Kennedy
   140 Federal Street
   Boston, MA 02110

# ROUTING SLIP

____ Improper Complaint ltr.

____ No Jurisdiction ltr.

____ Respondent Notification ltr.

X — X Complainant Notification ltr. (4) 1466-1469

____ Other:

To [illegible] from [illegible] on 9/13/82 9/15/82 for signature

To Docket from [illegible] on 9/13 for mailing

9/15

#1468 - omitted signing

9210350601

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 15, 1982

Mr. Alwin E Hopfmann
29 Tuttle Road
Sterling, MA

Dear Mr. Hopfmann:

This letter is to acknowledge receipt of your complaint of September 13, 1982, against Senator Edward M. Kennedy and Committee to Re-elect Senator Kennedy which alleges violations of the Federal Election Campaign laws. A staff member has been assigned to analyze your allegations. The respondents will be notified of this complaint within five days.

You will be notified as soon as the Commission takes final action on your complaint. Should you have or receive any additional information in this matter, please forward it to this office. We suggest that this information be sworn to in the same manner as your original complaint. For your information, we have attached a brief description of the Commission's procedure for handling complaints. If you have any questions, please contact Steven Barndollar at (202) 523-4073.

Sincerely,

Charles N. Steele
General Counsel

By Kenneth A. Gross
Associate General Counsel

Enclosure

RECEIVED AT THE FEC

82 SEP 13 A11:00

FEDERAL ELECTION COMMISSION

| | | |
|---|---|---|
| ALWIN E. HOPFMANN<br>29 Tuttle Road<br>Sterling, Massachusetts,<br><br>Complainant | : | |
| v. | : | No. _____ |
| EDWARD M. KENNEDY<br>109 Russell Senate Office Building<br>Washington, D. C. 20510<br><br>COMMITTEE TO RE-ELECT SENATOR KENNEDY<br>140 Federal Street<br>Boston, Massachusetts 02110<br><br>Respondents. | : | |

COMPLAINT

ALWIN E. HOPFMANN, 29 Tuttle Road, Sterling, Massachusetts, brings this COMPLAINT pursuant to the Federal Election Campaign Act of 1971 as amended, 2 USC 431, et seq., and, in particular, 2 USC 437(a) and the regulations under that Act, 11 CFR, Part III and, in particular, 11 CFR 111.3. Pursuant to 11 CFR 111.4(d) the COMPLAINT contains the following:

I) VIOLATIONS alleged;

II) RECITATION OF THE FACTS which describe a violation of the statutes and regulations over which this Commission has jurisdiction;

III) IDENTIFICATION OF THE SOURCE OF INFORMATION which gives rise to Complainant's relief;

IV) MEMORANDUM OF POINTS AND AUTHORITIES in support of the Complaint;

V) DOCUMENTATION supporting the facts alleged.

I. VIOLATIONS

EDWARD M. KENNEDY was nominated as a candidate for the United States Senate from Massachusetts by the Democratic Party of that

state in a convention election which it held on May 21 and 22 of this year. However, in violation of section 434(a)(2)(A)(i) of the Federal Election Campaign Act as amended, the COMMITTEE TO RE-ELECT SENATOR KENNEDY, EDWARD M. KENNEDY's principal campaign committee, failed to file the required pre-election report no later than the twelfth day before the convention election.

In further violation of the Federal Election Campaign Act, §434(a)(6)(A), the COMMITTEE TO RE-ELECT SENATOR KENNEDY failed to file the required notification of contributions of $1,000.00 or more received after the 20th day before, but more than 48 hours before, the convention election referred to.

At the convention election held by the Massachusetts democratic party on May 21 and 22 of this year, EDWARD M. KENNEDY's quest for the democratic party nomination was ended by the elimination of the only opposing candidates from the ballot and the nomination race. The primary was then over for EDWARD M. KENNEDY.

Nonetheless, in violation of provisions of the Federal Election Campaign Act, and of the regulations of Title 11 of the Code of Federal Regulations as well as the Advisory Opinions of the Commission, the COMMITTEE TO RE-ELECT SENATOR KENNEDY did not terminate its reporting of contributions and expenditures for the primary after the convention election which ended the nomination process of the primary as far as EDWARD M. KENNEDY was concerned.

Instead, the reporting has been continued as if the nominating process had not already ended and would not end until the September 14, 1982 primary for those candidates who either still have competition within their party or who faced no opposition in the first instance.

This is a violation of the reporting requirements of section 434(b) of the Federal Election Campaign Act of contributions and expenditures as defined in section 431 of the Act for each

"election" as defined. This incorrect reporting reflects further violations of the contribution limitations as set out in section 441a of the Act for those contributions which are reported by the COMMITTEE TO RE-ELECT SENATOR KENNEDY as having been made after May 22, 1982. The same is true for expenditures. These violations are further specified in Title 11 of the Code of Federal Regulations, Part 110, section 110.1(2) and Advisory Opinions AO 1976-58, AO 1978-30, AO 1978-25, AO 1980-60, AO 1980-68, AO-1975-54, AO 1975-53 and the Instruction Letter of November 4, 1976, to Elizabeth Holtzman (CCH Federal Election Campaign Financing Guide paragraph 6048).

These violations, in turn, lead to additional violations in the reporting of the COMMITTEE TO RE-ELECT SENATOR KENNEDY in all of those requirements where a separate limit or requirement is specified for each separate "election." These include, but are not limited to, the requirements of

1) 2 USC 431(8)(B)(ii)
2) 2 USC 431(8)(B)(iii)
3) 2 USC 431(8)(B)(iv) and (v)
4) 2 USC 431(9)(B)(ii)
5) 2 USC 431(9)(B)(iv)
6) 2 USC 431(9)(B)
7) 2 USC 432(f)
8) 2 USC 441(d)(3)(A)
9) 11 CFR 100.7(b)(6)
10) 11 CFR 100.7(b)(7)
11) 11 CFR 100.7(b)(8)
12) 11 CFR 100.7(b)(9)
13) 11 CFR 100.7(b)(15)(vi)
14) 11 CFR 100.7(b)(16)
15) 11 CFR 100.8(b)(4)
16) 11 CFR 100.8(b)(7)
17) 11 CFR 100.8(b)(8)
18) 11 CFR 100.8(b)(9)
19) 11 CFR 100.8(b)(10)
20) 11 CFR 100.8(b)(16)
21) 11 CFR 102.8
22) 11 CFR 102.9
23) 11 CFR 104.3
24) 11 CFR 104.5
25) 11 CFR 104.6(a)(1)
26) 11 CFR 104.6(b)
27) 11 CFR 104.14
28) 11 CFR 110.1(e)
29) 11 CFR 110.1(f)
30) 11 CFR 110.1(h)
31) 11 CFR 110.1(j)
32) 11 CFR 110.4(c)

5. Thus, prior to April of 1982, Massachusetts allowed access to the primary ballot in the U.S. Congressional races in a manner similar to that of Minnesota as described by the Commission in Advisory Opinion AO 1978-25. Like that of Colorado, described in the same Advisory Opinion or that of New Mexico, described by the Commission in Advisory Opinion AO 1981-29, the Massachusetts way of allowing access to the primary ballot for a candidate did not give a party convention "authority to nominate a candidate" as that phrase is used in 2 USC 431(a)(2), the Federal Election Campaign Act of 1971 as amended. The office of United States Seantor is treated in the Code of Massachusetts as a State-wide office. The Secretary of State of the Commonwealth refused to put my name on the ballot for the September 14, 1982 election because I did not receive fifteen percent (15%) of the convention vote.

6. On April 23, 1982, all of this was changed by seven Justices of the Supreme Judicial Court of Massachusetts, acting under color of their authority as justices of the highest court of that State. In that capacity they rendered, on that day, an Advisory Opinion to the Governor of Massachusetts in which they stated that a provision in the charter of the State's Democratic Party, adopted some months before, was to be interpreted as forbidding a place on the ballot to any candidate of the Democratic Party who had not received fifteen percent (15%) of the vote at the Democratic Party's pre-primary convention, the so-called "15% rule."

