FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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BEFORE THE FEDERAL ELECTION COMMISSION

OF THE UNITED STATES OF AMERICA

In the Matter of:	)	
The National Republican Senatorial Committee	)	
v.	)	MUR 3090
Common Cause, a 501(c)(4) corporation	)	

FEDERAL ELECTION COMMISSION OFFICE OF GENERAL COUNSEL
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I. INTRODUCTION

Common Cause has illegally influenced federal elections by using its status as a tax-exempt corporation to make corporate contributions advocating the defeat of incumbent Republican Senators who disagree with its legislative agenda regarding tax-payer financing of congressional elections.

From its shelter as a 501(c)(4) tax-exempt entity, Common Cause has violated federal election law by failing to report as "expenditures" a series of targeted newspaper advertisements which ran against incumbent Republican Senators who faced election in 1988 and face election in 1990; in support of Democrat Senators who faced election in 1988 and face election in 1990. The content of these communications makes them reportable as "expenditures" because their clear purpose was to influence federal elections.

As a result, the payments for those communications and the sources of Common Cause's funding are subject to the prohibitions and limitations of the Federal Election Campaign Act ("the Act"). Federal Election Commission ("FEC") Advisory Opinion 1985-14, Fed. Elec. Camp. Fin. Guide (CCH) 5819 (1985); See 2 U.S.C. 434, 441b, 441c, 441e and 441f. By failing to report these partisan advertisements as "expenditures", Common Cause has kept from public view the sources of the funds used to pay for the advertisements.

By preparing and paying for these partisan communications, Common Cause has unilaterally determined that it does not have to follow the same statutory requirements as other groups or individuals who spend money in an attempt to influence federal elections. By treating the ads as non-disclosed "soft money" expenditures (an interesting commentary in and of itself, given Common Cause's public position on "soft money" disclosure), the fact is that Common Cause has found a way to evade the prohibitions of federal election law so as to illegally inject corporate money into the political process. Its public media ads and direct mail did, over a period of weeks (in June, 1987, in January, 1988 and in July, 1990) and at considerable cost, amount to a highly focused and specific criticism of incumbent Republican Senators who are seeking reelection. This newspaper advertising campaign was designed specifically to influence voters to cast their ballots against identified incumbent Republican Senators who were seeking reelection in 1988 and in 1990 or for their Democrat challengers. Since these advertisements were specifically intended by Common Cause to affect adversely the election of specific Republican candidates, these "expenditures" were either subject to the Act's provisions governing "independent expenditures", 2 U.S.C. 434(b), (c), or were attributable to a specific Democrat candidate and subject to the Act's limitations on "contributions", 2 U.S.C. 431(8)(A).

By preparing and paying for these advertisements, Common Cause has violated specific provisions of the Federal Election Campaign Act. Common Cause refused to do what the law plainly requires -- account to the public for the money it spends influencing federal elections. The reason for this decision is obvious. Common Cause is a 501(c)(4) tax-exempt corporation. By refusing to acknowledge that its activities constitute "expenditures" and "contributions" under the Act, Common Cause was able in 1987, 1988 and 1990 to funnel corporate money into federal elections. By not registering and reporting to the Federal Election Commission, Common Cause was able to hide from public scrutiny the sources of its funding and extent of its own involvement in the 1988 and 1990 federal elections.

This effort to evade federal election law demands the attention of the Federal Election Commission. Accordingly, the National Republican Senatorial Committee, 425 Second Street, N.E., Washington, D.C. 20002, files this Complaint against Common Cause, 2030 M Street, N.W., Washington, D.C. 20036 alleging the following specific violations of federal election law:

1. Failing to report its communications as "expenditures" under the Act, 2 U.S.C. 431(9)(A), 434; 11 C.F.R. 106.1(a);

2. Refusing to report its activities as either an "independent expenditure" made to influence a federal election, 2 U.S.C. 431(17), 434(b)(6), (c), or as a "contribution" to a Democrat candidate subject to the Act's limits, 2 U.S.C. 431(8)(A), 441(a);

3. Using illegal corporate money to influence federal elections, 2 U.S.C. 441b;

4. Refusing to publicly disclose the sources of the funds used by it, a 501(c)(4) tax-exempt entity, <u>see</u> 2 U.S.C. 441b, 441c, 441e and 441f, through intentional and willful failure to register and report as a "political committee", 2 U.S.C. 431(4), 432, 433 and 434, with the result that the public cannot ascertain whether Common Cause's sources of funds are corporations, labor unions, individuals giving above the limits allowed by the election laws or other forms of so-called "soft money";

5. Refusing to disclose to the public as required by the Act specific information on whether these advertisements were authorized by a Democrat Senatorial candidate or officials of the Democratic Senatorial Campaign Committee or were made without the authorization of any candidate or committee. 2 U.S.C. 441d.

II. FACTS

Common Cause, a special interest group claiming 280,000 members nationwide, is an incorporated entity enjoying the status of a 501(c)(4) tax-exempt organization under the Internal Revenue Code. For several years, it has placed legislation to change federal campaign finance laws at the top of its legislative agenda. During the 100th Congress and again in the 101st Congress, the Democrat leadership of the Senate and nearly all of the Senate's Democrat members actively supported S.2 and then S.137, the Democrats' consensus legislation which would have implemented taxpayer financing of elections and spending limits in congressional races. At the same time, Common Cause, through its Executive Director, Mr. Fred Wertheimer, actively participated in the drafting and public promotion of S.2 and S.137. On the other hand, Republican Senators viewed these bills as little more than a political ploy by the Democrats to further institutionalize their control of the Senate. Not surprisingly, given the inherently partisan nature of this proposal, during the 100th Congress, S.2 faced determined opposition, with Common Cause and the Democrats unable to envoke cloture despite a record eight attempts. If cloture had been envoked on S.2, a restrictive gemaneness test would have come into fruition with the result that all Republican amendments would have been ruled non-germane and, thus, non-debatable.

Common Cause's role as a surrogate for the Democrat Party in this debate yielded the communications that are the subject of this Complaint. In early 1987, in early 1988 and in July, 1990, Common Cause prepared and placed a series of full-page newspaper ads concerning the debate on S.2 and then the debate on S.137. These ads, which ran in both national and local newspapers, were specifically focused either against incumbent Republican Senators who faced reelection (specifically Senators Hatfield [1990], Pressler [1990], Durenberger [1988], Weicker [1988]) and Roth [1988], criticizing their opposition to Common Cause's (and the Democrat Party's) legislation, Exhibits A-F, or in support of a specific Democrat Senator who was seeking reelection in the state where the ad ran (specifically Senator Mitchell [1988], Senator DeConcini [1988] and Senator Kennedy [1988]). Exhibits G-I. That their aim was obvious is clear from a reading of the text. Since the Republican Senators who were the subject of the ads had not waivered in their opposition to the bills, S.2 and S.137, Common Cause wanted them defeated in the 1988 elections and the upcoming 1990 elections so that the resultant makeup of the Senate would have fewer Republicans who opposed S.2 and S.137 and more Democrats who, presumably, would support Common Cause and S.137 (or similar legislation) during the 102nd Congress.

In addition, in 1988 Common Cause also took out national newspaper advertisements against the Presidential candidacy of Senator Robert J. Dole, the Senate Republican Leader, during the height of the national Presidential primary season. In bringing this complaint, we acknowledge that the Commission has previously dismissed a complaint (MUR 2580) which alleged that Common Cause had violated the Act when it paid for an advertisement which ran in the Washington Post (January, [illegible]) criticizing Senator Dole's

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opposition to S.2. We believe that the facts represented in the "Dole/Washington Post" ad and the facts represented in the 1988 and 1990 advertisements which are the subject of this complaint are materially different and, thus, distinguishable. In that regard, we would point out that the "Dole/Washington Post" ad ran in a newspaper of national circulation at a time when Senator Dole was an active candidate for the Republican nomination for President, a national office, and at a time in which he was accepting public financing for his campaign for the presidential nomination while actively opposing public financing for congressional elections (S.2). On the other hand, the Common Cause advertisements which are the subject of this complaint were prepared and placed in local newspapers in the states of selected and identified incumbents Republican Senators, three of whom were seeking reelection to the Senate (Senators Roth, Durenberger, and Weicker) in 1988 and two of whom are seeking reelection in 1990 (Senators Hatfield and Pressler). It is also clear from the text of these advertisements that Common Cause intended to place public pressure on these incumbent Republican Senators to change their positions on S.2 and S.137, respectively. This public pressure, in the form of full-page ads in state-wide newspapers, was clearly intended by Common Cause to (1) generate a negative image in the mind of the reader/voter and (2) to equate the Senator's opposition to tax-payer financed congressional elections as being akin to support of political corruption within Congress. Common Cause clearly intended that these two themes would become the focus of each Senator's on-going campaign for reelection in 1988 or 1990. Were that to occur, Common Cause further believed that the incumbent Republican Senator would be defeated in November, 1988 and in November, 1990 and therefore would be replaced with a Democrat more favorable to the Common Cause political agenda.

To this end, Respondent Common Cause expended substantial sums in an attempt to weaken the electoral strength of certain Republican Senators facing election in 1988 and 1990. The ads at issue here were a conscious attempt to affect the 1988 and 1990 Senatorial elections so that the special interest legislation pushed by Common Cause (S.2 and S.137) and benefiting the Democrat Party could pass. The Commission must investigate the facts and circumstances behind this negative advertising campaign to determine the extent of Common Cause's coordination of its advertising effort with the leaders of the Democrat Party and its Senatorial Campaign Committee.

Attached are samples of these ads attacking Republican Senators facing reelection in 1988 and 1990. See Exhibits A-F. A clear reading of the text of the ads will demonstrate that they are reportable "expenditures" whose purpose was to influence federal elections. Each of the attached ads identifies a specific Senator who was running for election in 1988 and in 1990. Each criticizes the Senator for lacking the integrity to be a Senator because his views were opposed to those of Common Cause. All the ads are from newspapers either published or widely circulated in the state in which the incumbent Republican Senator was running in 1988 and 1990. The ads make repeated references to "congressional campaigns" and "candidates" and suggest that those who do not vote Common Cause's way are somehow "fundamentally corrupt" in the campaigns they run for reelection. Common Cause clearly made these "expenditures" in the hope that the voters in that state would be swayed and come to believe that the incumbent Republican Senator supported public corruption and had to be replaced.

The ads which supported the Democrat Senators who faced reelection in 1988 contain common text and demonstrate why they fall within the ambit of the Act as well. Exhibits G-I. These ads, which supported Senators Mitchell, DeConcini, and Kennedy (all of whom were candidates for reelection to the Senate in 1988), specifically mention the Democrat Senator by name and praise him for voting with Common Cause on S.2. These ads ran in newspapers published in the states in which the Democrat Senators were facing reelection in 1988 and compared their positions on S.2 favorably and in contrast with what the voter might get if the Democrat Senator's opponent were to represent that voter. These ads made repeated references to "congressional campaigns" and "candidates" and suggested that voting the way of the two Democrat Senators was the only option to the goal of "restoring honesty and integrity in government." Common Cause's obvious aim was to publicly influence the perception of the voters in the Democrat Senators' states that these Senators were worthy of support. If the aim of Common Cause had been to tell these Senators that they were "doing a good job", it could have written them a letter. But a private letter of support was not Common Cause's aim or intent. Clearly it intended to positively and in the most public way possible affect the reflection prospects of Senators Mitchell, DeConcini, and Kennedy and adversely affect the reelection prospects of the named Republican Senators.

III. <u>LEGAL ANALYSIS</u>

A. <u>Common Cause's Ads Were Designed to Influence a Federal Election</u>.

The Commission has developed a three-pronged test for determining whether a particular communication is subject to the reporting requirements and limitations of the Act. In its rulings, the Commission has consistently taken the position that "expenditures" are subject to the Act where they are made for (1) the purpose of influencing a general election, (2) depict a clearly identified candidate, and (3) convey an electioneering message. The ads which are the subject of this complaint fall squarely within that articulated test. Common Cause, perhaps because it feels it enjoys an exemption from the application of the Act as a 501(c)(4) corporation, has chosen to ignore this legal test. Irrespective of its tax status, Common Cause's actions are clearly designed to influence federal elections under the FEC's test. These ads were paid for by a corporation. That is against the law. The FEC must enforce the Act. Common Cause must abide by the same statutory requirements as other groups which attempt to influence federal elections. Common Cause must not be allowed to use its tax exempt status as a veil to mask its electioneering activities.

The Commission has previously addressed an analogous factual situation to that which is complained of herein. In AO 1985-14, the Commission concluded that "expenditures" by the Democratic Congressional Campaign Committee ("DCCC") were reportable "expenditures" and allocable to each candidate who benefited from the communication under 11 C.F.R. 106.1. The communication at issue in AO 1985-14 identified by name a specific Congressman and was to be distributed to part or all of the district represented by the identified officeholder. The Commission determined that the communication, either with or without a partisan "Vote Democratic" statement, would be subject to the Act's limitations. In reviewing that particular communication's language, the Commission looked to the requirements set out in AO 1984-15, Fed. Elec. Camp. Fin. Guide (CCH) para. 5766 (1984). In AO 1984-15, the Commission concluded that the Act would apply where a communication both depicted a "clearly identified candidate" and "conveyed an electioneering message." Electioneering messages, according to AO 1985-14 which cited United States v. United Auto Workers, 352 U.S. 567, 587 (1957), include statements "designed to urge the public to elect a certain candidate or party."

It is important to note that there is no requirement in either AO 1984-15 or AO 1985-14 that the advertisement or communication, to be attributable, must contain "express advocacy", a term of art under the Act, 11 C.F.R. 109.1(b)(2). In AO 1984-15, the Commission recognized that an advertisement was attributable where it "effectively" advocated the defeat of a candidate. In AO 1985-14, the FEC, interpreting AO 1984-15, set forth the requirement that an allocable communication include an "electioneering message." On the facts of that particular case, the FEC identified a clear "electioneering message" in direct mailings which clearly identified a Member of Congress and which were distributed within the Member's district.

The Commission reached its conclusions in AO 1985-14 even though the question posed indicated that there might not yet be a Democrat candidate, either announced or qualified under the Act, in the congressional district which received the communication at issue. The test propounded by the Commission centered on whether the expenditures were made "for the purpose of influencing the outcome of the general election." As the FEC made clear in this ruling, "expenditures" made with a genuine general election purpose count regardless of whether a nominee has been selected or even clearly identified. The FEC stated: "(W)hether a specific nominee has been chosen, or a candidate assured of nomination, at the time the expenditure is made is immaterial." Thus, in preparing and placing the advertisements which are at issue in this complaint, Common Cause was making attributable "contribution" or "expenditure" under the Act, whether there was at the time the ads appeared a Democrat candidate opposing the Republican Senator criticized or a Republican candidate opposing the Democrat Senator praised.

The communication which was the subject of AO 1985-14 included references to "rhetoric" by a named political party. The Common Cause advertisements at issue here did not make reference to any political party by name. This difference is not significant. AO 1985-14 does not state what element of the proposed mailer constituted "an electioneering message." It is reasonable to believe that the mailing as a whole conveyed "an electioneering message." Similarly, in this instance, the Common Cause communications when taken as a whole convey "an electioneering message" constituting an "expenditure" under the Act by Common Cause.

The communication in AO 1985-14 included references to an election by its inclusion of a list of campaign contributions from the oil industry to the named representative. The 1988 Common Cause communications complained of herein refer to "the way our congressional campaigns are financed" and that "too much money is given to candidates by special interest PACs. Too much money is spent by candidates." The Common Cause ads also state: "Obstructionist tactics to preserve a 'fundamentally corrupt' campaign finance system have no place in our democratic process." It adds: "The Senate's integrity is at stake. What will Senator _______do?" These are references to the 1988 election in which, asserted Common Cause, one way to restore the Senate's integrity would be to vote the named Republican Senator facing reelection out of office or leave the praised Democrat in office.

The 1990 Common Cause communications complained of herein refer to the "corrupt political system" present on Capitol Hill and to "the political influence-money game in Congress." It adds: "Senator _________: in 1988 your vote helped kill legislation to clear up the Senate's corrupt political system. Don't vote to kill campaign finance reform again now."

The Common Cause ads at issue are similar to the proposed communications in AO 1985-14 in many other respects. The Common Cause advertisement identifies by name a specific Republican or Democrat Senator, just as the DCCC proposed to name a specific Republican Congressman in its Advisory Opinion request. Both communications criticized the records of the Republican officeholder (or praised the Democrats). The Common Cause communication criticized the Republican Senator for forsaking the integrity of the Senate if he did not vote Common Cause's way or praised the Democrat Senator for voting the Common Cause way. The DCCC mailer criticized a named representative for his views on the coastal environment and the oil industry. The Common Cause ads ran in newspapers in the Senators' home states or in newspapers that circulated there, just as the Commission assumed the DCCC would disseminate its mailer to part or all of the district represented by the identified Congressman.

Indeed, the similarity of the Common Cause communications to those in the Commission's previous rulings is striking. The ads involve an attack on (or testimony to) the record and positions of a clearly identified candidate of the opposition party for a single office, in this case, the United States Senate. The clear purpose and effect of the ads concerning the Senators is to influence the general election, since voters will have an opportunity to decide between the Democrat and Republican nominees until the general election. The Commission's rulings are unequivocal: a communication such as that directed by Common Cause against the incumbent Republican Senators or in support of the incumbent Democrat Senators falls within the purview of the Act when it (1) identifies by name the candidate under attack, (2) argues either for or against his or her performance in office or position on issues and (3) is distributed to the voting constituency. Therefore, on these facts, the Office of the General Counsel and the Commission must find that Common Cause knowingly violated the Federal Election Campaign Act.

B. Violations

1. Failure to Report Ads as Expenditures Under the Act

Common Cause violated the Act by failing to report the costs of the advertisements which are the subject of this complaint as "expenditures." The ads identify and criticize specific incumbent Republican Senators or support specific incumbent Democrat Senators who were candidates for reelection to the Senate in 1988 and 1990. In these Senate elections, the communications were distributed throughout the Senators' home states using the medium of state-wide newspaper advertisements. Since, by definition, the Senate races involved state-wide elections, this distribution scheme was knowingly directed toward the very electorate that would subsequently be asked to chose between the Republican and the Democrat in the November, 1988 and November, 1990 general elections.

The ads were paid for by Common Cause, a corporation, for the express purpose of criticizing Republican (and praising Democrat) Senators in the midst of their reelection cycle and accusing Republican Senators of supporting systematic corruption in government, a clearly campaign-related issue during the 1988 and 1990 primary and general election period. Choosing as their forum for criticism (or praise) newspapers of state-wide circulation in the Senators' home states (rather than a letter to the Senator at his Washington, D.C. office), Common Cause knowingly sought to influence the 1988 and 1990 elections for the United States Senate. 2 U.S.C. 431(9)(A). Common Cause violated the Act by failing to report its "expenditures", 2 U.S.C. 434, and by failing to allocate the "expenditures" to the Democrat candidates who directly benefited from the anti-corruption, anti-Republican-incumbent message of these advertisements. 11 C.F.R. 106.1(a).

2. Failing to Report Ads as Independent Expenditures or Contributions

Since the ads had a clear and measurable value to any candidate challenging one of the named Republican incumbent Senators and were knowingly prepared and place so as to influence a federal election, they constitute either an "independent expenditure" by Common Cause or "contributions" by Common Cause to the Democrat candidate opposing the Republican incumbent Senator criticized or the Democrat incumbent Senator who was named and complemented. In either case, Common Cause has violated the Act and has failed to either register or report its activity. Since Common Cause is an incorporated entity, the "expenditure" itself is illegal on its face. 2 U.S.C. 441b.

An "independent expenditure" is defined as an expenditure by a person or political committee "expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17). The law requires that such "independent expenditures" be fully reported. 2 U.S.C. 434(c). Common Cause failed to report its "independent expenditures" in 1988 and 1990, again preferring to willfully and knowingly disregard the Act. The FEC must investigate whether Common Cause consulted with any leaders or agents of the Democratic Party in the Senate or its campaign organizations in deciding against which Republican Senators to place these ads or which Democrats to praise.

Clearly, the value of these ads were a "contribution" to a federal candidate by Common Cause, 2 U.S.C. 431(8)(A), and thus was subject to the "contribution" limits of the Act. Common Cause has not qualified with the FEC as a multi-candidate committee. 2 U.S.C. 441a(a)(4). That means that Common Cause, if it were a legal source, would be limited to contributing $1,000 for the primary election and $1,000 for the general election. 2 U.S.C. 441a(a). The FEC must investigate whether this limit was exceeded by the "expenditures" made by Common Cause in preparing and placing these newspaper ads.

3. Illegal Corporate Expenditures and Contributions

A basic tenet of federal election law is that "contributions" or "expenditures" by corporations are prohibited:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office.

2 U.S.C. 441b(a). This prohibition applies whether the "contribution" is in the form of money, goods or services. Neither candidates nor political committees can accept such "contributions", nor may officers and directors of corporations provide consent for such "contributions" or "expenditures" to be made on the incorporated entity's behalf. 11 C.F.R. 114.2(a)(2)(c),(d).

Common Cause is an incorporated entity and operates as a 501(c)(4) organization. On the facts complained of, Common Cause made "expenditures" under the Act. This violated the law. Either Common Cause's "independent expenditures" were made with prohibited funds or the Democrat candidates opposing the Republican targets of the Common Cause's ads received illegal corporate contributions. The FEC must determine which of these alternatives is accurate and take the appropriate remedial action.

4. Failure to Register and Report

Relying on its tax-exempt status, Common Cause refuses to allow public scrutiny of the sources of the funding it uses to prepare and place advertisements which it intends will influence the federal elections in which the advertisements appear. In choosing to operate behind the veil of its tax-exempt status, Common Cause violates the central theory behind federal election law, i.e., that the public must be able to scrutinize all sources of funding in a federal election. It is only through public disclosure of "contributions" and "expenditures" that honest and above-board federal election campaigns will be conducted. By refusing to register as a "political committee" making "expenditures" under the Act, Common Cause willfully violates this disclosure requirement. 2 U.S.C. 431(4), 432, 433, 434.

It is an inarguable fact that Common Cause is publicly active in criticizing others who it feels are not adhering to federal law. It is just as true that the American people have the right, provided by Congress in the Federal Election Campaign Act, to know that Common Cause has in the past and continues to play a partisan role in conjunction and in concert with the Democratic Party. Under the Act, the public must be able to scrutinize who Common Cause is backing with its advertising campaign and who is funding Common Cause in this partisan effort.

5. Violation of Sponsorship Identification Rule

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

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

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

2 U.S.C. 441d.

The ads at issue were designed and intended to influence a federal election. Indeed, that such an influence was to be exerted by these advertisements is evidenced by the fact that Common Cause affixed its own disclaimer ("Paid for by Common Cause") to the ads. But this self-initiated "disclaimer" failed to reveal if any Democrat candidate authorized the expenditures or was contacted by Common Cause in the planning stage leading up to the placement of these advertisements. The "disclaimer" also fails to reveal if Common Cause consulted with officials of the Democratic Senatorial Campaign Committee who are the agents of all Democratic Senatorial candidates. By failing to reveal if any political committees authorized or were consulted in the preparation of these ads, in violation of 2 U.S.C. 441d and 11 C.F.R. 110.11(a), Common Cause continues to hide behind its tax-exempt status, denying to the public its lawful right to be informed about the sources of "contributions" and "expenditures" in federal elections.

IV. <u>CONCLUSION</u>

The FEC must hold Common Cause to the same standards and statutory requirements as all others who attempt to influence federal elections. The facts presented in this complaint warrant an investigation by the Commission. An investigation will reveal that the amounts spent by Common Cause to prepare and place these advertisements should have been precluded as either illegal corporate "independent expenditures" by Common Cause or illegal corporate "contributions" to the benefiting Democrat candidates. In either case, such sources of illegal "expenditures" must be halted by Common Cause in order that such a politically motivated, express advocacy advertising campaign will not be continued during the remainder of the 1990 election cycle.

Since the law is clear, service on Common Cause of this complaint will operate as notice that spending of this type is accountable under the Act. From that day forward, any spending by Common Cause to further influence federal elections in 1990 will be viewed by Complainant as a knowing and wilful violation of the Act requiring FEC referral to the Justice Department or the imposition by the agency of remedial action as set forth in 2 U.S.C. 437g(d)(1).

Respectfully submitted,

William B. [signature]

LEGAL COUNSEL

Sworn to and subscribed before me this 27 day of July 1990.

Lea C. [signature]

Notary Public

My Commission Expires: July 14, 1992

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EXHIBIT A

[redacted] regonian Portland, OR [redacted] 7-3-90 issue

Mike Sen

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S&L INTERESTS GAVE MEMBERS OF CONGRESS MILLIONS. TAXPAYERS WERE RIPPED OFF FOR BILLIONS... AND CONGRESS HAS DONE NOTHING.

NOTHING TO CHANGE THE CORRUPT POLITICAL SYSTEM THAT LET IT HAPPEN.

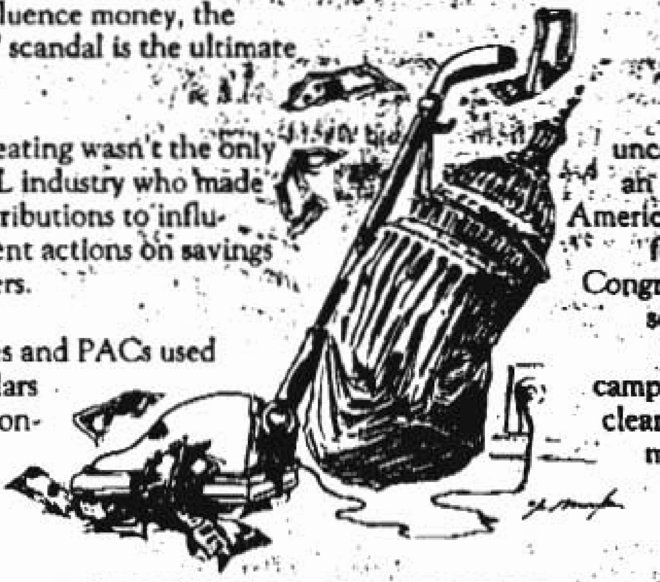
When it comes to the S&L crisis and high-flying influence money, the "Keating Five" scandal is the ultimate smoking gun.

But Charles Keating wasn't the only one in the S&L industry who made campaign contributions to influence government actions on savings and loan matters.

S&L executives and PACs used millions of dollars in campaign contributions to play the political influence-money game in Congress throughout the 1980s—*and it's still being played.*

Members of Congress handed every taxpayer a $2,500 bill to clean up the $300 billion S&L scandal.

It would be unconscionable—an insult to every American taxpayer—for Members of Congress to end this session without enacting real campaign reform to clean up their own money scandal.



Note →

SENATOR HATFIELD:

In 1988 your vote helped kill legislation to clean up the Senate's corrupt political system. Don't vote to kill campaign finance reform again now.

This message is brought to you by the 280,000 members of Common Cause, 2030 M Street, NW, Washington, D.C. 20036 (202) 833-1200.

EXHIBIT B

Argus 9-3-90 8A

S&L INTERESTS GAVE MEMBERS OF CONGRESS MILLIONS. TAXPAYERS WERE RIPPED OFF FOR BILLIONS... AND CONGRESS HAS DONE NOTHING.

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SYSTEM THAT LET IT HAPPEN."

When it comes to the S&L crisis and high-flying influence money, the "Keating Five" scandal is the ultimate smoking gun.

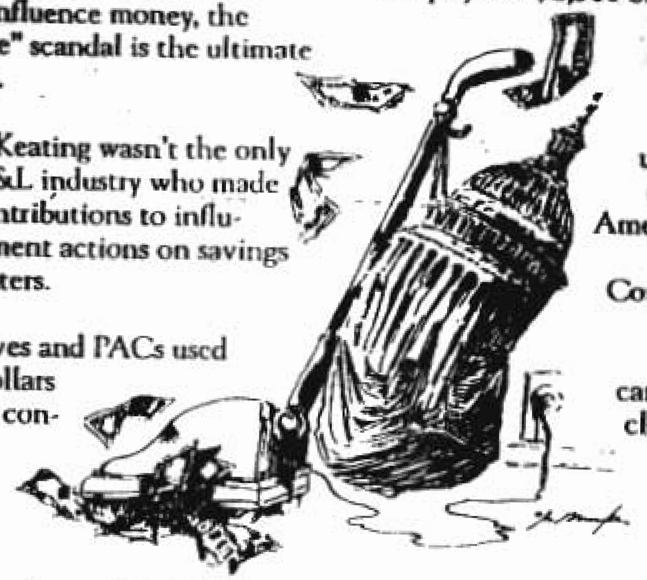
But Charles Keating wasn't the only one in the S&L industry who made campaign contributions to influence government actions on savings and loan matters.

S&L executives and PACs used millions of dollars in campaign contributions to

and it's still being played.

Members of Congress handed every taxpayer a $2,500 bill to clean up the $300 billion S&L scandal.

It would be unconscionable—an insult to every American taxpayer—for Members of Congress to end this session without enacting real campaign reform to clean up their own money scandal.



SENATOR PRESSLER:

In 1988 your vote helped kill legislation to clean up the Senate's corrupt political system. Don't vote to kill campaign finance reform again now.

EXHIBIT 6C

Senator Roth,

"Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system."

—ARCHIBALD COX
CHAIRMAN, COMMON CAUSE

Hon. William Roth, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Roth,

The way our congressional campaigns are financed is a national scandal. As *The Washington Post* has written, our congressional campaign financing system is "fundamentally corrupt. Every citizen knows that. So does every legislator."

Yet, last year you voted *seven times* to block the Senate from cleaning up the way its campaigns are financed. You joined a minority of the Senate in a filibuster that prevented S.2, comprehensive reform legislation, from even coming to a vote.

S.2 would clean up congressional campaigns by establishing limits on campaign spending and on the use of personal wealth in Senate campaigns. And S.2 would put a cap on the overall amount of special interest PAC money a congressional candidate may accept.

Fifty-five Senators, including Senator Joseph Biden, are on record in favor of acting on this bill. Some 270 newspapers across the country have editorialized in favor of S.2. And more than 70 diverse national organizations representing millions of citizens have joined in support of this legislation which is essential to restoring honesty and integrity in government.

Senator Roth, most scandals involve broken laws. In this case, the laws are the scandal—and they must be changed.

S.2 is once again before the Senate and, shortly, you will have another opportunity to act on this urgently needed reform measure.

Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system. Let the Senate act on S.2.

Sincerely,

Archibald Cox

Archibald Cox
Chairman, Common Cause

Stop blocking campaign finance reform.

This message is brought to you by the [illegible] members of Common Cause across the nation and in Delaware who [illegible] passage of S.2 [illegible] integrity legislation.

[illegible] WASHINGTON, D.C. [illegible]

EXHIBIT 5D

JUN 7 1987

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SENATOR ROTH IS ABOUT TO VOTE ON WHETHER TO END A NATIONAL SCANDAL

Senator William Roth will shortly vote on legislation to end the national scandal caused by the way our congressional campaigns are financed.

Money is at the core of the scandal.

Too much money is given to candidates by special interest PACs. Too much money is spent by candidates.

Too much time and energy is used to raise political money. Too much influence is exercised through political money.

The result?

The 100th Congress has come into office more indebted to special interest political money than any other Congress in the nation's history.

As *The Washington Post* wrote, the congressional campaign financing system "is fundamentally corrupt. Every citizen knows that. So does every legislator."

A bill to clean up the campaign finance system has broad support.

S. 2, the Senatorial Election Campaign Act, would fundamentally clean up the financing of Senate campaigns.

The bill is already publicly supported by 49 Senators, including Senator Joseph Biden, and by 65 diverse national

organizations, including the American Association of Retired Persons, the International Association of Chiefs of Police, and the National Farmers Organization.

More than 175 newspapers from cities and towns across the country have editorialized against the current campaign finance system and called for passage of S. 2.

S. 2 would create a campaign financing system for senatorial elections similar to the one that has worked to clean up presidential elections. S. 2 would reduce the influence of special interest PACs and put limits on skyrocketing campaign spending.

Former Arizona Senator Barry Goldwater, a supporter of S. 2, has said: "Unlimited campaign spending eats at the heart of the democratic process... Our nation is facing a crisis of liberty if we do not control campaign expenditures."

Opponents plan [illegible] to try to block [illegible]

Because S. 2 has [illegible] broad support, a [illegible] Senators are [illegible] block the Senate [illegible] this historic [illegible] conducting a filibuster [illegible] debate designed to keep the Senate from acting. To break a filibuster, not just a majority [illegible] the votes of 60 Senators are needed.

Obstructionist tactics to preserve a "fundamentally corrupt" campaign finance system have no place in our democratic process. It is essential that Senators reject the filibuster and face up to their responsibility to act on this vitally important legislation.