7. Twenty-eight (28) days after this Advisory Opinion, on May 21, 1982, the Democratic Party of Massachusetts held a pre-primary convention and EDWARD M. KENNEDY was the only candidate for United States Senator to receive the newly required 15% endorsement, eliminating all other Democratic Party candidates from being placed on the ballot for the upcoming primary scheduled for September 14, 1982.

8. On May 25, 1982, four (4) days after the democratic party pre-primary convention, the Secretary of State of Massachusetts, acting under color of authority of his office, issued a press release announcing that he would abide by the April 23, 1982 Advisory Opinion of his state's Supreme Judicial Court and that he would exclude from the primary ballot the names of candidates who would have, under the old way, been eligible to have their names on the ballot.

9. The effect of this Advisory Opinion by the Supreme Judicial Court of Massachusetts, therefore, was to convert the pre-primary convention of the Massachusetts democratic party from a convention without "authority to nominate a candidate" within the meaning of 2 USC 431(a)(2) to a convention with "authority to nominate a candidate" within the meaning of that law.

10. Thus, the pre-primary convention of the democratic party in Massachusetts which was held on May 21, 1982, was a convention with "authority to nominate a candidate" as governed by 2 USC 431(a)(2) and was, therefore, an "election."

It was similar, in all important respects, to conventions held in Connecticut, where a "20% rule" prevails as described by the Commission in Advisory Opinion AO 1976-58 and in Utah as described in AO 1978-30. These conventions are "elections" under the law as set out in these opinions.

11. Despite the fact that the May 21, 1982 convention of the Massachusetts democratic party thus became an election, the respondents have not filed the pre-election report required by 2 USC 434(a)(2)(A). EDWARD M. KENNEDY knew that the convention of May 21 and 22, 1982, held by the Democratic Party of Massachusetts had authority to nominate a candidate or candidates for United States Senate and that his quest for the nomination might end in success at that convention under the Advisory Opinion of the Supreme Judicial Court.

12. Challengers to EDWARD M. KENNEDY for the nomination of the Massachusetts Democratic Party to the U.S. Senate were eliminated at the May party convention. This year, in Massachusetts, therefore, the primary for U.S. Senator in the Democratic Party terminated at that time.

13. EDWARD M. KENNEDY was not unopposed. He eliminated his competition and secured the nomination, ending the nomination process. The upcoming Massachusetts primary, to be held on September 14, 1982, is not an "election" for respondent EDWARD M. KENNEDY.

14. Despite these facts, the respondents have continued to report campaign contributions and expenditures as if the September 14, 1982 primary in Massachusetts were an "election" for EDWARD M. KENNEDY. The COMMITTEE TO RE-ELECT SENATOR KENNEDY, in its July 15, 1982 quarterly report, made pursuant to 2 USC 434 (a)(2)(A)(iii), reported numerous contributions and expenditures for the "primary" which was already over.

15. EDWARD M. KENNEDY and the COMMITTEE TO RE-ELECT SENATOR KENNEDY have failed to report any contributions which have been "designated in writing" for the "particular election" of the May 21 party convention as described in 11 CFR 110.1(a)(2)(i). The reports filed by EDWARD M. KENNEDY and the COMMITTEE TO RE-ELECT SENATOR KENNEDY with the Commission do not show that those contributions made on or before the May 21, 1982 convention "election" were made for that "election" as set out in 11 CFR 110.1(a)(2)(A).

16. Further, the quarterly report filed by EDWARD M. KENNEDY and the COMMITTEE TO RE-ELECT SENATOR KENNEDY for the quarter ending June 30, 1982, shows that contributions made after the May 21, 1982 convention "election" but before the September 14 primary in Massachusetts, which is now no longer an "election" under Advisory Opinions AO 1976-58 and AO 1978-30, referred to above, are designated as being for the "primary" when, in fact, under the rule of 11 CFR 110.1(a)(2)(ii)(B), they are for the general election. Even if these definitions were stretched for

partisan purposes and the contributions for "primary" were held to be designated in writing as having been for the convention "election" as the primary (the reports show clearly that this was not intended), the large surplus which the reports show in the "war chest" of EDWARD M. KENNEDY and the COMMITTEE TO RE-ELECT SENATOR KENNEDY indicates that the "net debts" of the convention could have been paid off at any time and that, consequently, contributions after May 21, 1982, though marked "primary" are really for the general election.

16. The reports on file with the Commission do not include a pre-election report for the convention election of the Massachusetts democratic party held on May 21 and 22 where EDWARD M. KENNEDY was, in fact, nominated.

17. The reports on file with the Commission show that contributions of $1,000. or more were made to respondents between twenty (20) days before the May 21, 1982 convention election and the time forty-eight (48) hours before the election, but these contributions were not reported.

III. IDENTIFICATION OF THE SOURCE OF INFORMATION

1. With regard to paragraph 1 and also paragraph 2 of the Recitation of Facts: I have this on information and belief from my attorney, Laurence A. Elgin, a member of the Bar of the District of Columbia, who has examined the FEC Form 2 filed by EDWARD M. KENNEDY which is referred to in paragraph 2 of the Recitation of Facts.

2. With regard to paragraph 3: as regards the Advisory Opinion of the Justices of the Supreme Judicial Court of Massachusetts, I have personally examined that opinion. A copy of that opinion is attached for the Commission's inspection.

As regards the previous requirements for becoming a candidate on the ballot in the Democratic primary in Massachusetts: I have personal knowledge of that procedure, and it may also be found set out in the general laws of the Commonwealth at chapter 53, section 44, as amended to the statutes of 1981, chapter 278, section 1.

That this is set out in the opinion of the Justices, dated April 23, 1982, to the Governor, to which I refer. It was a bill passed by the legislature and then pending approval of the Governor, which bill would have amended that chapter and section of the laws of Massachusetts, which provided the occasion for the Advisory Opinion. I should add that the legislature was then seeking to amend the law referred to in a manner which would have made this right even clearer. This can be seen by reading the aforesaid Advisory Opinion.

3. With regard to paragraph 4: This is stated from my own personal knowledge. I have been a member of the Democratic Party in Massachusetts for some years now. I have been a resident of the Commonwealth for even more years and have been generally familiar with its political processes and have participated in them.

4. With regard to paragraph 5: the Advisory Opinions, of course, are those of the Commission itself and are a matter of notice to the Commission. That such a system was in effect in Massachusetts prior to the Advisory Opinion of the Justices to the Supreme Judicial Court, dated April 23, 1982, is again set out in the statutes of the Commonwealth referred to and the annotations to those statutes in the general laws of Massachusetts published by the Lawyers Co-operative Publishing Company which is the official codification of the laws.

5. With regard to paragrah 6: we have attached the opinion of the Justices which sets this out.

6. With regard to paragraph 7: I was at this convention and received votes, but did not receive the required fifteen percent (15%) as set out in the opinion of the Supreme Judicial Court.

7. With regard to paragraph 8: a copy of the press release referred to is attached as part of the documentation in this Complaint.

8. With regard to paragraph 9: I know this from my own personal knowledge of what, in fact, happened with the change of procedures in Massachusetts and, as regards the Advisory Opinions of the Commission from the reading of those opinions and on information and belief from the reading of those opinions by my attorney.

9. With regard to paragraph 10: Again, I personally know that EDWARD M. KENNEDY was nominated at this convention and there was no competition for that nomination after the convention from my own attendance at it. As regards the Commission's Advisory Opinions, I have examined them, and examined the statute, and my attorney has also.