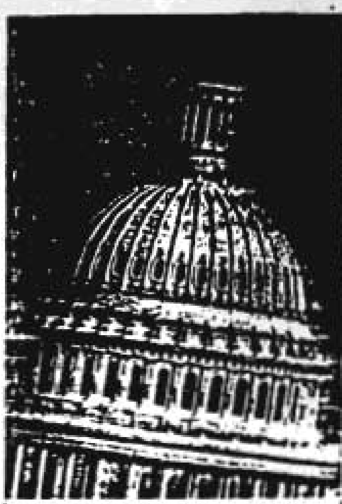
Will Senator Roth block the Senate from acting on reform? Will Senator Roth support S. 2?

THE SENATE'S INTEGRITY IS AT STAKE. WHAT WILL SENATOR ROTH DO?

This message is brought to you by the [illegible] members of Common Cause [illegible] [illegible] who are urging [illegible] of this critical integrity [illegible]

EXHIBIT E

SENATOR DURENBERGER IS ABOUT TO VOTE ON WHETHER TO END A NATIONAL SCANDAL



Senator David Durenberger will shortly vote on legislation to end the national scandal caused by the way our congressional campaigns are financed.

Money is at the core of the scandal.

Too much money is given to candidates by special interest PACs. Too much money is spent by candidates.

Too much time and energy is used to raise political money. Too much influence is exercised through political money.

The result?

The 100th Congress has come into office more indebted to special interest political money than any other Congress in the nation's history.

As *The Washington Post* wrote, the congressional campaign financing system "is fundamentally corrupt. Every citizen knows that. So does every legislator."

A bill to clean up the campaign finance system has broad support.

S. 2, the Senatorial Election Campaign Act, would fundamentally clean up the financing of Senate campaigns.

The bill is already publicly supported by 49 Senators and by 65 diverse national organizations, including the American Association of Retired Persons, the International Association of Chiefs of Police, and the National Farmers Organization.

More than 175 newspapers from cities and towns across the country have editorialized against the current campaign finance system and called for passage of S. 2.

S. 2 would create a campaign financing system for senatorial elections similar to the one that has worked to clean up presidential elections. S. 2 would reduce the influence of special interest PACs and put limits on skyrocketing campaign spending.

Former Arizona Senator Barry Goldwater, a supporter of S. 2, has said: "Unlimited campaign spending eats at the heart of the democratic process... Our nation is facing a crisis of liberty if we do not control campaign expenditures."

Opponents plan filibuster to try to block reform.

Because S. 2 has gained such broad support, a minority of Senators are planning to try to block the Senate from voting on this historic legislation by conducting a filibuster—endless debate designed to keep the Senate from acting. To break a filibuster, not just a majority but the votes of 60 Senators are needed.

Obstructionist tactics to preserve a "fundamentally corrupt" campaign finance system have no place in our democratic process. It is essential that Senators reject the filibuster and face up to their responsibility to act on this vitally important legislation.

Will Senator Durenberger block the Senate from acting on reform? Will Senator Durenberger support S. 2?

THE SENATE'S INTEGRITY IS AT STAKE. WHAT WILL SENATOR DURENBERGER DO?

This message is brought to you by the 280,000 members of Common Cause in Minnesota and across the nation who are urging passage of this essential integrity legislation.

9 1 0 4 0 6 4 0 7 8 6

EXHIBIT 9F

NEW ENGLAND SENATORS ARE ABOUT TO VOTE ON WHETHER TO END A NATIONAL SCANDAL

New England Senators will shortly vote on legislation to end the national scandal caused by the way our congressional campaigns are financed.

Money is at the core of the scandal.

Too much money is given to candidates by special interest PACs. Too much money is spent by candidates.

Too much time and energy is used to raise political money. Too much influence is exercised through political money.

The result?

The 100th Congress has come into office more indebted to special interest political money than any other Congress in the nation's history.

As *The Washington Post* wrote, the congressional campaign financing system "is fundamentally corrupt. Every citizen knows that. So does every legislator."

A bill to clean up the campaign finance system has broad support.

S. 2, the Senatorial Election Campaign Act, would fundamentally clean up the financing of Senate campaigns.

The bill is already publicly supported by 49 Senators, including New England Senators John Chafee (RI), Christopher Dodd

(CT), Edward Kennedy (MA), John Kerry (MA), Patrick Leahy (VT), George Mitchell (ME), Claiborne Pell (RI), and Robert Stafford (VT). It is also supported by 65 diverse national organizations, including the American Association of Retired Persons, the International Association of Chiefs of Police, and the National Farmers Organization.

More than 175 newspapers from cities and towns across the country have editorialized against the current campaign finance system and called for passage of S. 2.

S. 2 would create a campaign financing system for senatorial elections similar to the one that has worked to clean up presidential elections. S. 2 would reduce the influence of special interest PACs and put limits on skyrocketing campaign spending.

Former Arizona Senator Barry Goldwater, a supporter of S. 2, has said: "Unlimited campaign spending eats at the heart of the democratic process... Our nation is facing a crisis of liberty if we do not control campaign expenditures."

Opponents plan filibuster to try to block reform.

Because S. 2 has gained such broad support, a minority of Senators are planning to try to block the Senate from voting on this historic legislation by conducting a filibuster—endless debate designed to keep the Senate from acting. To break a filibuster, not just a majority but the votes of 60 Senators are needed.

Obstructionist tactics to preserve a "fundamentally corrupt" campaign finance system have no place in our democratic process. It is essential that Senators face up to their responsibility to act on this vitally important legislation.

Will Senators William Cohen (ME), Gordon Humphrey (NH), Warren Rudman (NH) and Lowell Weicker (CT) support S. 2? Will they block the Senate from acting on reform?

THE SENATE'S INTEGRITY IS AT STAKE. WHAT WILL SENATORS COHEN, HUMPHREY, RUDMAN AND WEICKER DO?

This message is brought to you by the 280,000 members of Common Cause in New England and across the nation who are urging passage of this essential integrity legislation.

91040540787

EXHIBIT 3 6

91040840788

Senator Cohen,

"Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system."
—ARCHIBALD COX
CHAIRMAN, COMMON CAUSE

Hon. William S. Cohen
United States Senate
Washington, D.C. 20510

Dear Senator Cohen,

The way our congressional campaigns are financed is a national scandal. As *The Washington Post* has written, our congressional campaign financing system is "fundamentally corrupt. Every citizen knows that. So does every legislator."

Yet, last year you voted *seven times* to block the Senate from cleaning up the way its campaigns are financed. You joined a minority of the Senate in a filibuster that prevented S.2, comprehensive reform legislation, from even coming to a vote.

S.2 would clean up congressional campaigns by establishing limits on campaign spending and on the use of personal wealth in Senate campaigns. And S.2 would put a cap on the overall amount of special interest PAC money a congressional candidate may accept.

Fifty-five Senators, including Senator George Mitchell, are on record in favor of acting on this bill. Some 270 newspapers across the country, including Maine newspapers, have editorialized in favor of S.2. And more than 70 diverse national organizations representing millions of citizens have joined in support of this legislation which is essential to restoring honesty and integrity in government.

Senator Cohen, most scandals involve broken laws. In this case, the laws are the scandal—and they must be changed.

S.2 is once again before the Senate and, shortly, you will have another opportunity to act on this urgently needed reform measure.

Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system. Let the Senate act on S.2.

Sincerely,

Archibald Cox

Archibald Cox
Chairman, Common Cause

Stop blocking campaign finance reform.

This message is brought to you by the 280,000 members of Common Cause across the nation and in Maine who are urging passage of S.2, essential integrity legislation.

COMMON CAUSE 2030 M STREET NW WASHINGTON D.C. 20036

91040830789

EXHIBIT #14

Senator McCain,

"Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system."

—ARCHIBALD COX
CHAIRMAN, COMMON CAUSE

Hon. John McCain
United States Senate
Washington, D.C. 20510

Dear Senator McCain,

The way our congressional campaigns are financed is a national scandal. As *The Washington Post* has written, our congressional campaign financing system is "fundamentally corrupt. Every citizen knows that. So does every legislator."

Yet, last year you voted *seven times* to block the Senate from cleaning up the way its campaigns are financed. You joined a minority of the Senate in a filibuster that prevented S.2, comprehensive reform legislation, from even coming to a vote.

S.2 would clean up congressional campaigns by establishing limits on campaign spending and on the use of personal wealth in Senate campaigns. And S.2 would put a cap on the overall amount of special interest PAC money a congressional candidate may accept.

Fifty-five Senators, including Senator Dennis DeConcini, are on record in favor of acting on this bill. Some 270 newspapers across the country, including Arizona newspape[rs] have editorialized in favor of S.2. An[d] more than 70 diverse national organ[iza]tions representing millions of citizen[s] have joined in support of this legislat[ion] which is essential to restoring hones[ty] and integrity in government.

Senator McCain, most scandals involve broken laws. In this case, the laws are the scandal—and they must be changed.

S.2 is once again before the Senate and, shortly, you will have another opportunity to act on this urgently needed reform measure.

Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system. Let the Senate act on S.2.

Sincerely,

Archibald Cox

Archibald Cox
Chairman, Common Cause

Stop blocking campaign finance reform.

[illegible]

EXHIBIT C

The Arizona Republic, Su June 7 1987

SENATOR McCAIN IS ABOUT TO VOTE ON WHETHER TO END A NATIONAL SCANDAL

Senator John McCain will shortly vote on legislation to end the national scandal caused by the way our congressional campaigns are financed.

Money is at the core of the scandal.

Too much money is given to candidates by special interest PACs. Too much money is spent by candidates.

Too much time and energy is used to raise political money. Too much influence is exercised through political money.

The result?

The 100th Congress has come into office more indebted to special interest political money than any other Congress in the nation's history.

As *The Washington Post* wrote, the congressional campaign financing system "is fundamentally corrupt. Every citizen knows that. So does every legislator."

A bill to clean up the campaign finance system has broad support.

S. 2, the Senatorial Election Campaign Act, would fundamentally clean up the financing of Senate campaigns.

The bill is already publicly supported by 49 Senators, including Senator Dennis DeConcini, and by 65 diverse national

organizations, including the American Association of Retired Persons, the International Association of Chiefs of Police, and the National Farmers Organization.

More than 175 newspapers from cities and towns across the country have editorialized against the current campaign finance system and called for passage of S. 2.

S. 2 would create a campaign financing system for senatorial elections similar to the one that has worked to clean up presidential elections. S. 2 would reduce the influence of special interest PACs and put limits on skyrocketing campaign spending.

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Because S. 2 has gained such broad support, a minority of Senators are planning to try to block the Senate from voting on this historic legislation by conducting a filibuster—endless debate designed to keep the Senate from acting. To break a filibuster, not just a majority but the votes of 60 Senators are needed.

Obstructionist tactics to preserve a "fundamentally corrupt" campaign finance system have no place in our democratic process. It is essential that Senators reject the filibuster and face up to their responsibility to act on this vitally important legislation.

Will Senator McCain block the Senate from acting on reform? Will Senator McCain support S. 2?

THE SENATE'S INTEGRITY IS AT STAKE. WHAT WILL SENATOR McCAIN DO?

This message is brought to you by the 280,000 members of Common Cause in Arizona and across the nation

91040840790

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 31, 1990

William B. Canfield, III, Legal Counsel
National Republican Senatorial Committee
425 Second Street, N.E.
Washington, D.C. 20002

RE: MUR 3090

Dear Mr. Canfield:

This letter acknowledges receipt on July 27, 1990, of your complaint alleging possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by Common Cause. The respondents will be notified of this complaint within five days.

You will be notified as soon as the Federal Election Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be sworn to in the same manner as the original complaint. We have numbered this matter MUR 3090. Please refer to this number in all future correspondence. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

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

Sincerely,

Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

Enclosure
Procedures

9 1 0 4 0 8 4 0 7 9 1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 31, 1990

Archibold Cox, Chairman
Common Cause
2030 M Street, N.W.
Washington, D.C. 20036

RE: MUR 3090

Dear Mr. Cox:

The Federal Election Commission received a complaint which alleges that Common Cause may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 3090. 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 Common Cause in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

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

Sincerely,

Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

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

OGC 7217

WILMER, CUTLER & PICKERING
2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 659-0819,
429-9293, 429-4930, 293-5829
TELEX 440239 WCPI UI
ABA NET ABA1284

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (441) 839-4466
FACSIMILE 011 (441) 839-3537
TELEX 8813918 WCP LDN

15 RUE DE LA LOI
B-1040 BRUSSELS
TELEPHONE 011 (322) 231-0903
FACSIMILE 011 (322) 230-4322

CAROL F. LEE
DIRECT LINE (202)
663-6289

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
90 AUG -6 PM 3:44

August 6, 1990

Anne Weissenborn
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 3090

Dear Ms. Weissenborn:

Common Cause, the respondent in MUR 3090, has designated my partner Roger M. Witten as its counsel in the proceeding. The Statement of Designation of Counsel, signed by Fred Wertheimer, president of Common Cause, is enclosed.

Mr. Witten is currently out of town on vacation. Therefore, we would like to request a three week extension of the deadline for submitting a response to the complaint in MUR 3090. Common Cause received the Commission's letter on August 2, 1990. The original deadline would be Friday, August 17, and an additional three weeks would move the deadline to Friday, September 7.

If you have any questions, please call me at 663-6289.

Yours sincerely,

Carol F. Lee

Carol F. Lee

Enclosure

91040840794

STATEMENT OF DESIGNATION OF COUNSEL

MUR 3090

NAME OF COUNSEL: Roger Witten

ADDRESS: Wilmer, Cutler & Pickering

2445 M Street, N.W.

Washington, D.C. 20037

TELEPHONE: 202/663-6170

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.

August 6, 1990
Date

Signature

RESPONDENT'S NAME: Fred Wertheimer

ADDRESS: President, Common Cause

2030 M St., N.W.

Washington, D.C. 20036

HOME PHONE: 202/338-7906

BUSINESS PHONE: 202/833-1200

91040840795

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 13, 1990

Roger M. Witten, Esquire
Wilmer, Cutler and Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Attn: Carol F. Lee, Esquire

RE: MUR 3090
Common Cause

Dear Mr. Witten:

This is in response to the letter from Carol Lee dated August 6, 1990, which we received on August 7, 1990, requesting an extension of three weeks to respond to the complaint in MUR 3090. After considering the circumstances presented in your letter, I have granted the requested extension. Accordingly, your response is due by the close of business on September 7, 1990.

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

Sincerely,

Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

91040840796

OGC 7794

WILMER, CUTLER & PICKERING
2445 M STREET, N. W.
WASHINGTON, D. C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 835-0819,
429-9893, 429-4930, 293-8929
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TELEX 8813918 WCP LDN

15 RUE DE LA LOI
B-1040 BRUSSELS
TELEPHONE 011 (322) 231-0903
FACSIMILE 011 (322) 230-4322

ROGER M. WITTEN
DIRECT LINE (202)
663-6170

September 7, 1990

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
90 SEP -7 PM 4:52

Lawrence M. Noble, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Attention: Anne Weissenborn, Esq.

Re: MUR 3090

Dear Ms. Weissenborn:

On behalf of respondent Common Cause, we submit this response to the frivolous complaint the National Republican Senatorial Committee ("NRSC") filed against Common Cause. For the reasons set forth below, no action should be taken against Common Cause on the basis of the complaint, and it should be summarily dismissed. See 2 U.S.C. § 437g(a)(1).

SUMMARY

The NRSC complaint should be dismissed because the Common Cause advertisements in question -- on their face and in light of all the circumstances -- constitute pure issue advocacy, not campaign expenditures. In these advertisements, Common Cause lobbied legislators to amend the Federal Election Campaign Act.

Common Cause's advertisements do not expressly advocate the election or defeat of any candidate directly or indirectly in any way. Most of the Senators whom Common Cause lobbied are not candidates for election this year. Common Cause addressed the advertisements to both Democratic and Republican legislators. The Commission has previously dismissed similar complaints against Common Cause (MUR 1723 (1984); MUR 2580 (1988)) and should promptly do the same here.

DISCUSSION

Section 441b's prohibition on corporate expenditures is inapplicable to issue advocacy. The definition of "expenditure" is limited to payments made "for the purpose of influencing" an election for federal office. 2 U.S.C. § 431(9)(A). The definition includes only statements that "'expressly advocate the election or defeat of a clearly identified candidate,'" but excludes "mere discussion of public issues that by their nature raise the names of certain politicians." Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 248, 249 (1986) (quoting Buckley v. Valeo, 424 U.S. 1, 80 (1976)).[1]

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[1] See United States v. UAW-CIO, 352 U.S. 567, 589 (1957) (prohibition on corporate and union expenditures applies only to "use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party") (quoted in Corporate Promotion of Voter Registration, AO 1980-20, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5487, at 10,551 (May 2, 1980)); Federal Election Comm'n v. Furgatch, 807 F.2d 857, 864 (9th Cir.), cert. denied, 484 U.S. 850 (1987) (express advocacy (continued...)

Commission advisory opinions recognize the critical distinction between candidate-related corporate expenditures, which the statute prohibits, and non-partisan issue advocacy, which the statute permits.[2] In numerous enforcement proceedings, the Commission has dismissed complaints regarding non-partisan issue advocacy by corporations, even when the corporate communications mentioned the names of politicians who were candidates for office.[3] Twice before, the Commission has dismissed, without finding reason to believe, complaints against Common Cause which, like this one, mistakenly characterized issue

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[1](...continued)
exists only when the communication presents an unambiguous exhortation for the recipient to elect or defeat a clearly identified candidate); Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 52 (2d Cir. 1980).

[2] See, e.g., Corporate Promotion of Voter Registration, AO 1980-20, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5487, at 10,551 (May 2, 1980) (corporation does not violate § 441b(a) by purchasing newspaper advertisement urging people to vote); Distribution of Congressional Survey, AO 1987-7, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5889, at 11,358 (Apr. 16, 1987) ("Given that the purpose of these specific communications is to influence candidates to agree with USDC's positions on the issues it selects, and to enlist the assistance of the public in this endeavor, the Commission believes that these specific materials . . . reflect primarily a 'grass roots' lobbying or issue advocacy effort").

[3] See, e.g., MUR 1815 (1984) (Citizens for Constitutional Concerns, Inc.); MUR 1805 (1984) (Gray Panthers Project Fund); MUR 1807 (1984) (National Women's Political Caucus); MUR 1811 (1984) (The Disarm Education Fund); MUR 1814 (1984) (The Wilderness Society); MUR 1804 (1984) (SANE, Inc.).

advocacy as partisan electioneering.[4] The Advisory Opinions that the NRSC complaint cites (1984-15 and 1985-14) are altogether different because they involve party committees whose expenditures are presumptively partisan and election-oriented.

In light of these governing principles, the NRSC's complaint plainly lacks merit. Common Cause is a non-partisan, non-profit membership corporation. Since its inception, Common Cause has had a policy of not engaging in partisan politics at all. Accordingly, in its twenty-year history, Common Cause has never expressly or impliedly advocated the election or defeat of any candidate. Since its inception, it has lobbied for reform in the Nation's campaign finance laws. Campaign finance reform has been Common Cause's principal lobbying issue for two decades.

The advertisements that are the subject of the NRSC's complaint were part of Common Cause's publicly announced, national lobbying campaign to secure passage of campaign finance reform legislation in the House and Senate.[5] The advertisements were designed to encourage passage of pending bills and to

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[4] See MUR 1723 (dismissed, Aug. 15, 1984); MUR 2580 (dismissed, June 14, 1988).

[5] See Press Release, Common Cause Begins Ad Campaign With Full-page Ad in Washington Post Intensifying Call for Campaign Finance Reform (June 14, 1990) (Attachment 1). See Press Release, Common Cause Conducts Major Media Campaign During July 4th Recess to Lobby for Passage of Real Campaign Finance Reform in House and Senate (July 3, 1990) ("July 3 Press Release") (Attachment 2).

"enlist the assistance of the public" to achieve that end.[5] Common Cause was engaged, during this period, in a continuing lobbying effort on the Hill with respect to this legislation. It also sent mailings to members asking them to write their elected representatives, and telephoned members to encourage them to contact their representatives about the pending campaign finance legislation. Contrary to NRSC's bald accusation, Common Cause did not coordinate the advertisements in question directly or indirectly, in any way with any political party, candidate, or public official.

In the advertisements, Common Cause lobbied on an issue of public importance -- campaign finance reform. Not a word in any of the challenged advertisements takes any position regarding the election or defeat of any candidate. The advertisements do not mention that the legislator addressed in the advertisement is running for re-election or discuss upcoming candidate elections in any way, directly or indirectly. Instead, each advertisement unambiguously and directly urges the identified legislator to vote for campaign finance reform. The typical advertisement addressed to Senators said:

> Senator [name]: In 1988 your vote helped kill legislation to clean up the Senate's corrupt political

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[5] See Distribution of Congressional Survey, AO 1987-7, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5889, at 11,358 (Apr. 16, 1987).

> system. Don't vote to kill campaign finance reform again now.[7]

Likewise, the typical advertisement addressed to House Members said:

> Representative [name]: You received [amount] from PACs representing special interests during the past [number] elections. Vote for major cuts in special-interest PAC contributions. Don't vote for the House Democrats' fake campaign reform bill.[8]

These advertisements make no statement on the incumbent's merits as a candidate for re-election, nor do they invite the reader to vote the legislator out of office.[9] While some of the advertisements criticize past positions taken by individual legislators, disagreement on the issues with a legislator -- even one who is a candidate -- is not express advocacy.[10]

Thus, the plain language of the advertisements fully refutes the NRSC's contentions. This is sufficient to warrant

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7/ See Attachment 2.

8/ Id.

9/ Cf. Federal Election Comm'n v. Furgatch, 807 F.2d at 864 ("[T]o be express advocacy under the Act, [speech] . . . when read as a whole, and with limited reference to external events, [must] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate").

10/ Federal Election Comm'n v. National Org. for Women, 713 F. Supp. 428, 433-34 (D.D.C. 1989).

prompt dismissal of the complaint without further inquiry.[11] But should it be appropriate to look beyond the message in the advertisements to their context, the surrounding circumstances completely reinforce the conclusions that the advertisements were not designed to influence the outcome of any federal election and were not partisan.

The context, to the extent relevant, dashes any argument that the 1990 advertisements were designed to influence federal elections. Of the nine Senators whom Common Cause lobbied in the 1990 advertisements, six are not even up for reelection in 1990.[12] The Senate advertisements ran in late June and early July. This timing directly corresponded to the then current expectation that, in just a few weeks, the Senate would debate the Senate Election Ethics Act of 1990.[13] In fact, the Senate did debate the bill within a month. The timing of the advertisements also corresponded to the then current expectation that the Senators would be home during the July 4th recess when the advertisements were run. The advertisements were not, however, close in time to the general elections, which were more

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11/ <u>Federal Election Comm'n v. Furgatch</u>, 807 F.2d at 864 ("context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear impact of the words").

12/ These were Senators Chafee, D'Amato, Durenberger, Jeffords, McCain, and Shelby. <u>Congressional Yellow Book</u> (Summer ed. 1990). Senators Durenberger, Jeffords, and Chafee are not up for reelection until 1994. <u>Id</u>.

13/ July 3 Press Release (Attachment 2).

than four months later. (The general elections are the only relevant election in light of the NRSC's claim of partisan politics.)

In recommending dismissal of a complaint against Common Cause in MUR 2580 concerning an advertisement that had lobbied Senator Dole weeks before a Presidential primary on S. 2, the FEC's General Counsel reasoned in terms directly applicable to this very similar case. The General Counsel first noted that

> The advertisement was by no means an isolated effort by Common Cause to lobby on behalf of S2. Several months earlier, Congressional Quarterly reported that Common Cause had launched an all-out campaign on behalf of the proposed legislation.[14]

The Report then referenced Common Cause's "'multifaceted lobbying drive.'"[15] The Report pointed to Common Cause's advertising campaign and its advertisements in South Dakota, Minnesota, Delaware, Arizona, and Massachusetts lobbying a number of Senators. The Report went on to say

> In the context of this campaign, the advertisement appears to be another in a series of efforts to lobby Senators to support S2.[16]

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[14] First General Counsel's Report, MUR 2580, at 6 (May 24, 1988).

[15] Id. (quoting Gaunt, Common Cause's Lobbying War on Pacs, 45 Cong. Q. 1258 (1987)).

[16] Id. at 7.

Finally, the Report stated:

> [T]he newspaper [The Washington Post] is a logical choice in which to advertise in order to lobby Members of Congress. The fact that the advertisement ran on January 25, 1988, is especially significant, because the 100th Congress convened on that date to begin its second session. The legislation in which Common Cause is interested, S2, would be on the agenda during that session. It was entirely logical for Common Cause, in pursuit of its issue-oriented activities, to react to the return to Washington of Members of Congress by running an ad in the Washington Post urging the end of the filibuster and passage of S2.[17]

That reasoning was correct and applies just as forcefully here.

The context, to the extent relevant, also refutes the NRSC's argument that the 1990 advertisements were partisan. Of the three Senators who are running for reelection in 1990, one was a Democrat (Heflin) and two were Republicans (Pressler and Hatfield). All told, Common Cause's 1990 advertisements lobbied twenty-two members of the Senate and House; fifteen were Democrats, and only seven were Republicans.[18] Moreover, the 1990 advertisements prominently mentioned in an implicitly

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17/ *Id*. at 9-10.

18/ *See* July 3 Press Release (Attachment 2).

critical way the so-called "Keating Five" Senators, four of whom are Democrats.[19]

As the FEC has already recognized in MUR 2580, the 1987 and 1988 Common Cause advertisements mentioned in the NRSC complaint, like the 1990 advertisements, were grass-roots issue advocacy, not express advocacy of the election or defeat of any candidate. Those advertisements discussed the issue of campaign finance reform, and their context refutes any argument that they were election-oriented. The 1987 advertisements were not even run in an election year. The 1988 advertisements, addressed to specific Senators, were published in late January and early February 1988. Soon thereafter, in late February 1988, the Senate debated S. 2. Of the seven Senators whom Common Cause lobbied through newspaper advertisements in the winter of 1988, only one was up for reelection in November of that year.[20] The General Counsel's Report in MUR 2580 concluded that the advertisements were part of a continuing "series of efforts to lobby Senators to support" campaign finance legislation.[21]

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[19] See "Common Cause right on target," The Winter Haven News Chief, Winter Haven, Fla. (July 16, 1990); "Uncommon Complaint," The Birmingham News, Birmingham, Alabama (July 16, 1990) (both in Attachment 3).

[20] The seven were Senators Cohen, Dole, McCain, Pressler, Roth, Simpson, and Specter. Only Senator Roth was up for reelection. At that time, Senator Dole was running for the Republican nomination for President.

[21] See First General Counsel's Report, MUR 2580, at 7 (May 24, 1988).

Accordingly, Common Cause's payments for the advertisements challenged in the NRSC complaint did not constitute "expenditures" prohibited by 2 U.S.C. § 441b. Common Cause was not required to report such payments either as "independent expenditures" or as "contributions," 2 U.S.C. § 434, or to register as a "political committee" pursuant to 2 U.S.C. §§ 431(4)(A) and 433. For the same reason, Common Cause was not required to include in the advertisement any disclaimer pursuant to 2 U.S.C. § 441d(a)(3).

CONCLUSION

For these reasons, NRSC's complaint should be summarily dismissed.

Respectfully submitted,

Roger M. Witten

Roger M. Witten
Carol F. Lee
Steven E. Gordon
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Common Cause

September 7, 1990

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91040340808

Common Cause

For Release: IMMEDIATE
Thursday, June 14, 1990

For Information: Jane Mentzinger
Jackie G. Howell
Colleen O'Day

COMMON CAUSE BEGINS AD CAMPAIGN WITH FULL-PAGE AD IN <u>THE WASHINGTON POST</u>

INTENSIFYING CALL FOR CAMPAIGN FINANCE REFORM:

**"S&L INTERESTS GAVE MEMBERS OF CONGRESS MILLIONS.
TAXPAYERS WERE RIPPED OFF FOR BILLIONS ...
AND CONGRESS HAS DONE NOTHING."**

A full-page advertisement placed today in The Washington Post by Common Cause asserts that Members of Congress have done "nothing to change the corrupt political system" that allowed the S&L crisis to happen.

The ad states that savings-and-loan interests gave Members of Congress millions in campaign contributions, while taxpayers will pay billions of dollars in additional taxes for the S&L bailout.

The ad is part of a larger nationwide Common Cause grassroots lobbying and media campaign to win passage of real campaign finance reform this year. The ad will next appear on the op-ed page of The New York Times on Sunday, June 17.

"Millions of American taxpayers who had nothing to do with causing the S&L catastrophe will have to pay billions of dollars to pay for other people's mistakes," according to Common Cause President Fred Wertheimer. "Members of Congress have handed every American taxpayer a $2,500 bill to clean up this mess, but have done nothing to demonstrate to the American people that one of the most important lessons of this taxpayer fiasco has been learned: the corrupt campaign finance system must be reformed."

The ad notes, "It would be unconscionable -- an insult to every American taxpayer -- for Members of Congress to end this session without enacting real campaign finance reform."

The ad states that, "When it comes to the S&L crisis and high-flying influence money, the 'Keating Five' scandal is the ultimate smoking gun.

"But Charles Keating wasn't the only one in the S&L industry who made campaign contributions to influence government actions on savings and loan matters. S&L executives and PACs used millions of dollars in campaign contributions to play the political influence-money game in Congress throughout the 1980s -- and it's still being played."

According to published reports, Lincoln Savings and Loan owner Charles H. Keating Jr. arranged for more than $1 million in political contributions and financial benefits to Senators Alan Cranston (D-CA), Dennis DeConcini (D-AZ), John Glenn (D-OH), John McCain (R-AZ), and Don Riegle (D-MI) -- five Senators who intervened on his behalf with S&L regulators.

When asked about the purpose of his campaign contributions, Keating said: "One question, among the many raised in recent weeks, had to do with whether my financial support in any way influenced several political figures to take up my cause. I want to say in the most forceful way I can: I certainly hope so."

The Common Cause ad concludes with the message: "Members of Congress: You handed every taxpayer a $2,500 bill to clean up the S&L scandal. Don't go home without cleaning up your own money scandal."

A copy of the ad is attached.

\# \# \#

S&L INTERESTS GAVE MEMBERS OF CONGRESS MILLIONS. TAXPAYERS WERE RIPPED OFF FOR BILLIONS... AND CONGRESS HAS DONE NOTHING.

NOTHING TO CHANGE THE CORRUPT POLITICAL SYSTEM THAT LET IT HAPPEN.

When it comes to the S&L crisis and high-flying influence money, the "Keating Five" scandal is the ultimate smoking gun.

But Charles Keating wasn't the only one in the S&L industry who made campaign contributions to influence government actions on savings and loan matters.

S&L executives and PACs used millions of dollars in campaign contributions to play the political influence-money game in Congress throughout the 1980s—***and it's still being played.***

It would be unconscionable—an insult to every American taxpayer—for Members of Congress to end this session without enacting real campaign finance reform.

MEMBERS OF CONGRESS:

You handed every taxpayer a $2,500 bill* to clean up the S&L scandal. Don't go home without cleaning up your own money scandal.

*It will take $2,500 from every taxpayer to pay for the $300 billion S&L bailout. That's $2,500 from you and every taxpayer in your family. And the $300 billion estimate may well go up to $500 billion before it's through.

This message is brought to you by the 280,000 members of Common Cause, 2030 M Street, NW, Washington, D.C. 20036 (202) 833-1200.

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2

91040340812

Common Cause

For Release: IMMEDIATE
Tuesday, July 3, 1990

For Information: Jane Mentzinger
Jackie G. Howell
Colleen O'Day

COMMON CAUSE CONDUCTS MAJOR MEDIA CAMPAIGN DURING JULY 4TH RECESS TO LOBBY FOR PASSAGE OF REAL CAMPAIGN FINANCE REFORM IN SENATE AND HOUSE

Common Cause is conducting a major media campaign during the Fourth of July recess week, using newspaper and radio ads to lobby Members of Congress to pass real campaign finance reform legislation before the congressional session ends this year.

The newspaper ads and 60-second radio spots that will run in selected states and congressional districts are aimed at lobbying specific Senators and Representatives to vote for real campaign finance reform. (See attached list of states and congressional districts where the advertisements will run.)

A June 30 editorial in The New York Times, entitled "Congress Goes Home, Still for Sale," stated that, "This is supposed to be the year that Congress cleans up the way its election campaigns are financed. Yet the members are heading home for the Independence Day recess having so far failed. They remain tainted by their reliance on contributions from special interests." (A copy of The New York Times editorial is attached.)

In the Senate, the newspaper ads are focused on eight Senators -- six Republicans and two Democrats. The Senate is expected to consider campaign finance reform legislation when it returns from the July 4 recess.