10. With regard to paragraph 11: I know this from an examination of the computer printout from the Commission on the filings of Senator Kennedy, which shows all of the reports of which EDWARD M. KENNEDY and the COMMITTEE TO RE-ELECT SENATOR KENNEDY have filed. The required pre-election report for the convention election is not shown as having been filed on that computer printout. The rest I know from personal knowledge.

11. With regard to paragraphs 12 and 13: I know these things from my own personal knowledge.

12. With regard to paragraphs 14, 15, and 16 as well as 17 and 18: I know these facts on information and belief from my attorney's examination of the documents on file with the Commission and I have, myself, examined sample documents of the contribution reporting of EDWARD M. KENNEDY and the COMMITTEE TO RE-ELECT SENATOR KENNEDY and have observed that the computerized reporting format which they have used does not show or allow for reporting as if the party convention of May 21 and 22 of 1982 have been the election that it, in fact, was.

IV. MEMORANDUM OF POINTS AND AUTHORITIES

A. There is a single contribution and expenditure limit for the nominating process. This Commission, in four Advisory Opinions, has made it clear that, in the situation in which a candidate is opposed in a primary, the nominating process of the primary is over when the nomination has been achieved and no opposition remains. These four Advisory Opinions are: AO 1975-54 (CCH Federal Election Campaign Financing Guide paragraph 5165, hereinafter referred to as CCH Guide); AO 1976-58 (CCH Guide paragraph 5211); AO 1978-25 (CCH Guide paragraph 5315); and AO 1978-30 (CCH Guide paragraph 5325). The last cited Advisory Opinion, AO 1978-30, slightly modified the opinion rendered by the Commission in AO 1975-54 but did not modify the conclusion of AO 1975-54 that, as stated in the headnote: "There is a single contribution and expenditure limitation for the nominating process, regardless of whether the process includes a convention, primary or other procedure."

Both of these opinions concern the nominating process in Utah. Between the rendering of AO 1975-54 and AO 1978-30, of course, the Federal Election Campaign Act of 1971 was amended. Those amendments were contained in the 1974 amendments to the Act. The 1974 amendments to the Act specifically amended 2 USC 431(a)(2) to include "a convention ... of a political party held to nominate a candidate." as an election. Therefore, under that amendment a party convention which was not held for the purpose of nominating a candidate was considered to be merely part of the primary election process, as set out in AO 1975-54. The 1974 amendments, of course, were in effect at the time that AO1975-54 was rendered by the Commission. Under the authority of the 1974

amendments referred to in that opinion, a convention was considered to be not a separate election under 2 USC 431(a) that was not held for the specific purpose of nominating a candidate.

This resulted in some confusion in those states, such as Utah, Connecticut, sometimes Virginia and now, under the Advisory Opinion of the justices of the Supreme Judicial Court of that Commonwealth rendered on April 23, 1982, Massachusetts, where a convention election can result in either the ending of the primary election process for that party by the survival of a single candidate whose name will be on the ballot in lieu of all others or by the survival of two or possibly more candidates who will then be running against each other in the subsequent primary from the same party. Those states in which there are alternative means of ballot access fall into a different category and will be discussed further below.

Congress acted to end this confusing state of affairs in the 1976 amendments to the Federal Election Campaign Act of 1971. These amendments were effective May 11, 1976. In these amendments Congress modified the definition of a convention as an election to read as follows: "A convention ... of a political party <u>which has authority</u> to nominate a candidate." This change in the definition of a convention as an election was then discussed by the Commission in Advisory Opinion AO 1976-58, concerning the Connecticut convention process. Under the Connecticut system a party's district convention determines who shall be the candidate endorsed by the party by plurality vote. Other candidates who receive at least twenty percent (20%) of the votes of the delegates present at the convention may also continue as candidates for the nomination and be on the ballot for the subsequent "primary" proper.

In addition, a candidate may obtain ballot access even if he does not receive the twenty percent (20%) vote of the convention delegates by filing a "candidacy."

Finding that such a convention had "authority to nominate a candidate." within the meaning of the amendments to the Act, the Commission, in AO 1976-58, held that it constituted an election.

The Connecticut statutes also provide that if no candidate other than the party-endorsed candidate receives the twenty percent (20%) vote of the convention delegates and, if no other "candidacy" is filed, then the party-endorsed candidate shall be deemed to have been "lawfully chosen as the nominee of such party for such office." Thus, in Connecticut, the convention can either result in the nomination process being ended or in the nomination process continuing with a narrowing of the field of candidates.

In this opinion, the Commission considered the fact that the party endorsement from the convention might result in a tentative nomination subject to a challenge. However, the Commission ruled that that made no difference. If there is in fact no challenge and therefore no real primary election after the convention there would be two elections as that term is defined in the Federal election laws. These elections would be the convention and the general election.

In the case where another candidate wins twenty percent of the convention delegate votes and petitions for a primary election and does thus challenge the candidate who received the largest number of votes in the convention or in the case where a candidacy is filed, the Commission ruled, there would be three "elections:" the convention; the primary; and the general election.

Clearly, this opinion is controlling in this situation where there is no challenge after the convention and, thus, under state law, there is no primary election. However, it does not fully answer the question of what happens when, as presently in Massachusetts, the convention eliminates all but one candidate for the position from the ballot for the party holding the convention but a "primary" is nonetheless held. The question then becomes one of whether or not the subsequent primary is governed by the Advisory Opinions cited herein which consider the entire nominating process or by those which deal strictly with the "unopposed" election.

The Commission shed some light on this in its second opinion concerning the Utah primary system, cited above, AO 1978-30. Under the Utah system it is provided that the two candidates receiving the most votes at the party convention shall be declared the party's nominees, in the plural, to run in a primary election. However, the Utah statutes also provide that if one candidate receives at least seventy percent (70%) of the total votes cast at the convention, "he shall become the party's candidate in the next general election without the necessity of running in the primary election." In the Utah situation it is not said that the primary is eliminated, it is simply said that the candidate who receives seventy percent (70%) of the convention vote does not need to run in it.

The Massachusetts situation, of course, is decidedly different from this in that EDWARD M. KENNEDY is continuing to run in the primary, even though he has no opposition on the ballot and none through any petitioning or other similar process such as filing a "candidacy." That difference, however, does not appear to be material.

However, the Utah situation as the Commission rendered an opinion upon it in AO 1978-30 to answer the question in favor of the "primary" having ended in Massachusetts with the conclusion of the convention which eliminated all other opposition from the ballot because, the Commission noted, under the Utah system, the individual who received the seventy percent (70%) endorsement at the convention is omitting the direct primary election as far as that individual is concerned. Again, the results were the same: where the individual receives the seventy percent (70%) endorsement, there are only two elections in which he is running. Where the individual does not receive the seventy percent endorsement and two candidates go forward from the convention, there are three elections.

In rendering Advisory Opinion AO 1978-30 about the Utah primary system, the Commission specifically noted that the opinion was based on the definition of election in the 1976 amendments and that the advisory opinion, therefore, superceded AO 1975-54. However, the Commission did not, in this opinion, overrule the holding in AO 1975-54 that there is a single contribution and expenditure limitation for the nominating process, regardless of whether the process includes a convention, primary or other procedure. What was superceded was the definition of what is an "election." It was specifically held that the 1976 amendments changed that definition so that conventions such as Utah's were an "election," and that, therefore, there were either three or two elections under a system like Utah's or Connecticut's, depending upon the question of whether or not the nominating process effectively ended at the convention or continued forward through the subsequent "primary" as that term is used under the State's particular system. This refers, of course, to the State "primary" for all candidates. Care should be taken not to confuse the

primary for all candidates as an event held in the state with the question of whether or not there is, in fact, a primary on that date for a particular candidate under Federal law.