In the House of Representatives, the ads are focused on 13 Democratic Members, representing a cross section of House Democrats. The House is expected during the month of July to consider campaign finance reform legislation introduced by Representative Al Swift (D-WA) which Common Cause views as fundamentally flawed and not real reform. "The House Democratic campaign finance proposal not only would fail to curb the flow of PAC money to the House, but it would also leave room for tens of millions of dollars in additional PAC contributions," Common Cause President Fred Wertheimer said.

In the Senate, the Common Cause newspaper ads are primarily focused on Senators who helped kill campaign reform in the last Congress by supporting a Republican-led filibuster that blocked Senate action on the issue, including four Republicans -- Senators David Durenberger (MN), Mark Hatfield (OR), John McCain (AZ) and Larry Pressler (SD) -- and the two Democratic Senators who supported the filibuster -- Senators Howell Heflin (AL) and Richard Shelby (AL). (A Common Cause ad focusing on a fifth Republican who supported the filibuster, Senator Alfonse D'Amato (NY), appeared in the June 26 edition of The New York Times.)

The Common Cause newspaper ads are headlined, "S&L interests gave Members of Congress millions. Taxpayers were ripped off for billions ... and Congress has done nothing ... Nothing to change the corrupt political system that let it happen." The ads include the individual Senator's name and state, "In 1988 your vote helped kill legislation to clean up the Senate's corrupt political system. Don't vote to kill campaign finance reform again now." (A copy of a sample Senate ad is attached.)

Common Cause ads are appearing in two additional states involving Senate Republicans. In Rhode Island, where Republican Senator John Chafee voted to end the filibuster in the last Congress, the Common Cause ad states, "Don't abandon your good-government position. Don't vote to kill campaign finance reform now."

In Vermont, where former Republican Senator Robert Stafford voted in the last Congress to end the filibuster, the Common Cause ad addresses freshman Republican Senator James Jeffords and states, "Don't abandon this good-government position. Don't vote to kill campaign finance reform."

Each House ad lists the total amount of political action committee (PAC) money received during the Member's recent elections and urges the Democratic Representative to "Vote for major cuts in special-interest PAC contributions. Don't vote for the House Democrats' fake campaign reform bill." (A copy of a sample House ad is attached.)

The newspaper ads are directed at lobbying the following House Democrats: Representatives Doug Barnard (GA), Bob Carr (MI), Norman Dicks (WA), Richard Durbin (IL), Marcy Kaptur (OH), Thomas McMillen (MD), Michael McNulty (NY), Stephen Neal (NC), Bill Sarpalius (TX), Louise Slaughter (NY), Lawrence Smith (FL), Robert Torricelli (NJ) and Ron Wyden (OR).

The Common Cause radio spot, which will run in some of these states and congressional districts, states, "When Congress hands us the bill for the worst financial scandal in American history and does nothing to change the corrupt political system that let it happen, that's an insult to every taxpayer."

"So here's a message to every Member of Congress: You've handed me -- and every other taxpayer in my family -- a $2,500 tax bill to clean up the S&L money scandal. So don't come home from Washington without cleaning up your own money scandal first," according to the Common Cause radio spot. (A copy of the full radio spot script is attached.)

According to Common Cause, comprehensive campaign finance reform must include provisions to:

- Limit overall campaign spending;
- Dramatically reduce the role of special-interest PAC contributions;
- Provide alternative campaign funds for congressional candidates; and
- Shut down the soft money system that is bringing huge, "fat cat" campaign contributions back into federal campaigns.

\# \# \#

COMMON CAUSE

CAMPAIGN FINANCE REFORM MEDIA CAMPAIGN

SENATE

Alabama
Howell Heflin (D)
Richard Shelby (D)

Arizona
John McCain (R)

Minnesota
David Durenberger (R)

New York
Alfonse D'Amato (R)

Oregon
Mark Hatfield (R)

Rhode Island
John Chafee (R)

South Dakota
Larry Pressler (R)

Vermont
James Jeffords (R)

HOUSE

Florida
Lawrence Smith (D/CD-16)

Georgia
Doug Barnard (D/CD-10)

Illinois
Richard Durbin (D/CD-20)

Maryland
Thomas McMillen (D/CD-4)

Michigan
Bob Carr (D/CD-6)

New Jersey
Robert Torricelli (D/CD-9)

91040340316

HOUSE (CONT'D)

New York
Michael McNulty (D/CD-23)
Louise Slaughter (D/CD-30)

North Carolina
Stephen Neal (D/CD-5)

Ohio
Marcy Kaptur (D/CD-9)

Oregon
Ron Wyden (D/CD-3)

Texas
Bill Sarpalius (D/CD-13)

Washington
Norman Dicks (D/CD-6)

The New York Times, 6/30/90

Congress Goes Home, Still for Sale

This is supposed to be the year that Congress cleans up the way its election campaigns are financed. Yet the members are heading home for the Independence Day recess having so far failed. They remain tainted by their reliance on contributions from special interests.

The taint is plainer than ever. Witness the embarrassment of the five Senators who helped Charles Keating, the savings and loan operator, fend off regulators after he gave them thousands of dollars in campaign contributions. Yet the Keating Five were hardly alone. A new study by Common Cause, the public affairs lobby, delineates how savings and loan interests contributed more than $11 million to Congressional candidates and the political parties in the 1980's.

The Senate is stalling. It has yet to renounce honorariums, the speaking fees banned by the House last year. And it has yet to fashion a bipartisan compromise on campaign financing. Once-promising talks have broken down, mainly over the issue of spending limits.

The Senate minority leader, Robert Dole, blames the Democrats. But Mr. Dole virtually ordained a stalemate by delegating the negotiations to Senator Mitch McConnell of Kentucky, the intransigent filibusterer who helped kill sensible reform in the last Congress. The Senate majority leader, George Mitchell, has sponsored a promising reform plan. But he has been strangely unwilling to fight for it by bringing it to the floor for debate and recorded votes.

Democrats in the House, meanwhile, seem interested only in preserving their majority. Months ago, the Republican minority leader, Robert Michel, expressed a willingness to resolve the spending limits issue as part of a comprehensive overhaul. But Speaker Thomas Foley failed to seize that offer. Instead, Mr. Foley's point man on the issue, Representative Al Swift of Washington, is circulating a proposal that would ratify the worst aspects of the current system.

That's no way for Congress to celebrate democracy, not on July 4, not any time.

S&L INTERESTS GAVE MEMBERS OF CONGRESS MILLIONS. TAXPAYERS WERE RIPPED OFF FOR BILLIONS... AND CONGRESS HAS DONE NOTHING.

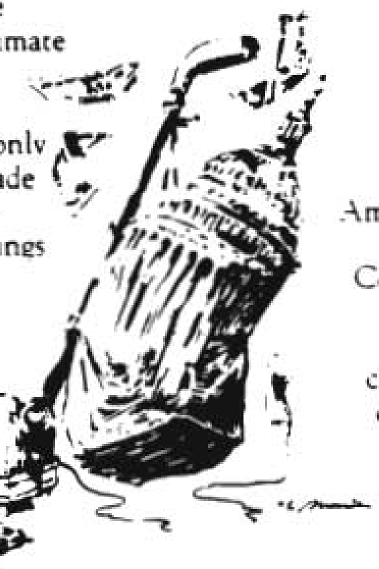
91040840819

NOTHING TO CHANGE THE CORRUPT POLITICAL SYSTEM THAT LET IT HAPPEN.

When it comes to the S&L crisis and high-flying influence money, the "Keating Five" scandal is the ultimate smoking gun.

But Charles Keating wasn't the only one in the S&L industry who made campaign contributions to influence government actions on savings and loan matters.

S&L executives and PACs used millions of dollars in campaign contributions to play the political influence-money game in Congress throughout the 1980s—*and it's still being played.*



Members of Congress handed every taxpayer a $2,500 bill to clean up the $300 billion S&L scandal.

It would be unconscionable—an insult to every American taxpayer—for Members of Congress to end this session without enacting real campaign reform to clean up their own money scandal.

SENATOR PRESSLER:

In 1988 your vote helped kill legislation to clean up the Senate's corrupt political system. Don't vote to kill campaign finance reform again now.

This message is brought to you by the 280,000 members of Common Cause, 2030 M Street, NW, Washington, D.C. 20036 (202) 833-1200.

S&L INTERESTS GAVE MEMBERS OF CONGRESS MILLIONS. TAXPAYERS WERE RIPPED OFF FOR BILLIONS... AND CONGRESS HAS DONE NOTHING.

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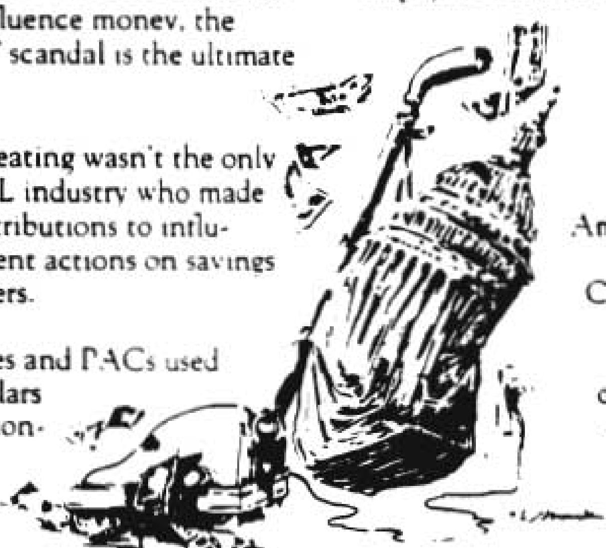
Members of Congress handed every taxpayer a $2,500 bill to clean up the $300 billion S&L scandal.



It would be unconscionable—an insult to every American taxpayer—for Members of Congress to end this session without enacting real campaign reform to clean up their own money scandal.

REPRESENTATIVE CARR:

You received $1 million from PACs representing special interests during the past three elections. Vote for major cuts in special-interest PAC contributions. Don't vote for the House Democrats' fake campaign reform bill.

This message is brought to you by the 280,000 members of Common Cause, 2030 M Street, NW, Washington, D.C. 20036 (202) 833-1200.

COMMON CAUSE RADIO AD SCRIPT: 1-MINUTE SPOT

YOUR PERSONAL TAX BILL FOR THE SAVINGS AND LOAN SCANDAL IS 2500 DOLLARS.

YOU AND EVERY TAXPAYER WILL PAY 2500 DOLLARS IN ADDED TAXES BECAUSE OF THE 300 BILLION DOLLAR S&L MESS.

AND WHAT'S CONGRESS DONE ABOUT IT?

THEY HAVEN'T EVEN CHANGED THE CORRUPT POLITICAL SYSTEM THAT LET IT HAPPEN.

CHARLES KEATING PROVIDED MORE THAN ONE MILLION DOLLARS TO BUY THE INFLUENCE OF FIVE SENATORS.

AND CONGRESS DOES NOTHING.

WHEN CONGRESS HANDS US THE BILL FOR THE WORST FINANCIAL SCANDAL IN AMERICAN HISTORY ... AND DOES NOTHING TO CHANGE THE CORRUPT POLITICAL SYSTEM THAT LET IT HAPPEN ... THAT'S AN INSULT TO EVERY TAXPAYER.

SO HERE'S A MESSAGE TO EVERY MEMBER OF CONGRESS:

"YOU'VE HANDED ME -- AND EVERY OTHER TAXPAYER IN MY FAMILY -- A 2500 DOLLAR TAX BILL TO CLEAN UP THE S&L MONEY SCANDAL. SO DON'T COME HOME FROM WASHINGTON WITHOUT CLEANING UP YOUR OWN MONEY SCANDAL FIRST."

Brought to you by the 280,000 members of Common Cause.

3

91040340822

The Winter Haven News Chief, Winter Haven, Florida 7/16/90

Common Cause right on target

When 13 Democrats in the House of Representatives were criticized in a recent advertising campaign for taking money from the savings and loan industry, House Democratic leaders responded in a way that can only be called self-serving.

The normally cool-headed House Speaker Thomas S. Foley, D-Wash., led the charge by denouncing the ad campaign as "scurrilous" and one that "uses tactics of innuendo and inference that are typical of the worst elements of campaign advertising."

Rep. Beryl Anthony Jr., D-Ark., chairman of the Democratic Congressional Campaign Committee, accused the ad sponsors of "sleazeball politics," while Rep. Richard J. Durbin, D-Ill., called the ad campaign "irrelevant."

Scurrilous? Sleazy? Irrelevant? Who are these Democrats talking about — Republicans?

Hardly. The sponsors of the biting ad campaign are anything but conservative Republicans. Rather, they are the directors of Common Cause, the national citizens' lobby which for two decades has been at the forefront of spurring ethics and campaign reform in Congress.

Foley

The advertisements that have so disturbed House Democrats are offensive to them only because the ads reveal the untold story behind the nation's savings and loan scandal, a scandal that threatens to take up to $500 billion out of American taxpayers' pockets.

The Common Cause campaign targeted 13 House Democrats in newspaper ads in their home districts and linked their acceptance of political action committee (PAC) contributions to the S&L scandal. Each ad listed the amount of PAC funds received by the individual lawmaker in recent years.

"S&L interests gave members of Congress millions," the ads said. "Taxpayers were ripped off for billions ... and Congress has done nothing."

Following the expected counterattack from Democrats, Common Cause President Fred Wertheimer defended the campaign by saying it was designed to increase public pressure upon the majority party in Congress to toughen a proposed campaign finance bill. Currently, that bill contains no aggregate limit on the amount of PAC funds members of Congress may accept.

"We believe it is essential to pass real campaign reform," Wertheimer said. "We are talking about cleaning up a corrupt system, a system that helped the S&L scandal happen."

To show that the ad campaign was not meant to be partisan, Wertheimer pointed to another Common Cause campaign targeting seven Republicans and two Democrats in the Senate.

Many members of Congress would like to blame the entire S&L debacle on the Republican administrations of Ronald Reagan and George Bush, but, in reality, the whole sorry episode was of bipartisan origin. At the same time that many of the nation's leading S&Ls were going under, their political action committees were pumping millions of dollars into the campaign coffers of influential senators and representatives in Congress.

What the S&Ls bought with those contributions was freedom from regulation and investigation. The most notorious example of influence-buying involved the so-called "Keating Five," a group of five senators who received millions of dollars from S&L mogul Charles Keating and in return put pressure on the government not to investigate him. The failure to probe Keating will cost the taxpayers $2 billion.

By pointing out such cozy connections between members of Congress and the S&L industry, Common Cause has done this country a great service.

The Birmingham News, Birmingham, Alabama 7/16/90

Uncommon Complaints

It's "scurrilous," said House Speaker Thomas S. Foley, D-Wash. "Sleazy," added Rep. Richard J. Durbin, D-Ill. And Rep. Beryl Anthony Jr., D-Ark., went even further: "Sleazeball politics!"

The honorables were not reacting to the growing savings and loan scandal. They weren't talking about higher taxes for Americans, either. And heck, they certainly weren't upset about overspending their free-mailing budget this year by almost 100 percent.

What's all the ruckus about?

The Democrats are miffed at Common Cause, the Washington citizen's lobby.

Common Cause has been running an advertising campaign promoting campaign finance reform and linking House members' receipt of political action committee contributions to the S&L mess.

The Common Cause ads are tough, sure, and have been running in newspapers in each congressman's district. That especially hurts.

But instead of attacking Common Cause and its president, Fred Wertheimer, maybe the House members should take a serious look at themselves, their own campaign practices and a sorry state of affairs that allows them to take gobs of PAC money one day, then vote on an issue that involves that special interest the next.

Clearly, some meaningful campaign finance reform is long overdue, and not the kind that House members are trying to sneak through.

Under one plan, each member would be "limited" to "only" $275,000 from all PACs per election year.

Congressmen already raise so much PAC money they can't spend it all, so it gets rolled over from election to election, discouraging any serious challengers who can't compete with those stuffed warchests.

Some House members targeted by Common Cause are angry. Yes, the truth hurts.

It's a fact that S&L interests have given millions of dollars to congressional campaigns. It's a fact that the S&L catastrophe will wind up costing taxpayers billions and billions. And it's a fact that the House and Senate both have resisted tough campaign finance reform.

But then consider that current House members received almost $90 million in PAC money during the last election cycle alone, and it's easy to see why they're addicted to PAC money.

Serious limits on PAC contributions are needed, if not the outright elimination of PAC money altogether.

House members should stop whining about Common Cause and think about that.

SENSITIVE

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RECEIVED
FEDERAL ELECTION COMMISSION
SECRETARIAT

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

FIRST GENERAL COUNSEL'S REPORT

MUR # 3090
DATE COMPLAINT RECEIVED BY OGC:
July 27, 1990
DATE OF NOTIFICATION TO RESPONDENTS:
July 31, 1990
STAFF MEMBER:
Dodie C. Kent

COMPLAINANT: National Republican Senatorial Committee

RESPONDENT: Common Cause

RELEVANT STATUTES:
2 U.S.C. § 431(4)
2 U.S.C. § 431(8)(A)
2 U.S.C. § 431(17)
2 U.S.C. § 434(c)
2 U.S.C. § 441a(a)
2 U.S.C. § 441b
2 U.S.C. § 441d

I. GENERATION OF MATTER

This matter was generated by a complaint filed by the National Republican Senatorial Committee ("NRSC") against Common Cause. Attachment 1. The NRSC alleges that Common Cause, a tax-exempt corporation, paid for full page newspaper advertisements which appeared in June 1987, February 1988 and July 1990 advocating the defeat of certain incumbent Republican Senators who disagreed with Common Cause's policy position regarding taxpayer financing of congressional election campaigns. According to the NRSC complaint, these advertisements (and related efforts) were specifically directed against incumbent Republican Senators

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David Durenberger, Mark Hatfield, Larry Pressler, William Roth and Lowell Weicker. In other ads, Common Cause allegedly supported incumbent Democratic Senators Dennis DeConcini, Edward Kennedy and George Mitchell. All of these Senators were up for re-election in 1988 or 1990.

In the NRSC's view, these advertisements represent corporate expenditures in connection with a federal election, thus violating 2 U.S.C. § 441b. NRSC further contends that Common Cause failed to report these advertisements either as independent expenditures under 2 U.S.C. § 434(c), or conversely, as in-kind contributions to Democratic candidates. <u>See</u> 2 U.S.C. § 434(b). While no dollar amounts were given, the complaint alleges that "substantial amounts" were expended. Attachment 1 at 8. NRSC also argues that Common Cause violated 2 U.S.C. § 441d by neglecting to attach a proper statement to the advertisements disclosing whether they were authorized by any candidate or committee. Finally, the NRSC maintains that Common Cause violated 2 U.S.C. §§ 433 and 434 generally by knowingly and willfully failing to register and report as a political committee, thereby hiding the source of its funding (which the complaint asserts includes funds impermissible under 2 U.S.C. §§ 441b, 441c, 441e and 441f) and the extent of its own involvement in federal elections. The Complaint contends that Common Cause has thus acted in a manner inconsistent with its own public position regarding disclosure of "soft money." After being granted an extension of time to reply, Common Cause responded through counsel. Attachment 2.

Although this matter presents a close question, the Office of General Counsel believes that Common Cause's ads do not cross the line from issue advocacy to campaign related activity. For the reasons discussed below, this Office therefore recommends that the Commission find no reason to believe that Common Cause violated the Act.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

Common Cause is a corporation organized under the laws of the District of Columbia. During the past three years, Common Cause has supported the passage of campaign finance reform legislation then pending in Congress through print advertisements, radio and television advertising, and direct mail efforts.

The newspaper advertisements in question ran in June 1987, February 1988 and July 1990. Although the challenged advertisements varied in language and format depending largely upon the publication date, each one discussed the position of incumbent U.S. Senators on S.2 and S.137, Common Cause sponsored legislation which would have implemented taxpayer financing of congressional election campaigns, as well as spending limits for congressional races.

Some ads mentioned only one Senator by name. Others mentioned two or more Senators. In some instances, individual ads listed Senators who supported, as well as others, who opposed S.2 and S.137. All of the ads in dispute were published in the home state newspapers of the identified incumbent Senators. See Attachment 2 at 7. Each ad closed with the statement "[t]his ad was brought to you by the 280,000 members of Common Cause" and listed the organization's Washington D.C. mailing address. The various advertising campaigns are delineated on the attached chart (Attachment 3) and discussed in turn below. Individual copies of many of the ads are also attached. Attachments 4-14.

1. 1987 Advertisements

In 1987, Common Cause conducted a "media blitz" concerning the campaign finance issue. See Gaunt, Common Cause's Lobbying War on PACs, 45 CONG. Q. 1258. In this regard, Common Cause placed full page advertisements in newspapers published in Arizona, Delaware, Massachusetts, Minnesota and South Dakota on June 7, 1987. Id.[1] These advertisements were substantially identical in that all of the ads prominently mentioned incumbent Republican Senators by name and contained nearly identical text regarding S.2, the proposed Senatorial Election Campaign Act.

In the simplest advertisement, a banner headline stated "Senator Durenberger is about to vote on whether to end a national scandal." Attachment 4. The ad then went on to discuss the present "fundamentally corrupt" campaign finance system and the purported need for reform, stating that many

1. In its complaint, NRSC has cited only four of the five June 1987 advertisements.

other Senators already supported campaign reform. After mentioning that the opponents of S.2 planned a filibuster to prevent a vote on S.2, the advertisement championed breaking the filibuster and allowing the Senate to vote on the merits of the proposed legislation. The advertisement then closed with another banner headline at the bottom of the page stating "The Senate's integrity is at stake. What will Senator Durenberger do?" Attachment 4. This particular ad was published in Minnesota where Senator Durenberger faced re-election in 1988, over one year later.

Ads mentioning Republican Senators John McCain and William Roth in the same fashion were published in their home states of Arizona and Delaware. Attachments 5 and 6, respectively. Unlike the Durenberger ad, however, the text of these ads specifically listed the other incumbent Senators from those states, Democratic Senators Dennis DeConcini and Joseph Biden, as already supportive of campaign finance reform. Yet, none of the named Senators were running against each other and, indeed, none of their elections would occur until more than one year after these ads appeared. Republican Senator Roth and Democratic Senator DeConcini were up for re-election in 1988; Senators McCain and Biden were not up again until 1992 and 1990, respectively.

An additional Common Cause ad mentioned New England Republican Senators Cohen, Humphrey, Rudman and Weicker. Attachment 7. The text of these full page newspaper advertisements also referred to New England Senators John

Chafee, Christopher Dodd, Edward Kennedy, John Kerry, Patrick Leahy, George Mitchell, Claiborne Pell and Robert Stafford, all Democrats (except Senators Chafee and Stafford), as already supportive of campaign finance reform. This ad was published in Massachusetts where identified Democratic Senator Kennedy sought re-election in 1988, the following year. Likewise, Senator Weicker also sought re-election (unsuccessfully) in 1988, but it is unknown whether the advertisement was published in Connecticut. All other named Senators were not up for re-election until 1990 or 1992. Again, none of the named Senators were running against each other.

2. 1988 Advertisements

In the winter of 1988, Common Cause prepared and placed additional full page newspaper advertisements which mentioned seven individual incumbent Senators.

The three ads challenged herein were each published on February 11, 1988 and were substantially identical. Attachments 8-10. All of the ads were in letter form, addressed to Republican Senators Cohen, McCain and Roth, respectively, and signed by Archibald Cox, Chairman of Common Cause. These ads appeared in newspapers in the Senators' home states of Maine, Arizona and Delaware, respectively. All of the ads discussed the identified Republican Senators' opposition to campaign finance reform and criticized the

Senator for joining the filibuster preventing voting on S.2.

The headline of each ad stated, in large bold type:

> Senator [Name] . . . Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system.

See Attachments 8-10. The text of the three ads in question included the following:

> The way our congressional campaigns are financed is a national scandal. As The Washington Post has written, our congressional campaign financing system is "fundamentally corrupt. Every citizen knows that. So does every legislator."
>
> Yet last year you voted seven times to block the Senate from cleaning up the way its campaigns are financed. You joined a minority of the Senate in a filibuster that prevented S.2, comprehensive reform legislation, from even coming to a vote.
>
> S.2 is once again before the Senate and, shortly, you will have another opportunity to act on this urgently needed reform measure.
>
> Won't you please stop backing the filibuster that is protecting the current corrupt campaign financing system. Let the Senate act on S.2.

See Attachments 8-10.

Like previous Common Cause advertisements, the text of each ad made reference to the Democratic Senator from the same state who was already on the record in favor of acting on S.2. In this regard, all three ads stated "Fifty-five Senators, including [George Mitchell, Dennis DeConcini, Joseph Biden] are on the record in favor of acting on this bill." See Attachments 8-10.

Republican Senator Cohen and Democratic Senator Mitchell both represent Maine where Senator Mitchell was seeking re-election in June 1988. Both Republican Senator McCain and Democratic Senator DeConcini represent Arizona where Senator DeConcini was seeking re-election in September 1988. Republican Senator Roth and Democratic Senator Biden both represent Delaware where Senator Roth was seeking re-election in September 1988. None of the named Senators were running against each other.

3. 1990 Advertisements

In late June and early July 1990, Common Cause placed additional full page advertisements which discussed nine individual Senators and 13 Congressmen. The two ads challenged by the NRSC were published on July 3, 1990 and referred to Republican Senators Mark Hatfield and Larry Pressler. Attachments 11 and 12. Each of these ads appeared in newspapers published in the individual states in which these Republican incumbents were facing re-election in November 1990 (in Oregon and in South Dakota). In addition to asserting that "S&L interests gave members of Congress millions" and "Taxpayers were ripped off for billions . . . and Congress has done nothing," the advertisements assert that "[i]t would be unconscionable -- an insult to every American taxpayer -- for Members of Congress to end this session without enacting real campaign reform to clean up their own money scandal." The advertisements then closed by stating in bold print:

> Senator [Name]: In 1988, your vote helped kill legislation to clean up the

> Senate's corrupt political system. Don't vote to kill campaign finance reform again now.

Attachments 11 and 12. According to Common Cause, generic versions of the same advertisements, stating "Members of Congress" rather than individual Senator's names, appeared in the June 14, 1990 Washington Post (Attachment 13) and the June 17, 1990 New York Times. Additionally, two advertisements published in Rhode Island and Vermont urged Republican Senators John Chafee and James Jeffords not to abandon their "good-government position. Don't vote to kill campaign finance reform." Attachment 2 at 7. Both Chafee and Jefford's predecessor, Robert Stafford, had voted to end the filibuster in the last Congress. Id.

Finally, Common Cause financed additional newspaper advertisements which appeared in the home states and congressional districts of thirteen House Democrats. See, e.g. Attachment 14. These ads were identical to the advertisements which mentioned Senators Hatfield and Pressler, except that they closed,

> Representative [Name]: You received $1 million from PACs representing special interests during the past three elections. Vote for major cuts in special-interest PAC contributions. Don't vote for the House Democrats' fake campaign finance reform bill.

Attachment 14. Common Cause sponsored radio spots also were aired in some of these states and districts.

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B. Complaint and Response

NRSC contends that Common Cause's "clear purpose" in preparing and publishing the June 1987, February 1988 and July 1990 advertisements was to influence voters to cast their ballots against identified incumbent Republican Senators who were seeking re-election or for their Democratic challengers.

According to NRSC, this public media campaign together with a direct mail effort resulted in a "highly focused and specific criticism" of Republican Senators Durenberger, Hatfield, Pressler, Roth and Weicker, all of whom faced re-election in 1988 or 1990. Although the NRSC acknowledges that Common Cause intended, at least in part, "to place public pressure on these incumbent Republican Senators to change their positions on S.2 and S.137," the NRSC also contends that

> [t]his public pressure, in the form of full-page ads in state-wide newspapers, was clearly intended by Common Cause (1) to generate a negative image in the mind of the reader/voter and (2) to equate the Senator's opposition to taxpayer financed congressional elections as being akin to support of political corruption within Congress. Common Cause clearly intended for these two themes to become the focus of each Senator's on-going campaign for re-election in 1988 or 1990. Were that to occur, Common Cause further believed that the incumbent Republican Senator would be defeated in November 1988 and November 1990 and therefore would be replaced with a Democrat more favorable to the Common Cause political agenda.

Attachment 1 at 7-8.

Furthermore, according to NRSC, the ads which specifically mentioned Democratic Senators DeConcini, Kennedy and Mitchell, and favorably compared and contrasted those Senators' S.2 voting records on campaign finance reform with that of the named Republican Senators, were "clearly intended to positively and in the most public way possible affect the re-election prospects of Senators Mitchell, DeConcini and Kennedy and adversely affect the re-election prospects of the named Republican Senators." Attachment 1 at 9-10.

NRSC claims that Common Cause, in effect, thus was acting as a "surrogate for the Democratic Party" by publishing the communications that are the subject of this complaint. Attachment 1 at 5. Although no specific allegations were made to support this suggestion, NRSC insists that

> [t]he Commission must investigate the facts and circumstances behind this negative advertising campaign to determine the extent of Common Cause's coordination of its advertising effort with the leaders of the Democratic Party and its Senatorial Campaign Committee.

Attachment 1 at 8. See also id. at 17.

In its response to the administrative complaint, Common Cause flatly denies that any of the advertisements in question were election oriented, or even partisan in nature. Instead, Common Cause argues that the advertisements in question -- both on their face and in light of all the circumstances -- constitute pure grass-roots issue advocacy and were part of a publicly announced national lobbying campaign to secure passage of campaign finance reform legislation. In respondent's view, the advertisements were merely "designed to encourage passage of pending bills and to 'enlist the assistance of the public' to achieve that end." Attachment 2 at 4-5 (citing AO 1987-7).[2] Common Cause also categorically denies, albeit not under oath, that the advertisements were directly or indirectly coordinated "in any way with any political party, candidate or public official." Attachment 2 at 5. According to respondents, their payments for the advertisements thus did not constitute campaign contributions or expenditures within the meaning of the Act, and Common Cause therefore was not required to register and report with the Commission, or ensure that appropriate disclaimers appeared as part of the advertisements. Common Cause therefore requests that the NRSC's "frivolous" complaint be dismissed.

C. Applicable Law

Pursuant to 2 U.S.C. § 433, a political committee must file a statement of organization within ten days after becoming a political committee within the meaning of 2 U.S.C. § 431(4). The treasurer of the political committee must also begin filing periodic reports of the committee's receipts and disbursements on behalf of the committee. See 2 U.S.C. § 434(a). For the purposes of the Act, the term "political committee" is defined to mean any committee, club, association, or other group of persons, including a corporation, which receives contributions aggregating in excess of $1,000 or makes expenditures in excess of $1,000 during a calendar year. 2 U.S.C. §§ 431(4)

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2. Common Cause has provided no information regarding whether it reported its disbursements pursuant to the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1988). This latter statute, of course, is outside the Commission's jurisdiction.

and 431(11). The term "contribution" is generally defined by the Act to include any gift, subscription, loan, advance, or deposit of money or anything of value for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)(a)(i). Similarly, the term "expenditure" includes 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. 2 U.S.C. § 431(9)(A)(i).

Pursuant to 2 U.S.C. § 441d(a), whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, the communication must include an appropriate disclaimer clearly stating the name of the person who paid for the communication and indicating whether the communication was authorized by any candidate or candidate's committee.

Pursuant to 2 U.S.C. § 441b(a), it is unlawful for a corporation to make a contribution or expenditure in connection with any election for Federal office. For purposes of this section, a "contribution or expenditure" includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value to any candidate, campaign committee, or political party or organization, in connection with any election to Federal office. 2 U.S.C. § 441(b)(2).

As the foregoing discussion demonstrates, the critical question with regard to each of the alleged violations here is whether Common Cause's financial activity constituted a "contribution" or "expenditure" within the meaning of the Act. If Common Cause's actions were neither "for the purpose of influencing," nor "in connection with," a Federal election, no violations of the Act's registration, reporting, or prohibitions and limitations occurred.[3] Although neither "the Act" nor the Commission's regulations define these phrases, prior enforcement and advisory opinions, as well as case law, provide a working definition for those terms.

In 1974, the United States Court of Appeals for the Third Circuit held that in order for a contribution or expenditure to be considered as having been made in connection with a federal election, "a nexus must be established between the alleged contribution or expenditure and the federal election in question." Miller v. AT&T, 507 F.2d 759, 764 (3rd Cir. 1974). In determining whether such a "nexus" exists, the Commission has considered whether a communication solicited contributions to the candidate or candidate's campaign, and whether the communication expressly advocated the nomination, election or

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3. In its response, Common Cause relies on the Supreme Court's decision in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 248 (1986), for the proposition that the Act's prohibition on corporate contributions and expenditures only applies to statements that "expressly advocate the election of defeat of a clearly identified candidate." It has been the Commission's consistent position that the language relied upon by respondents is mere dicta. See, e.g. AO 1989-28. But see FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989), appeal docketed, No. 89-5230 (D.C.Cir. Sept. 1, 1989); Faucher v. FEC, 743 F. Supp. 64 (D.Me 1990), aff'd No. 90-1832 (1st Cir. Mar. 21, 1991).

defeat of a candidate. Advisory Opinion 1990-5. However, the absence of solicitation of contributions or express advocacy regarding candidates will not preclude a determination that an activity is "campaign-related"; the totality of the circumstances may nevertheless indicate that the overall purpose of a communication was advocacy of a candidate, rather than merely advocacy of an issue or policy. Id. Factors which the Commission has considered relevant in this regard include: the content of the communication (even if it does not constitute express advocacy), the timing of the communication and the circumstances under which it occurred. See generally Advisory Opinions 1989-28, 1988-22, 1987-7, 1983-12. Furthermore, the Commission has held that, when a candidate is involved with the activity, disbursements will be considered for the purpose of influencing his election to Congress if: (1) direct or indirect reference is made to the candidacy, campaign or qualifications for public office of the candidate or the candidate's opponent; (2) the communication refers to the candidate's views on public policy issues or issues raised in the campaign; (3) or distribution of the communication in any way indicates that it is a campaign communication. Advisory Opinion 1990-5.