In Advisory Opinion AO 1976-58 (also decided after the 1976 amendments) to which we have referred, the Commission made it clear that where the convention was "tantamount to a nomination of the candidate," and the convention "would fall within the ... definition of 'election'" as pelled out in the 1976 amendments to the Act, then the nominating process stopped right there and the subsequent state-wide primary for all candidates would no longer be a primary for the candidate who had been the recipient of what was "tantamount" to a nomination. Any doubts on this score would seem to have firmly resolved in favor of this position by subsequent opinion of the Commission, AO 1978-25 (CCH Guide, paragraph 5315). This case concerned a runoff election subsequent to the primary rather than a state-wide "primary" subsequent to a convention election. However, in the opinion, this Commission made it resoundingly clear that the reality of when the nomination process is terminated will govern.

According to this Commission the question in that Advisory Opinion posed "the issue of whether a Senate candidate who is not on the ballot in a primary run-off election may nevertheless have the benefit of a separate contribution limit with respect to a runoff election which is required between other Senate candidates opposing each other for the nomination of another political party." Thus, this situation was directly analogous to the present one in Massachusetts in that Senator Kennedy is no longer opposed within the democratic party, but other candidates who still have opposition are running from other parties. The language of this Commission in answering that question seems to be definitive with regard to the issues raised by this Complaint, so we quote it:

> "In addition, the definition of 'candidate' in 2 USC 431(b) refers to an individual seeking nomination for election, or election to Federal office. Once nominated for election to Federal office, a candidate is no longer seeking nomination and therefore is not regarded as a candidate with respect to any runoff election prescribed by applicable State law to select another nominee for the same Federal office. Accordingly, contributions to such a candidate may not be made with respect to a runoff election which, as to that candidate, is obviously immaterial to his or her selection as a nominee for the general election."

This clear language, which concentrates on the reality of the situation, would seem to be dispositive of the present case. Clearly, EDWARD M. KENNEDY is the nominee of the democratic party at this time as the result of the actions of the convention election held by the Democratic Party of Massachusetts on May 21 and 22 of this year. The state-wide primary for other candidates, although he is still on the ballot, is not material to his selection as nominee for the general election.

B. A convention with authority to nominate: the importance of ballot access. There are two subsidiary questions that must be answered in conjunction with the above discussion. One concerns the determination of whether or not a convention has authority to nominate so as to be an "election" under the Federal Election Campaign Act of 1971 as revised by the 1976 amendments and the other concerns the question of: is a situation like the present one in Massachusetts where the candidate who was in effect nominated at the convention and remains on the ballot, although unopposed, a situation which qualifies as a separate election under Federal election laws? In the latter situation, the question is: can the candidate then take advantage of the Advisory Opinions which relate to totally unopposed candidates?

We will first discuss the question of a convention with authority to nominate and go into the criterion of ballot access which the Commission has established since that will shed great light upon the second question.

It can be seen clearly from the above discussion in subpart A that in the systems that prevail in Connecticut and Utah the party convention is an election. In the case of Utah, either two candidates or one go forward from the convention election and if two go forward there are three elections for purposes of contribution and expenditure limitations whereas, if only one goes forward, there are two elections. In Utah, of course, the candidate who receives the seventy percent (70%) endorsement of the convention election does not have to run in the primary, although it is held. In Connecticut, the results are the same although the language is somewhat different. This is true, even though a challenge to the party-endorsed candidate in the state-wide primary may emerge subsequent to the convention nomination process.

Clearly, in the situation in these two States, as is sometimes the case in Virginia, a convention election which narrows down the field of candidates is an election under the FEC Act. The Commission has also rendered two Advisory Opinions about States where party conventions do not constitute elections and these opinions shed additional light upon the present situation and make it clear that the Massachusetts Democratic party convention in May of this year was, indeed, an election. In AO 1978-25, which we have alluded to above, the Commission referred to the situation in Colorado and Minnesota and the opinion requested with regard to the conventions held by the Republican Party in those States by the same group that asked for the opinion on the primary and runoff elections discussed in AO 1978-25. These two opinions,(which is somewhat confusing,) have the same Advisory Opinion number, AO 1978-25, but are, in fact, different opinions and have different paragraph numbers in the reporting service, paragraph 5320 for the

opinion concerning Colorado and Minnesota, and paragraph 5315 for the opinion concerning primary and runoff elections.

In the opinion concerning the systems in Minnesota and Colorado, the Commission went into the question of whether or not a convention constituted an election under different circumstances than those addressed in the opinions concerning Connecticut and Utah. In Colorado, candidates for nomination at a primary election are placed on the ballot either by a certificate of designation by the "Assembly" as the party convention is called in that State, or by petition. It is specifically provided by the State's laws that no such "Assembly" or political convention shall declare that any one candidate has received the nomination of the Assembly. In other words, the Assembly can designate, and must designate, more than one candidate and, in addition to that, other candidates can get on the ballot for the primary by petition.

The significant factor is that what is emphasized by the Commission was the process by which the candidates "for nomination in a primary election are <u>placed on the primary ballot</u> ..." [emphasis added].

In the same opinion, the discussion of Minnesota did not illuminate specifically how ballot access to the primary ballot is obtained in that State but implied that it was open to all comers and emphasized that the only way to get a party's nomination was to get the most votes in the primary. In that State the State party convention has the final authority to control the affairs of each political party but not who is to be on the primary ballot.

Again, the language of this opinion is significant where it states: "The Commission's review of both Colorado and Minnesota law indicate that in neither State do the party conventions have authority nominate Senate candidates and thereby potentially obviate the need for a primary election." What is significant is the use of the language "potentially obviate the need."

What is emphasized then is the obviation of the need for a primary election not whether or not a subsequent primary in name is held where the candidate is in fact unopposed.

This issue was most recently addressed by the Commission in Advisory Opinion AO 1981-29 (CCH Guide paragraph 5616) which involved the conventions held in the State of New Mexico. Again, the opinion makes it clear that it is ballot access which is the key to determining whether or not a convention is an election. Therefore, it is clear, that the Commission regards ballot access as the realistic standard by which to measure whether or not a nomination process is going forward. Therefore, when ballot access has been terminated, the nomination process is at an end.

In New Mexico, the system is such that every candidate who receives twenty percent (20%) or more of the votes at the convention shall be certified to its Secretary of State as a convention-designated nominee. As a result of becoming such a convention designated nominee the name of the candidate is then placed on the primary election ballot. The opinion emphasizes, however, that a candidate who fails to obtain the requisite twenty percent (20%) of the delegates' votes is not precluded from appearing on the primary election ballot. He may obtain ballot access by filing a nominating petition in accordance with State law.

Moreover, the New Mexico law makes it clear that no convention shall declare that any one candidate has received the nomination of the state convention. The opinion then holds that the New Mexico type of primary convention is not an election under the FEC law, but instead is an "alternate method of obtaining access to the primary election ballot."

This wholesome realism of the Commission is reflected also in those opinions which deal with the question of petition campaigns to get on the ballot. These are the Advisory Opinions AO 1975-53 (CCH Guide paragraph 5158) and the instruction letter to Elizabeth Holtzman (CCH Guide paragraph 6048), addressing the same issue.

We would point the Commission's attention to the fact that in the present instance, complainant Hopfmann has been specifically precluded from such a petition campaign which was the type of campaign that he expected to be able to conduct prior to the Advisory Opinion of the Supreme Judicial Court of Massachusetts rendered in May.

Further reinforcement of the Commission's position on this matter is given in the Advisory Opinion AO 1978-25 (CCH Guide paragraph 5515). This opinion deals with the situation where there is a possible runoff election which may or may not occur for two candidates other than the candidate whose attorney requested the opinion. In other words, in the request for this Advisory Opinion, the requestor was seeking a possible separate contribution limit for an election which was only material to candidates of another party, whose nominating process had not ended. Again, the Commission made it clear that "Once nominated for election to Federal office the candidate is no longer seeking nomination ...." In that situation, the candidate who is already nominated is no longer a candidate regardless of the fact that others, in another party, may still be seeking that other party's nomination.