D. Legal Analysis

It is no secret that Common Cause lobbies extensively for campaign-finance reform. In 1987, Congressional Quarterly stated:

> If there is a newspaper in the nation that does not know the U.S. Senate is debating

> campaign-finance reform, Common Cause is certainly not to blame.
>
> The self-styled citizens' lobby has fought for more than a decade for changes in the way congressional elections are financed, a system it call a "national scandal." It is a vehement critic of political action committees(PAC's), arguing that their contributions to campaign represent something close to legalized bribery of members of Congress.

Gaunt, Common Cause's Lobbying War on PAC's, 45 CONG.Q. 1258 (1987). As noted in a recent commentary

> Common Cause, the lobbying organization that's long been in the forefront for enacting campaign reform legislation, [has] maintained its steady drumbeat of press releases and mounted a "grassroots" lobbying campaign to generate public support for the issue as well as demonstrate a political vulnerability to lawmakers.

PACs & Lobbies, July 18, 1990, p. 2 at 3. In this context, the Commission has dismissed two prior administrative complaints concerning advertisements sponsored by Common Cause alleging that Common Cause made prohibited corporate expenditures in connection with federal elections.

In MUR 1723, the National Conservative Political Action Committee filed a complaint regarding print and television advertisements Common Cause planned to finance in presidential primary election and caucus states in 1984. Attachment 15. Common Cause President Fred Wertheimer's written statement at the press conference announcing the media campaign emphasized that these states were selected because

> [o]ur goal is to make the issue of campaign finance reform a major part of the 1984 political debate. * * * Presidential campaigns provide the national forum where

issues of great significance to this country should be discussed."

Id. at 5. However, Common Cause's activities were not limited to those locations. Common Cause sponsored advertisements also appeared in major media markets around the country, including New York, Los Angeles, Chicago, Philadelphia and Washington, D.C., as well as in regional editions of Time and Newsweek magazines. Furthermore, the advertisements made no references whatsoever to any present candidates, just "Members of Congress." In fact, the only individual specifically identified in the advertisement attached to the complaint was a retiring Congressman. Common Cause also submitted a sworn affidavit from Mr. Wertheimer stating that the "media campaign was not designed or intended to influence the outcome of any federal election or to advocate or oppose any candidate for federal office." See Attachment 16 at 5. The Office of General Counsel therefore concluded that Common Cause's expenditures were not in connection with, or for the purposes of influencing, an election. Attachment 17. The Commission followed this Office's no reason to believe recommendation.

In MUR 2580, local resident Mary Zalar filed a complaint regarding a full-page advertisement which appeared in The Washington Post on January 25, 1988 alleging that Common Cause violated the same registration, reporting and contribution provisions of the Act at issue in the present matter. Attachment 18. The accompanying advertisement, which took the form of an open letter to Senator Robert Dole, criticized Dole for his opposition to public financing for congressional campaigns and campaign spending limits while Dole accepted federal matching funds for his 1988 presidential primary campaign. The advertisement, however, made no other references to Dole's candidacy. Significantly, the advertisement was not published in any of the early primary or caucus states. Furthermore, although the Virginia and Maryland (areas where The Washington Post is widely circulated) primaries were to be held on March 8, 1988, nearly two months later, Congress reconvened on the same day the advertisement appeared in the Post. Based on the content, timing and geographic placement of the advertisement, the General Counsel's Office therefore concluded that Common Cause's purpose for the advertisement was lobbying, not electioneering. Attachment 19. The Commission again followed this Office's recommendation to dismiss the complaint.

Common Cause suggests in the present matter that the Commission has already held in MUR 2580 that Common Cause's 1987 and 1988 advertisements constituted unregulated issue advocacy. Attachment 2 at 10. Common Cause's response therefore focuses primarily upon the 1990 advertisements. Although the complaint in MUR 2580 did, in fact, allege that Common Cause paid for "other" advertisements and publications for the purpose of influencing federal elections, only the Dole advertisement was attached to the complaint. The First General Counsel's Report in that matter quoted a news account as stating that Common Cause financed full page newspaper advertisements which appeared in Arizona, Delaware, Massachusetts, Minnesota and South Dakota on June 7, 1987; however, no additional information regarding these other advertisements was known at the time. Thus, while the Report made passing references to the other advertisements,[4] they were not before the Commission. The Commission's no reason to believe decision in MUR 2580 therefore is not determinative of this matter.

Although it is a close question, this Office believes that Common Cause's ads do not cross the line from issue advocacy to campaign related activity. While complainant's contention that Common Cause's ads contained the clear message that the named candidate(s) is either part of the "corrupt political system" and therefore bad for America or separate from the "corrupt political system" and therefore good for America has some merit, it appears that the overall purpose of Common Cause's advertising campaign was to lobby Congress on the campaign finance reform issue. The ads are analyzed by year below.

1. 1987 Ads

The 1987 ads challenged in this matter go further than those ads challenged in MURs 1723 and 2580. Although the ads in question in MUR 1723 appeared in local state newspapers, they made no direct reference(s) to a candidate for Federal office. On the other hand, although the ad in question in MUR 2580 made direct reference to Senator Dole's candidacy for president -- a

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4. See Attachment 19 at 7 ("In the context of this campaign, the advertisement appears to be another in a series of efforts to lobby Senators to support S.2. * * * As with the other advertisements . . ., the purpose of the advertisement was to lobby on behalf of S.2").

national office -- the ad was published only in the Washington Post. In contrast, the 1987 ads challenged herein were published in state newspapers and mentioned an incumbent Senator who was seeking re-election in 1988. All but one of these ads favorably compared the campaign finance voting record of the Senator(s) named in the text with that of the headlined Republican Senator.

Nevertheless, it is this Office's opinion that Common Cause's 1987 advertising effort was not campaign related. While all the ads contained a named Republican Senator in large bold-face type in the headline, not all of these headlined Senators sought re-election in 1988. Although all the ads were published in the home states of the named Senators where at least one Senator, either named in the headline or the text, was a candidate for re-election in 1988, the Senators who were compared were not running against each other. Hence, any contrast that was effected could not have influenced the reader to choose one candidate over another. Furthermore, the text of the "New England Senators" ad favorably contrasted the voting records of both Democrats and two Republicans to the headlined Republican. Finally, while many of the Senators had already filed their statements of candidacy (see Attachment 3), none of the ads identified the Senators as candidates. Hence, neither express advocacy nor solicitation is present in the 1987 ads. Furthermore, it appears that the additional factors which the Commission has previously deemed relevant in determining whether the overall purpose of a communication was campaign related are not present here, particularly since all of the ads appeared at least one year prior to any of the relevant elections. Instead, Common Cause's 1987 advertisements appear to be just another example of the organization's lobbying efforts on the campaign finance reform issue.

2. 1988 Ads

The 1988 ads are substantially similar to the 1987 ads. The 1988 ads likewise transcend the ads challenged in MURs 1723 and 2580 in that the 1988 ads appeared in state newspapers and mentioned candidates for Federal office. All of the 1988 ads favorably compared the campaign finance voting record of a Democrat Senator named in the text with that of the headlined Republican Senator.

Again, however, it is this Office's opinion that Common Cause's 1988 advertising campaign was not campaign related. While Republican Senators Cohen, McCain and Roth were all named in large bold-face type in the headline, only Senator Roth was seeking re-election in 1988. Admittedly all the ads were published in the home states where at least one Senator, either the Republican named in the headline or the Democrat named in the text, was a candidate for re-election; however, the Senators who were compared were not running against each other. Hence, any favorable contrast that was effected could not possibly have influenced the reader to choose one candidate over the another. Furthermore, although some of the Senators were actively seeking re-election, the ad did not identify them as candidates. Therefore, like the 1987 ads, neither express advocacy nor solicitation is present. Although some factors which the Commission has previously deemed sufficient for a finding of campaign related activity (regardless of the presence of express advocacy or solicitation) are more prevalent here than in the 1987 ads,[5] the totality of the circumstances does not demonstrate a candidate advocacy purpose. To the contrary, when viewed in the historical context within which the 1988 advertisements appeared (which was recited in the text of the ads themselves), Common Cause's 1988 advertising campaign appears to be a "grass roots" lobbying or issue advocacy effort. The fact that the 1988 ads were published in the home states of the named Senators merely represents an attempt put pressure on the Senators to support Common Cause's policy position on proposed legislation then pending in Congress by informing their constituents of the present "corrupt political system." See Advisory Opinion 1987-7.

3. 1990 Ads

In this Office's opinion, the 1990 ads also do not rise to the level of campaign-related activity, although some of these ads come close to crossing the boundary line. Common Cause's 1990 campaign consisted of at least 24 advertisements: nine identified Republican Senators in bold headlines ("Senators Ads"), 13 identified Democratic Congressmen in bold headlines ("Congressmen Ads") and two simply addressed "Members of

5. For example, these ads appeared much closer in time to the relevant elections, in some instances, within as little as four [4] months).

Congress." The latter "generic" ads appeared only in The Washington Post and The New York Times, but the ads addressed to Senators and Congressmen appeared in their home states and districts.

Admittedly, the Senators Ads are almost identical in content (if not in form) to the the 1987 and 1988 Common Cause ads at issue in this case. By publishing the 1990 ads in the home states of the Senators, Common Cause once again merely brought the campaign finance issue to the attention of the politician's constituents in the apparent hope that they, in turn, would put pressure on their Senator. Indeed, as Common Cause notes in its response to the complaint in this matter, the timing of the 1990 Senate advertisements directly correlates with the then-expectation that the Senate would be debating the Senate Election Ethics Act of 1990 within a few weeks. In fact, the Senate did debate that legislation within a month. Attachment 2 at 7. Furthermore, the timing of those ads, which ran in late June and early July 1990, appeared roughly during the time period when the Senate was in recess for the Independence Day holiday, and the Senators could be reasonably expected to be present in their home districts. Based on the foregoing, this Office therefore believes that the the 1990 Senate Ads were not campaign related.

However, the Congressmen Ads arguably go further. While only two of the named Senators were facing re-election in the 1989/1990 election cycle, all thirteen (13) Congressmen were up for re-election. All Congressmen targeted were Democrats.

While all the other Common Cause ads mentioned candidates without identifying them as such, the Congressmen Ads arguably make a veiled reference to the Democrats' candidacy: the ad which Common Cause provided us (which is supposedly representative of all the Congressmen Ads) states that Representative Carr accepted political action committee contributions during his prior election campaigns. Furthermore, while Common Cause claims that the Senators Ads were targeted at Senators who supported the filibuster that blocked Senate action on campaign finance reform, the Congressmen Ads were directed at a cross section of the House. Lastly, campaign financing was already an issue in at least one of the headlined Congressman's election campaign (Representative Doug Barnard, Jr.).[6] Based on the foregoing, the Congressmen Ads appear to be much closer to campaign advocacy. Indeed, one PAC manager remarked "[i]f these ads could be characterized as election-related, and I think a good case can be made that they are, then they represent the

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6. In regard to Barnard's campaign, the Congressional Quarterly stated:

> [B]efore a GOP opponent even appeared on the scene, Barnard was under fire in the state media for accepting more than $20,000 in 1986 campaign contributions from savings and loan executives associated with Charles H. Keating, Jr., chairman of the failed Lincoln Savings and Loan Association. * * * Billboards that have gone up around the district this spring read, 'Give the money back, Congressman Barnard.'

Donovan, Trio of House Contests Bear Close Watching, CONG.Q. 1899 (1990) (Attachment 20).

exact same kind of negative independent expenditures which Common Cause claims it so badly despises." Senate Set to Tackle Campaign Reform Bill, PACs & LOBBIES at 4 (July 18, 1990) (Attachment 21).[7]

Nevertheless, it is this Office's opinion that Common Cause's 1990 Congressmen Ads can not be viewed as election related; rather the purpose of the ads appears to have been issue advocacy. Although all ads named Democratic Congressmen in large bold-face type in the headline, arguably indirectly referred to their candidacy for re-election, and Common Cause

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7. Several of the identified Congressmen commented that Common Cause's ads both inaccurately portrayed the facts and created false images. Congressman Robert G. Torricelli (D-NJ) stated that claims made by the Common Cause newspaper ad which was directed at him were "genuinely dishonest." The Record, July 20, 1990, at b6 (Attachment 22). Torricelli further stated that the clear intent of the ad was to imply that contributions Torricelli received from PACs were all from from special interests connected with the Savings and Loan industry, and the ad left readers with the impression that his voting record favored the Savings and Loan industry to the detriment of U.S. taxpayers. Id.

Expressing concern that readers would think he also took large contributions from Savings and Loan interests, Congressman Ron Wyden (D-OR), another target of Common Cause's ads, concurred with Torricelli. Portland Oregonian, July 7, 1990 at E1 (Attachment 23). Wyden reported that Common Cause had never asked him what his views on campaign reform were and when he called Common Cause to complain about the ad "they said they were trying to change the system;" in reply, Wyden said "I want change too. I say don't try to change it by misrepresentation." Id.

In response to the ad identifying Congressman Bill Sarpalius (D-TX), the Congressman stated "[t]his is nothing but a bunch of trash... that somebody again is trying to distort our record." The Associated Press Political Service (News Wire), July 3, 1990 (Attachment 24).

Similarly, Congresswoman Marcy Kaptur (D-OH) commented that the ad addressing her was filled with half-truths, demonstrating that Common Cause did not do any research. The Associated Press Political Service (News Wire), July 5, 1990 (Attachment 25).

published the ads in the districts where the Representatives were running, the ads do not appear to take any position regarding the election or defeat of any candidate,[8] nor were campaign contributions solicited. Furthermore, although the ads' timing was close to many of the headlined Democrats' primary elections (in some instances, as little as two weeks) and the ads were published where potential voters could readily read them, the ads appear to be yet another chapter in Common Cause's long history of opposition to the present campaign system. Publishing the ads in the home districts of the named Congressmen simply brought the campaign finance issue to the attention of the politician's constituents in the apparent hope that they, in turn, would put pressure on the Representative.

4. Conclusion

As previously noted, the NRSC has alleged that Common Cause expended substantial amounts on its advertisements. While acknowledging that it indeed paid for the ads, Common Cause has otherwise not responded to this issue. The Commission, however, can reasonably assume that Common Cause's numerous advertisements cost over $1,000, and indeed probably over $5,000. Nevertheless, this Office believes that the expenditures made to finance Common Cause's advertising

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8. Thus, this case is distinguishable from MUR 2541, Farley Industries, Inc. (1987), where the advertisements in question therein both identified Richard Gephardt as a candidate and depicted him as detrimental to America due to his position on agriculture and international trade. There, the Commission found reason to believe and conducted an investigation, despite evidence of mixed motives on the part of the respondents.

campaigns of 1987, 1988 and 1990 were neither for the purpose of influencing nor in connection with any Federal elections. Therefore, this Office recommends that the Commission find no reason to believe that Common Cause has violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee. Furthermore, this Office also recommends that the Commission find no reason to believe that Common Cause violated 2 U.S.C. § 441b(a) by making prohibited corporate contributions. Lastly, since Common Cause's advertisements did not expressly advocate the election or defeat of a clearly identified candidate, no authorization statement was required. Hence, this Office recommends that the Commission find no reason to believe that Common Cause violated 2 U.S.C. § 441d.

III. RECOMMENDATIONS

1. Find no reason to believe that Common Cause has violated the Act.

2. Approve the appropriate letters.

3. Close the file.

4/4/91
Date

Lawrence M. Noble
General Counsel

Attachments
1. NRSC's Complaint
2. Common Cause's Response
3. Chart of Advertisements
4. Durenberger Ad (1987)
5. McCain Ad (1987)
6. Roth Ad (1987)
7. New England Senators Ad (1987)
8. Cohen Ad (1988)
9. McCain Ad (1988)
10. Roth Ad (1988)

11. Hatfield Ad (1990)
12. Pressler Ad (1990)
13. Members of Congress Ad (1990)
14. Carr Ad (1990)
15. NCPAC's Complaint (MUR 1723)
16. Common Cause's Response (MUR 1723)
17. First General Counsel's Report (MUR 1723)
18. Mary Zalar's Complaint (MUR 2580)
19. First General Counsel's Report (MUR 2580)
20. CONG. Q. at 1899 (1990)
21. PACs & Lobbies, July 18, 1990, at 1.
22. The Record, July 20, 1990, p.b6
23. Portland Oregonian, July 7, 1990, p.E1
24. The Associated Press Political Service, July 3, 1990
25. The Associated Press Political Service, July 5, 1990

Staff Assigned: Dodie C. Kent

FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/DELORES HARRIS DH
COMMISSION SECRETARY

DATE: APRIL 10, 1991

SUBJECT: MUR 3090 - FIRST GENERAL COUNSEL'S REPORT DATED APRIL 4, 1991.

The above-captioned document was circulated to the Commission on Friday, April 5, 1991 at 2:00 p.m.

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

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

This matter will be placed on the meeting agenda for Tuesday, April 16, 1991.

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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 3090
Common Cause)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on April 16, 1991, do hereby certify that the Commission decided by a vote of 4-2 to take the following actions in MUR 3090:

1. Find no reason to believe that Common Cause has violated the Act.

2. Approve the appropriate letters as recommended in the General Counsel's report dated April 4, 1991.

3. Close the file.

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

Attest:

4-16-91
Date

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

91040840854

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 23, 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

William B. Canfield, III, Legal Counsel
National Republican Senatorial Committee
425 Second Street, N.E.
Washington, D.C. 20002

RE: MUR 3090

Dear Mr. Canfield:

On April 16, 1991, the Federal Election Commission reviewed the allegations of your complaint dated July 27, 1990, and found that on the basis of the information provided in your complaint, and information provided by provided by counsel for Common Cause, there is no reason to believe Common Cause violated the Act. Accordingly, on April 16, 1991, the Commission closed the file in this matter.

The Federal Election Campaign Act of 1971, as amended ("the Act") allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
General Counsel's Report

91040340855

CLOSED

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 23, 1991

Roger M. Witten
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

RE: MUR 3090
Common Cause

Dear Mr. Witten:

On July 31, 1990, the Federal Election Commission notified your client, Common Cause, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

On April 16, 1991, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe that Common Cause violated the Act. Accordingly, the Commission closed its file in this matter.

This matter will become a part of the public record within 30 days. If you wish to submit any materials to appear on the public record, please do so within ten days. Please send such materials to the Office of the General Counsel.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
General Counsel's Report

91040840856

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 3090

DATE FILMED 5/1/91 CAMERA NO. 7

CAMERAMAN AS

91040340857

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3090.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF REASONS

Commissioner Lee Ann Elliott

In the Matter of:

Common Cause	)	MUR 3090

I approved the General Counsel's recommendation in MUR 3090 to find no reason to believe Common Cause violated the Federal Election Campaign Act in connection with their advertisements on campaign finance legislation pending before Congress. I do not, however, agree with any of the analysis offered in the General Counsel's Report in support of that recommendation. In my opinion, the Report's analysis urges the Commission use a test rejected by the courts to decide this case. I am writing separately, therefore, to explain my reasons for supporting the result in this matter.

The General Counsel's Report in MUR 3090 essentially asks the Commission to use a totality-of-circumstances test to evaluate this case.[1] This is improper. The correct and only standard for judging whether the respondent's speech in this matter violates §441b is whether it "expressly advocates" the election or defeat of clearly identified candidates. The Supreme Court made that determination five years ago in MCFL, but the Commission has ignored this rule of law. FEC v. Massachusetts Citizens for Life, Inc., ("MCFL") 479 U.S. 238, 248 (1986). This rule is the clear pronouncement of the high court on regulation of campaign finance and must be followed.

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1. MUR 3090 First General Counsel's Report, p. 15 ("the totality of the circumstances may nevertheless indicate that the overall purpose of a communication was advocacy of a candidate .... Factors which the Commission has considered relevant include: the content of the communication [even if it does not constitute express advocacy], the timing of the communication and the circumstances under which it occurred")(citations omitted). See also Id. at 19-26.

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I object, again, to the General Counsel's facile attempt to dodge this rule by calling the Supreme Court's holding in MCFL mere dictum. MUR 3090 First General Counsel's Report, p. 14, n. 3. It is not dictum, and the re-writing of a Supreme Court opinion has caused needless litigation and controversy, and has led to the chastising of this agency by the first circuit. Faucher v. FEC, No. 90-1832 (1st Cir. March 21, 1991) ("The Court's basis for deciding [should] not [later be treated as] dictum [simply] because a critic would have decided on another basis .... It is not the role of the FEC to second-guess the wisdom of the Supreme Court").

I do not have to recount here the legal reasoning and clarity behind the Court's use of "express advocacy" in enforcing the FECA. That has already been done by lower courts and in countless briefs ignored by the Commission.[2] What I will explain are the benefits the court-ordered "express advocacy" test has, and how that test's benefits can salvage our decision making at this agency.

"Express advocacy" is a fairly straight-forward and objective method for judging speech. When a speaker expressly calls for a candidate's election or defeat, that speech must be reported to the Commission and financed with money permissible under the FECA. The Supreme Court adopted this "express advocacy" threshold to save the statute from its constitutional deficiencies of vagueness and overbreadth. Buckley v. Valeo, 424 U.S. 1, 42-45 (1976). Although courts agree that express advocacy is not limited to the words listed in Buckley at 44 n. 52, it is also settled that the standard does not reach "implied" or "suggested" advocacy. Central Long Island Tax Reform Immediately Committee v. FEC, ("CLITRIM") 616 F.2d 45 (2d Cir. 1980) (en banc). Directly put, express advocacy is a statement from which no other reasonable inference can be drawn other than a vote for or against a candidate. FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987).

Importantly, a simply partisan discussion cannot be considered express advocacy even if it might exert some influence on voting at elections. This is because the right to speak about officeholders and issues is so

2. See FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989), appeal docketed, No. 89-5230 (D.C. Cir. Sept. 1, 1989); MUR 2163 (B'nai B'rith).

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zealously protected that only those statements which "expressly advocate" clearly identified candidates can be lawfully regulated. CLITRIM at 53 (citations omitted). These are not my ideas, but the ideas of numerous federal courts from over fifteen years of telling the Commission how it can do its work without treading on free speech.

Yet, the General Counsel's Report in MUR 3090 ignores judicial precedent and advocates an unsteady mix of fact, circumstance and innuendo. Instead of express advocacy, the Report urges the Commission consider the "overall purpose" of the speaker. MUR 3090 First General Counsel's Report, p. 19. Instead of reading the speech, we are urged to examine the speaker behind the message. Instead of reviewing what was actually said, we are asked to speculate on the speaker's motives. We are urged to review the history of the speaker and guess what his goals were.[3] In sum, we should decide whether the speaker slyly intended to expressly advocate someone's election or defeat, not if he actually did.

In my opinion, this is a huge mistake. Any attempt to regulate speech by typecasting speakers is unconstitutional and unworkable. Regulating speech by subjectively or pejoratively promoting what each of us think is the speaker's goal is equally erroneous. Furgatch at 863 ("attempts to fathom [a speaker's] mental state would distract us unnecessarily from the speech itself"). What is worse is when each Commissioner is tempted to put his or her own spin on circumstantial evidence, such as "whether Common Cause's long history of opposition to the present campaign system" is evidence that will acquit or convict them. MUR 3090 First General Counsel's Report, p. 24.

In addition to analyzing the speaker, the Report's "totality of circumstances" analysis over-emphasizes the timing, context and circumstances of the ads, instead of reading the ads themselves. Furgatch at 863 (with express advocacy, "the weight we give to the context of speech declines considerably. Our concern is with the clarity of

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3. For example, the General Counsel's Report says "it is no secret that Common Cause lobbies extensively for campaign-finance reform." The Report also quotes extensively from newspaper articles which describe the background and goals of Common Cause. MUR 3090 First General Counsel's Report, p. 15-16.

the communication rather than its harmful effects. Context remains a consideration, but an ancillary one, peripheral to the words themselves").

For example, the Report finds relevant that the 1990 Senatorial ads "appeared roughly during the time period when the Senate was in recess for the Independence Day holiday, and the Senators could reasonably expected to be present in their home districts." MUR 3090 First General Counsel's Report, p. 23. This is unbelievably irrelevant, as is the Report's discussion[4] of other circumstantial evidence on pages 23-25.

In my opinion, arguments over context, timing, and circumstances bog us down because there is no right answer once you attempt to consider them. We cannot adopt a balancing test that gives weights toward advocacy for some facts and weights toward free speech for other facts. This sort of legal-argument-by-the-pound is precisely the type of arbitrary post-hoc analysis the Supreme Court has has clearly rejected. See Buckley at 43 quoting Thomas v. Collins, 323 U.S. 516, 535 (1945) ("such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim").

An express advocacy test, on the other hand, draws a line and says precisely what speech must be paid for with permissible funds and reported to the Commission. Drawing this line will send a clear message to everyone in advance as to what speech is regulated. I support this line drawing since it is essential for speakers to know before making an expenditure whether it contains a regulated express advocacy message. See Buckley at 41 n. 48 quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (vague laws not only "trap the innocent by not providing

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4. For example, the Report amazingly finds relevant that "the Senators who were compared [in the ads] were not running against each other. Hence, any favorable contrast that was effected could not have possibly have influenced the reader to choose one candidate over the other." MUR 3090 First General Counsel's Report, p. 20, 21. This is astonishingly bad. Not only do incumbent Senators not run against each other, but the report skips over the fact that the ad was analyzing their votes as officeholders, not their merit as candidates.

fair warning," they foster "arbitrary and discriminatory application" and inhibit protected express by inducing citizens to "steer far wider of the unlawful zone" than necessary).

There is a side benefit to this bright-line test as well: it gives the Commission something it can handle. Instead of deciding whether an ad "arguably indirectly referred to their candidacy for re-election" as the General Counsel suggests, we can simply follow the court's command to[5] read the ad to see if it contains express advocacy.

In other words, our job is not to make a federal case out of everything that may have an effect on elections. If that were true, our enforcement files would be full of complaints about international events and the weather. Our job is to administer a law that separates protected speech from election advocacy, and not to judge this case by coyly inferring that "we know what Common Cause must be up to."

The way to administer this law is not to re-write court opinions, but to follow their constitutional guidance and only regulate speech containing express advocacy. That is a purely constitutional rule the Commission is not empowered to overturn or qualified to re-interpret. Regrettably, we have consistently avoided this rule of law and that has made our jobs difficult and our results incomprehensible.

In applying the correct test to the facts of this case, I find that Common Cause's ads do not contain any express advocacy. There are simply no words of advocacy, nor any mention of upcoming elections that urge voters to take action at the polls. Although I cannot imagine an issue any closer to elections than the debate over how campaigns should be financed, the text of these ads clearly prove them to be issue advocacy alone.

As the Supreme Court indicated, the distinction between the discussion of issues and the advocacy of candidates may often dissolve in practical application.

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5. A good example of how an ad should be read for express advocacy is in Furgatch at 864-65. In that case, the ad's "timing" reinforced the court's decision on express advocacy, but was not a substitute for it. See also MUR 1790 (Reagan-Bush '84) Elliott Statement, p. 17-21.

Buckley at 42. Its point is that the Commission should not be seduced by these close calls, we must only regulate the pure advocacy for and against candidates, not the advocacy of issues that campaigns may even be intimately tied to. Incumbents will always be intimately tied to public issues and legislative proposals, and the Commission will constantly be trying to separate campaign advocacy from issues of public interest. But we will never competently accomplish that job until we cease our adherence to unlawful standards and begin enforcing the Act as we've been instructed to do.

May 29, 1991

Lee Ann Elliott
Lee Ann Elliott
Commissioner

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3090.

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RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

91 MAY -3 PM 5:05

WILMER, CUTLER & PICKERING
2445 M STREET, N. W.
WASHINGTON, D. C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 633-0919,
429-9853, 429-4930, 293-5329
TELEX 440239 WCPI UI
ABA NET ABA1254

ROGER M. WITTEN
DIRECT LINE (202)
663-6170

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (4471) 839-4466
FACSIMILE 011 (4471) 839-3537
TELEX 8813918 WCP LDN

15 RUE DE LA LOI
B-1040 BRUSSELS
TELEPHONE 011 (322) 231-0903
FACSIMILE 011 (322) 230-4322

May 3, 1991

CLOSED

Lawrence M. Noble, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 3090 -- Statement for the Record

Dear Mr. Noble:

On behalf of respondent Common Cause, we submit this statement for inclusion in the public record in MUR 3090.

The Commission correctly dismissed the matter, which was initiated by a complaint filed by the National Republican Senatorial Committee ("NRSC") against Common Cause. The General Counsel's Report (the "Report") concluded that Common Cause's advertisements were issue advocacy whose purpose was to lobby legislators, and not campaign-related "express advocacy" whose purpose was to support or oppose candidates. The Report concluded that the advertisements were, therefore, not barred by Section 441b of the Federal Election Campaign Act ("FECA").

The Report, however, unjustifiably comments that some of the ads present a close question under the statute. Those comments are based on the untenable position that, even though the advertisements did not contain express electioneering advocacy, they could nonetheless be subject to Section 441b of the FECA. However, the Supreme Court has unanimously interpreted the statute to the contrary. In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986), the Supreme Court ruled that election campaigns generate issues of public interest, and that for purposes of the FECA it was necessary "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." The Court wrote, "We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of §441b." Id.

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Despite the Supreme Court's characterization of this conclusion as a "holding," the Commission has repeatedly refused to follow the Supreme Court's ruling. Thus, the Report continues to urge that it is "mere dicta" (Report, p. 14 n.3) which the FEC may disregard. This position is wrong and has consistently been rejected by the courts, most recently by the U.S. Court of Appeals for the First Circuit. See FEC v. National Organization for Women, 713 F. Supp. 428, 433 (D.D.C. 1989); Faucher v. Federal Election Commission, 743 F. Supp. 64, 68 (D. Mass. 1990), aff'd, No. 90-1832 (1st Cir. Mar. 21, 1991). The First Circuit declared:

> "The FEC, however, maintains that the language relied upon in Massachusetts Citizens For Life was mere dictum and therefore not binding on this court. We do not agree. All nine Justices assented to that portion of the opinion . . . . We cannot accept that in resolving constitutional issues such as the one presented in Massachusetts Citizens for Life, the Supreme Court proclaims the law lightly."

Under the authoritative pronouncements of the Supreme Court and other federal courts, it is clear that the NRSC complaint against Common Cause was frivolous and did not present a close question. The challenged advertisements were issue advocacy, and contained no express electioneering advocacy regarding candidates. They sought to encourage the enactment of campaign finance legislation, a government reform issue that Common Cause has promoted for many years. The advertisements lobbied Representatives and Senators, each of whom would be casting a vote on campaign finance reform in the near future. During its 20-year history, Common Cause has never supported or opposed a political candidate, nor has it ever sought to elect or defeat any candidate.

Respectfully submitted,

R. M. Witten

Roger M. Witten
Carol F. Lee
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Common Cause

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3090.

6/28/91

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 11, 1991

CLOSED

Roger M. Witten, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

RE: MUR 3090
Common Cause

Dear Mr. Witten:

By letter dated April 23, 1991, the Office of the General Counsel informed you of determinations made with respect to the complaint filed against Common Cause by the National Republican Senatorial Committee. Enclosed with that letter was the First General Counsel's Report.

Enclosed please find a Statement of Reasons from Commissioner Elliott explaining her vote. This document has been placed on the public record as part of the file of MUR 3090.

If you have any questions, please contact Dodie C. Kent, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Statement of Reasons

91040350216

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 11, 1991

CLOSED

William B. Canfield, III, Esq.
National Republican Senatorial Committee
425 Second Street, N.E.
Washington, D.C. 20002

RE: MUR 3090
Common Cause

Dear Mr. Canfield:

By letter dated April 23, 1991, the Office of the General Counsel informed you of determinations made with respect to the complaint filed by you against Common Cause. Enclosed with that letter was the First General Counsel's Report.

Enclosed please find a Statement of Reasons from Commissioner Elliott explaining her vote. This document has been placed on the public record as part of the file of MUR 3090.

If you have any questions, please contact Dodie C. Kent, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Statement of Reasons