The question may well be raised as to whether or not the fact that there still may be the possibility of an unsolicited write-in nomination, as extraordinarily remote as that possibility may be, would in some way render these rulings of the Commission incorrect. It is clear that the Commission, by concentrating on the issue of access to the ballot has foreclosed this argument.

In all of the States discussed in these various opinions of the Commission, the practice of writing in some frivolous name does exist. But the Commission has, quite rightly, considered this possibility as influencing the law on the subject. It should be noted, however, in this regard, that in the present situation in Massachusetts there is not even a check-off box, or a specified blank onto which a name can be written.

C. The issue of unopposed elections. Several opinions of the Commission have made it clear that where there is no opposition at all to a candidate, nonetheless, the scheduled primary and general election for that State wherein other candidates run for other offices still provide dates which define separate "elections" for Federal election law purposes. Thus, in Advisory Opinion AO 1978-79 (CCH Guide paragraph 5366) it was held that Senator J. Bennett Johnston of Louisiana, in running unopposed in the general election, could nonetheless have the benefit of a separate campaign contribution and expenditure limitation for the general election. Similarly, in Advisory Opinion AO 1978-41 (CCH Guide paragraph 5531) it was held that contributions for an unopposed primary election were within the boundaries of separate limitations for a separate election.

Again, in Advisory Opinion AO 1978-65 (CCH Guide paragraph 5360) it was held that representative Andrew Ireland of Florida, running unopposed in both the primary and the general election, could have the benefit of two separate "election" contribution and expenditure limits. However, there is no instance in which the Commission has ever advised that a candidate who is opposed and who eliminates the opposition at a convention may then have the benefit of a subsequent, separate contribution and expenditure limitation for a separate "election" for the primary that is scheduled for all of the candidates in that State, both for the State and Federal offices.

To hold in that regard would fly in the face of the opinions rendered by this Commission in the Advisory Opinions cited in subsection A, above.

D. Summary of the law derived from the Commission's Advisory Opinions as applied to this situation. The convention held by the Democratic Party of Massachusetts on May 21 and 22, 1982 was an election as defined in Federal law by the Federal Election Campaign Act of 1971, as amended by the amendments of 1976 to that Act. Because under the fifteen percent (15%) rule as newly stated to be law by the Supreme Judicial Court of Massachusetts in its Advisory Opinion of April 23, 1982, all candidates other than EDWARD M. KENNEDY were denied ballot access as a result of the voting at that convention, it terminated the nominating process for the Democratic candidate for United States Senator from Massachusetts in 1982.

Although EDWARD M. KENNEDY is on the ballot for the state-wide primary for all candidates for State and Federal office scheduled for September 14, 1982, that election is not an "election" within the meaning of Federal law for EDWARD M. KENNEDY. Therefore, he is not entitled, nor is the respondent THE COMMITTEE TO RE-ELECT SENATOR KENNEDY entitled a separate campaign contribution and expenditure limit for the September 14, 1982 event.

All contributions for the primary for EDWARD M. KENNEDY, as reported by the COMMITTEE TO RE-ELECT SENATOR KENNEDY, have been reported as if the September 14, 1982 state-wide election were a primary election for EDWARD M. KENNEDY, and the only primary election for EDWARD M. KENNEDY. Therefore, these contributions are illegal to the extent that they were not made specifically for the convention election of May 21 and 22, 1982 under the applicable statutory provisions and regulations and designated specifically for that convention election. All contributions to respondents after May 22, 1982 are, as a matter of law, for the general election.

E. Statutory provisions that are applicable. The term "contribution" and the term "expenditure" are defined by the Federal Election Campaign Act to mean, respectively, any gift, subscription, loan, advance, or deposit or money or anything of value made by any person for the person of influencing any "election" for Federal office, or, similarly, any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office. Notice that in each case any "election" in the singular is referred to. Act, subsections 431(8) and (9), respectively.

"Election" in turn is defined by section 431(1). Election is specifically defined by listing, (paragraph (A) of section 431 (1))a general, special, primary, or run-off election; and also (subparagraph (B)) a convention or caucus of a political party which has authority to nominate a candidate, such as we have discussed.

Therefore, under these definitions of the Act and the Advisory Opinions discussed above, the campaign of EDWARD M. KENNEDY for nomination to the United States Senate from the Democratic Party of Massachusetts ended, as we have noted, at the close of the party's convention of May 21 and 22, 1982 under these provisions of the Act.

Nor, though undoubtedly some would argue otherwise, do the regulations of the Commission, as set out in Title 11 of the Code of Federal Regulations, alter this conclusion.

"Primary elections" is defined in Title 11 CFR 100.2(c)(1) as:

> "An election which is held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to Federal office in a subsequent election is a primary election."

It can be seen from this definition that the primary election is defined in the regulations as that election which is held (first) prior to a general election; secondly, as a direct result of which the candidate is nominated for election in the general. It is clear that the situation in Massachusetts at the present is such that the only election which fits this description is the convention election held in May for the Democratic nomination to the United States Senate.

This is not altered by 11 CFR 100.2(c)(5). That section refers only to the situation where the candidate for nomination is unopposed for the nomination within his or her own party. In that situation, which does not apply here since the Complainant did oppose EDWARD M. KENNEDY for the nomination, the primary election is considered to have occurred on the date on which the primary election was held by the candidate's party in that State for all offices.

This reinforces the Advisory Opinions cited above concerning unopposed primary elections and general elections for Senator J. Bennett Johnston of Louisiana and Representative Andrew Ireland of Florida.

The legal consequences of this situation under the Act and the regulations are evident if we examine every passage in the Act and regulations where contribution or expenditure limits for a single election are referred to. Most evidently, of course, it affects the reporting requirements of section 434(a)(2)(A)(i).

That paragraph requires a Treasurer of a political committee such as the COMMITTEE TO RE-ELECT SENATOR KENNEDY to file a pre-election report twelve (12) days before any election, including a convention election. That has not been done here, as has been noted.

The other evident major provision affected is the contribution and expenditure limits as set out under the Act in section 441(a). In this instance, those individuals who have made contributions to the COMMITTEE TO RE-ELECT SENATOR KENNEDY or to EDWARD M. KENNEDY in the amount of One Thousand Dollars ($1,000.00) after May 22, 1982 have contributed to EDWARD M. KENNEDY's general campaign and not to his primary campaign.

Similarly, those multi-candidate political committees that have contributed to EDWARD M. KENNEDY's campaign after May 22, 1982 have made a contribution thereby to his general campaign whether or not such contribution was designated as being for a primary or for the general. Similarly, expenditures made after May 22, 1982 by the respondent committee or by EDWARD M. KENNEDY were made for the general and not for the primary election.

Thus, such expenditures, if made from funds designated for the primary, were made improperly. Therefore, with regard to the Act, Section 44la(d)(3), the National Committee of the Democratic Party and the State Committee of the Democratic Party for Massachusetts, including any subordinate committee of the Massachusetts State Democratic party, must count all donations made to the respondent committee, to EDWARD M. KENNEDY, and to the party itself for purposes of the primary campaign aimed toward the September 14, 1982 event as contributions to the general election of Senator Kennedy which must count against the limit set out by paragraph(A)(i) of section 44la(d)(3).

Further enlightenment on this score is provided by 11 CFR 110.1(j)(1), where it is set out that the limitations on contributions shall apply separately with respect to each election. In subparagraph (2) of that subsection it is said that an election in which a candidate is unopposed is a separate election. And this is in accord with the Advisory Opinions which we have cited above. It further specifies in subparagraph (3) of that subpart that if no primary election is held because a candidate is unopposed, the date on which the primary would have been held shall be deemed to be the date of the primary for purposes of the contribution limitations.

However, neither of these provisions applies to the situation in Massachusetts, where the candidate was opposed and achieved the nomination through a convention election. That situation is governed by Advisory Opinions on Connecticut and Utah as well as the Advisory Opinion 1978-25 to which we have referred.

Further, the phrase, "with respect to any election" is defined in the regulations at 11 CFR 110.1(a)(2). In the case where a contribution is designated in writing for a particular election "with respect to any election" means the election so designated. Here, contributors to the COMMITTEE TO RE-ELECT SENATOR KENNEDY and to EDWARD M. KENNEDY have designated either the primary or the general. It is clear from the reports filed and the failure to file a report prior to the convention election that by that designation of "primary" they meant, and the respondents understood them to mean, the upcoming primary for other candidates for other offices which will take place in Massachusetts on September 14, 1982.

11 CFR 110.1(a)(2)(ii) refers specifically to the situation before us where a contribution is not designated in writing for a particular election. Here, no contributions have been designated

for the convention election held on May 21 and 22, 1982. Therefore, under sub-subparagraph (A) of that section, since the contributions actually went toward a caucus or convention, they must have been made on or before the date of that caucus or convention, i.e., May 22, 1982.

As a practical matter, it would not make much difference in this case if the contributions did come under sub-subparagraph (i) since the net debts outstanding from the caucus or convention were exceeded by the contributions to a considerable degree.

As a result of these provisions of the Act and regulations, it can be seen readily that every other section of the Act and regulations where a specific limitation for an election is referred to is affected. We have listed most of these, although we undoubtedly missed some, in our Violations allegations, which constitute part one of this Complaint.

Many of these provisions are in the definitions section of the Act or the regulations. For example, in the Act, section 431(8)(B), it is specified that the term "contribution" does not include, in paragraph(iv) thereof, any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or political committee of a party to the extent that the cumulative value of such activity on behalf of a single candidate does not exceed One Thousand Dollars ($1,000.00) with respect to any single election.

Therefore, here, if an individual has made such unreimbursed payment for travel expenses between the May 22 date on which the convention election terminated and the September 14 primary, then such expenditure would count toward that limit for purposes of the general election, not for purposes of EDWARD M. KENNEDY's own primary effort.

The same can be said with regard to the limitations set out in the Act, section 431(9)(D)(iii) for costs in support of communication to membership.

Another way in which the Act will have been violated by the actions of the respondents in this instance will be in regard to situations such as that defined in the Act, section 431(D)(viii)(3). There contributions from the State or local committees for campaign materials are excluded from the definition of expenditures provided that they are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates. Here, however, contributions made for purposes of the election effort for the September 14, 1982 election of the party will have a certain portion of their funds designated to be spent for the Senatorial race and those funds will be designated for a particular candidate, since there is only one candidate remaining.

Other provisions have been violated concerning the subsidiary reporting of authorized committees to the candidate's principal campaign committee, in this case the respondent COMMITTEE TO RE-ELECT SENATOR KENNEDY. For example, it does not appear that any of the authorized committees of the respondent EDWARD M. KENNEDY filed pre-election reports for the convention election with the respondent COMMITTEE TO RE-ELECT SENATOR KENNEDY under the Act, section 432(f).

In summary, it can be said that every provision of the Act and regulations which establish a limit or a reporting requirement with regard to a particular election is here at issue. Clearly, a large number of these have been violated or are in the process of being violated.

V. DOCUMENTATION

Exhibit A is "Opinion of the Justices to the Governor" rendered by the Justices of the Supreme Judicial Court of Massachusetts on April 23, 1982, which changed the primary system in Massachusetts.

Exhibit B is a sample page from the reported receipts on the COMMITTEE TO RE-ELECT SENATOR KENNEDY showing contributions designated for the "primary" after May 22, 1982.

Exhibit C is the Charter of the Democratic Party of Massachusetts, Section 3 of Article 6, with the "15% rule" adopted early in 1982.

Exhibit D is a letter from the Democratic State Committee of Massachusetts, Chester Atkins, Chairman, to the Honorable Michael Joseph Connolly, Secretary of State of the Commonwealth, showing the endorsement of EDWARD M. KENNEDY for party candidate for United States Senate as a result of the May 21-22, 1982 convention and showing that no other candidate for that position received a fifteen percent (15%) endorsement from the convention.

Exhibit E is: copies of letters from the Director of Elections of Massachusetts to myself and to Frederick C. Langone, telling us that the Office of Secretary of State cannot place us on the ballot because of our failure to obtain the fifteen percent (15%) vote at the party convention.

Exhibit F is a copy of a press release from the Office of Michael Joseph Connolly, Secretary of State, showing that he feels he is not able to place on the primary those candidates who did not meet the fifteen percent (15%) rule.

Based on personal knowledge and on information and belief as set out in this Complaint, the undersigned suspects that there is reason to believe that violations of the Federal Election Campaign Act have occurred and complainant respectfully requests the Federal Election Commission to initiate appropriate action to determine the accuracy and completeness of respondents' reports of receipts and expenditures.

Alwin E. Hopfman

Alwin E. Hopfman, Complainant

DISTRICT OF COLUMBIA
CITY OF WASHINGTON : ss

Sworn to and subscribed before me this 13th day of September, 1982.

Monica R. Jung

NOTARY PUBLIC

My commission expires

MONICA R. JUNG
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires November 30, 1986

## II. RECITATION OF FACTS

1. EDWARD M. KENNEDY is running for election to the United States Senate from Massachusetts, as a democrat.

2. The COMMITTEE TO RE-ELECT SENATOR KENNEDY has been designated by EDWARD M. KENNEDY his "Principal Campaign Committee" pursuant to federal election laws and regulations on FEC Form 2, Statement of Candidacy, dated February 9, 1981, and received by the Federal Election Commission ("Commision") on February 10, 1981.

3. Until April 23, 1982, when an Advisory Opinion to the contrary was rendered by the Supreme Judicial Court of Massachusetts, access to the primary ballot in Massachusetts could be obtained by any candidate who met the following requirements:

A) The candidate must not have been enrolled in a political party (other than the one whose nomination he was seeking) for a period of one year prior to the filing date.

B) The candidate must have filed a certified petition with the names of 10,000 registered Massachusetts voters, voters who were either registered in the party whose nomination the candidate was seeking or, in the alternative, were not enrolled in any party.

C) The candidate had filed a written acceptance of candidacy.

D) The candidate had filed a certification from the Registrar of the town or city of his residence that he had been an enrolled member of the party in which he had run for at least 90 days.

4. Prior to the Advisory Opinion rendered by the justices of the Supreme Court of Massachusetts in April of 1982, the democratic party of Massachusetts had, from time to time, held conventions several months before a scheduled primary election and given party endorsement to candidates for state-wide office, but no candidate had been denied access to the primary ballot because he or she had not received any specified party "endorsement" as a candidate.

Exhibit "A"

# Opinion of the Justices to the Governor.

Constitutional Law, Freedom of association, Political party, Primary, Opinions of the Justices. Elections, Political party, Primary. Primary. Supreme Judicial Court, Opinions of the Justices.

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the questions set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "[t]he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval House Bill No. 5852, which would amend c. 53, § 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates

for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H. 5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c. 3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

"1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention? Not answered

"2. Would enactment of H. 5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?" yes but in cont.

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important questions of law" and to

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"solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. Answer of the Justices, 362 Mass. 914, 916-917 (1973). As the Justices have advised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 373 Mass. 867, 871 (1977), quoting from Answer of the Justices, 148 Mass. 623, 625-626 (1889).

Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. Opinion of the Justices, Mass. Adv. Sh. (1981) 1361, 1381-1382. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expendiency of proposed legislation. Answer of the Justices, 319 Mass. 731, 734 (1946). Opinion of the Justices,

314 Mass. 767, 771-772 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G. L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1, § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubts about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See Opinion of the Justices, 314 Mass. 767, 772 (1943).

"The [Democratic Party of the Commonwealth] and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). 'And of course this freedom protected against federal

enforcement by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Moreover, '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); see NAACP v. Button, 371 U.S. 415, 431 (1963)." Cousins v. Wigoda, 419 U.S. 477, 487-488 (1975). 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122 n.22 (1981), quoting L. Tribe, American Constitutional Law 791 (1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. Democratic Party of U.S. v. Wisconsin, supra.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G. L. c. 53, § 2. Voting in party primaries is limited to enrolled party members and unenrolled voters who enroll at the polls just before receiving ballots. G. L. c. 53, § 37. Apart from Article Six, section III, of the State Democratic party charter, in order to be placed on a party's primary election ballot, a candidate for statewide office must be an enrolled

member of that party, G. L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or unenrolled. G. L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership.[1]

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the Convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling interest in limiting the number of candidates in order to prevent voter confusion. American Party of Texas v. White, 415 U.S. 767, 780-781 (1974). Storer v. Brown, 415 U.S. 724, 732 (1974). A political party has a parallel interest.

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[1] As of February, 1980, 39.9% of all registered voters in the Commonwealth were unenrolled. Bachrach v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 93, 97.

If House No. 5852 were approved, G. L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 46, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional muster, it must serve a compelling State interest, Sears v. Secretary of the Commonwealth, 369 Mass. 392, 397 (1975), and do so with as little infringement on constitutional rights as possible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. Bachrach v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 93, 101.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support. American Party of Texas v. White, 415 U.S. 767, 782 (1974). This applies to the conduct of primary elections, Kusper v. Pontikes, 414 U.S. 51 (1973), Rosario v. Rockefeller, 410 U.S. 752 (1973), which are an important part of the procedure by which the ultimate office holder is chosen. Sears v. Secretary of the Commonwealth, supra at 398. These interests are served by the requirement that each candiate for statewide office obtain the signatures of at least 10,000 registered

voters on nomination papers, G. L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion. Speculation - no showing

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in Democratic Party of U.S. v. Wisconsin, supra. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." Id. at 122. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in

conjunction with §§ 44, 46, and 37 of G. L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 37, then c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G. L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

Edward F. Hennessey

Herbert P. Wilkins

Paul J. Liacos

Ruth I. Abrams

Joseph Nolan

Neil Lynch

Francis O'Connor

0 2 0 4 0 3 5 0 6 4 5

Line Number 11C

Schedule A
Committee to Reelect Senator Kennedy

Itemized Receipts

| Name<br>Address | Employer<br>Occupation<br>Aggregate YTD | | Date | Amount of Receipt | Receipt For |
|---|---|---|---|---|---|
| Handgun Control P.A.C.<br>810-18th St. N.W. Suite 705<br>Washington, DC 20006 | N/A<br>N/A | | 05/10/82<br>05/26/82 | 1000.00<br>1000.00 | Primary<br>Primary |
| | Primary:<br>General: | 2000.00<br>0.00 | | | |
| Joint Action Committee<br>P.O. Box 105<br>Highland Park, IL 60035 | N/A<br>N/A | | 06/09/82 | 500.00 | Primary |
| | Primary:<br>General: | 500.00<br>0.00 | | | |
| KidsPac Inc.<br>80 Trowbridge Street<br>Cambridge, MA 02138 | N/A<br>N/A | | 06/09/82 | 1000.00 | Primary |
| | Primary:<br>General: | 1000.00<br>0.00 | | | |
| Manufacturers Hanover<br>Assoc. for Responsible Government<br>350 Park Avenue 10th Floore<br>New York, NY 10022 | N/A<br>N/A | | 06/09/82 | 200.00 | Primary |
| | Primary:<br>General: | 200.00<br>0.00 | | | |
| Committee for Dean Mathey<br>142 East 38th Street<br>New York, NY 10016 | N/A<br>N/A | | 06/09/82 | 150.00 | Primary |
| | Primary:<br>General: | 150.00<br>0.00 | | | |

ie Rules of the Convention: providing for all
s by simple majority except for a two-thirds
rity required to suspend the rules; shall be
hmended to the State Committee by the
s Committee thereof and shall be adopted by
jority vote of the State Committee. The rules
pted shall be distributed to the delegates not
two weeks before the convention and
nded from the floor of the convention
majority vote of the delegates

ion I. Issues Convention

ere shall be a State Issues Convention in
numbered years for the purpose of adopting a
Agenda and/or Platform. Resolutions shall
eveloped through a process beginning with
uses of local Democrats, as provided in the
ws, and be adopted by a majority affirmative
of Convention delegates present and voting.

ion III. Endorsing Convention

ere shall be a State Convention in even-
bered years for the purpose of endorsing can-
es for statewide offices in those years in
h such office is to be filled. Endorsements for
wide office of enrolled Democrats nominated
e Convention shall be by majority vote of the
present and voting, with the proviso that
ndidate who receives at least 15 percent of
Convention vote on any ballot for a particular
may challenge the Convention endorsement
State Primary Election.

ion IV. Call of the Convention

e State Committee shall issue the Call for a
Convention at least four months prior to the
of the convention.

n-numbered years the State Convention
ve the Saturday before the date set by the
mmonwealth for the filing of nominating pap-
ith the Secretary of State's office. The Call
Convention shall:

provide for no fewer than 2,500 delegates

ssure all enrolled Democrats full, timely, and
qual opportunity to participate through cau-
sses in towns and cities and include publicity
nd affirmative action guidelines toward that
nd

stimate participation to enrolled Democrats
nor to the date of local caucuses

llocate one delegate to each city and town and
he remainder on the basis of a formula giving
qual weight to Democratic Party registration
nd to the average vote for Democratic candi-
ates in the last general elections for the offices
Governor and President

he delegate selection process shall begin within
ix months prior to the convention.

e State Committee shall be responsible for all
ganizing for a State Convention

ion V. Adherence to Platform by Democratic Officials

e most recent Democratic platform is the
platform of the Democratic Party. Every
State committee member, every Democratic
ator, and every official elected as the Demo-
c nominee shall adhere to the national, state,
ny local platform, in that order of priority, in
ficial statements and actions where to do so
not result in any removal of rights
in the Party, but may be publicly censured

## ARTICLE SEVEN
## Affirmative Action and Outreach

### Section I. Support of Affirmative Action Program.

The Democratic Party of Massachusetts, to encourage full participation by all segments of the population, shall conduct affirmative action and outreach programs in behalf of target groups: Blacks, Hispanics, Asian-Americans, Native Americans and Cape Verdeans; the physically handicapped, youth, the economically disadvantaged, senior citizens, and women. Affirmative action procedures shall be followed in constituting all bodies of the Democratic Party.

### Section II. Goals

The goals of affirmative action and outreach shall be:

a. to institute those at all levels and in all units of the Party which will provide:

   1. target group members with an understanding of the methods and procedures for participating in all elections and programs of the Democratic Party, and

   2. an opportunity to participate in all elections and programs of the Democratic Party

b. to elect target group members to all levels and units of the Democratic Party according to parity of enrolled Democrats in a voting area, through a formula compatible with United States Census data

c. this goal shall not be accomplished either directly or indirectly by the state Democratic Party's imposition of mandatory quotas at any level of the delegate selection process or in any other Party affairs as defined in the By-Laws of the Democratic National Committee and the Democratic State Committee.

### Section III. Affirmative Action and Outreach Sub-Committee

The majority of the Affirmative Action and Outreach Sub-Committee of the State Committee shall oversee the formulation and implementation of uniform affirmative action plans for each state senatorial district, to include plans for ward and town committees therein, for the election of members to all Party committees and for the selection of delegates to conferences and conventions. All Affirmative Action and Outreach plans shall be submitted for approval to the State Committee, which shall remain responsible for all affirmative action efforts. Challenges to the formulation or implementation of these plans shall be referred to the Judicial Council.

### Section IV. Implementation of Affirmative Action and Outreach

With continual outreach and affirmative action as a major priority of the National and Massachusetts Democratic Parties, the goals of affirmative action and outreach shall be achieved by, but not limited to, the following steps:

a. the equal division insofar as possible between men and women at every level of party structure

b. a written affirmative action plan by all levels and units of the Democratic Party, including submittal of population figures relative to the target groups. The Affirmative Action and Outreach Sub-Committee shall help [illegible]

c. the establishment of uniform implementation guidelines, data sources and procedures for setting goals

d. the allocation of financial resources by the State Committee to affirmative action and outreach as a priority program

e. the communication of all Party programs and Party elections shall be frequent, public and explicit. All meetings, caucuses, conferences and conventions shall be held in centrally located, accessible and well publicized sites.

f. the formulation of all Party rules, regulations and processes written in clear, explicit language

g. the establishment by each ward and town committee of an affirmative action and outreach advisor, who shall serve as an officer of the local committee

h. the State Committee shall hire a full-time staff person to assist the Affirmative Action and Outreach Sub-Committee in the discharge of their duties, if funds are available.

### Section V. Non-Compliance with Affirmative Action and Outreach

Delegate and member elections at every level will be monitored by the Affirmative Action Committee. The failure to achieve affirmative action goals will result in an automatic compliance review by the Affirmative Action and Outreach Committee. If a compliance review determines that affirmative action plans were not adequately implemented, then the matter shall be submitted to the Judicial Council which may order that a committee not be recognized or a delegation not be seated unless and until a new and adequate election is held. If a compliance review determines that, although a "good faith" effort was made to formulate and implement affirmative action goals the effort failed, in that case, the Judicial Council is empowered to recommend that the unit in question be designated a priority area for special affirmative action efforts by the State Committee

### Section VI. Challenges

Challenges to the formulation, implementation or achievement of affirmative action goals may be brought before the Affirmative Action and Outreach Committee by any enrolled Democrat from the area in question with right of appeal to the Judicial Council.

## ARTICLE EIGHT
## General Provisions

### Section I. Ethical Practices

The State Committee shall adopt and publish code of ethical conduct for Party officials and code of fair campaign practices for all candidates of the Democratic Party.

### Section II. Openness

All meetings of all Party committees or sub-units thereof, at all levels shall be open to the public, and votes shall be taken by secret ballot. However, secret ballot is permitted in local caucuses.

### Section III. Proxy Voting

Voting by proxy shall not be permitted at State Convention, a committee or sub-unit thereof at any level of the Party, or the State Judicial Council.

## ARTICLE NINE
## Amendments, By-Laws and Rules

### Section I. Majority Rule

EXHIBIT D

DEMOCRATIC STATE COMMITTEE Chet Atkins, Chairman
11 Beacon Street • Suite 317 • Boston • Massachusetts 02108 • (617) 367-4780

May 25, 1982

SECRETARY OF STATE
MAY 25 1 08 PM '82
ELECTION DIVISION

The Honorable Michael Joseph Connolly
Secretary of the Commonwealth
Room 330
State House
Boston, Massachusetts 02133

Dear Secretary Connolly:

Attached to this letter are copies of the Charter of the Democratic Party of the Commonwealth of Massachusetts, as amended through April 11, 1981, and two amendments adopted by the Party in Convention on May 21, 1982. One amendment amends Article Six, Section IV, by changing the date of the Convention, and the other amendment inserts certain sentences following the first sentance of the preamble. I hereby certify that these documents constitute the Charter as currently in effect.

Meeting in Convention in Springfield, Massachusetts, on May 21 and 22, 1982, the Democratic Party of the Commonwealth of Massachusetts endorsed the following candidates for state-wide offices in the 1982 Primary and General elections:

| | |
|---|---|
| United States Senator | Edward M. Kennedy |
| Governor | Michael S. Dukakis |
| Lieutenant Governor | Evelyn F. Murphy |
| Secretary of the Commonwealth | Michael Joseph Connolly |
| Attorney General | Francis X. Bellotti |
| Treasurer and Receiver-General | Robert Q. Crane |
| Auditor | John J. Finnegan |

May 25, 1982

The following nominees received at least 15 percent of the Convention vote on one or more ballots and are therefore eligible to challenge the Convention endorsement in a state Primary election, in accordance with Article Six, Section III, of the Charter:

| | |
|---|---|
| Governor | Edward J. King |
| Lieutenant Governor | John F. Kerry |
| | Louis R. Nickinello |
| | Lois G. Pines |
| | Samuel Rotondi |
| Secretary of the Commonwealth | Rosemarie E. Sansone |

Very truly yours,

Chester G. Atkins

CGA:bdk
Enclosures

# Office of the Massachusetts Secretary of State

Michael Joseph Connolly, Secretary

Marcia Molay, *Director of Elections*
Room 1705
One Ashburton Place
Boston, MA 02108
(617) 727-2828

May 28, 1982

Mr. Alwin E. Hopfmann
29 Tuttle Road
Sterling, Massachusetts 01564

Dear Mr. Hopfmann:

For the reasons given in the enclosed statement, Secretary Connolly has decided to follow the April 23 Supreme Judicial Court Opinion of the Justices, 385 Mass. 1201 (1982). Because the enclosed letter from the Democratic State Committee does not indicate your compliance with the party charter, we are unable to place your name on the Democratic state primary ballot.

We have already issued to you our receipt reflecting this decision. Please contact this office if you have any questions about this decision.

Sincerely,

Marcia Molay

Marcia Molay
Director of Elections

MM/lmg

Enclosure

EXHIBIT E

# Office of the Massachusetts Secretary of State

Michael Joseph Connolly, Secretary

Marcia Molay, *Director of Elections*
Room 1705
One Ashburton Place
Boston, MA 02108
(617) 727-2828

May 26, 1982

Mr. Frederick C. Langone
118 Richmond Street
Boston, MA 02109

Dear Councillor Langone:

For the reasons given in the enclosed statement, Secretary Connolly decided yesterday to follow the April 23 Supreme Judicial Court Opinion of the Justices, 385 Mass. 1201 (1982). Because the enclosed letter from the Democratic State Committee does not indicate your compliance with the party charter, we are unable to place your name on the Democratic state primary ballot.

Enclosed is our receipt reflecting this decision. Please contact this office if you have any questions about this decision.

Sincerely,

Marcia Molay

Marcia Molay
Director of Elections

MM/lc

Enclosure

EXHIBIT F

The Commonwealth of Massachusetts
Department of the State Secretary
State House - Boston 02133
727-2800

CHAEL JOSEPH CONNOLLY
SECRETARY OF STATE


CONNOLLY WILL ABIDE BY SUPREME JUDICIAL COURT OPINION

Tuesday, May 25, 1982
Contact: Ann McCaughey, 727-9126

Secretary of State Michael Joseph Connolly today released the following statement concerning the 1982 statewide Democratic primary ballot:

On April 23, the Supreme Judicial Court issued a unanimous opinion that it would be unconstitutional to apply state law so as to contradict the "15 percent rule" in the state Democratic party charter. After that opinion was released, I instructed my Elections Division to receive nomination papers from statewide Democratic candidates but to advise them that their ballot status was undetermined.

Today, the Democratic State Committee certified to me in the attached letter the names of those candidates who have met the requirements of this party charter provision. In accordance with the Supreme Judicial Court's opinion, I am therefore unable to place on the state primary ballot the names of two candidates who have filed otherwise-valid Democratic nomination papers for Lieutenant Governor with my office - Frederick C. Langone and Joel M. Pressman.

I am aware that litigation may result from my decision to comply with the Supreme Judicial Court's opinion. I will continue to do everything in my power to bring about a prompt and just judicial resolution, so that the state primary ballots can be printed on schedule.

FEDERAL ELECTION COMMISSION

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

THIS IS THE BEGINNING OF MUR # 1468

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