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June 1, 2000

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

Re: Complaint Urging Investigation of the Council for Responsible Government

Dear Mr. Noble:

Attached please find the original, and two copies of a Complaint against the Council for Responsible Government. We are submitting this complaint on behalf of our client, the Kean for Congress Committee. Because the campaign committee's address is temporary, please send all correspondence to the the permanent address of the signatory of the complaint at:

Anthony S. Cicatiello
CN Communications International
205 West Milton Avenue
Rahway, NJ 07065

If you have any questions, please do not hesitate to call me at the above number.

Sincerely,

Trevor Potter

EXHIBIT 01

1812 Front Street | Scotch Plains, New Jersey 07076 | Tel: 908.322.3015 | Fax: 908.322.4843

TOM KEAN Jr. for CONGRESS

www.tomkeanjr.com

May 31, 2000

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

Re: Complaint Urging Investigation of the Council for Responsible Government

Dear Mr. Noble:

This complaint is filed to request an investigation by the Federal Election Commission ("FEC") of the actions of a Virginia corporation known as the "Council for Responsible Government" ("CRG"), and its "Accountability Project.." This entity is responsible for secretly funded mailings which attempt to influence the New Jersey Congressional Seventh District Republican primary in violation of federal law.[1]

The Federal Election Campaign Act of 1971, as amended ("FECA"),[2] prohibits contributions or expenditures by corporations in federal elections.[3] A contribution or expenditure is "anything of value made by any person for the purpose of influencing any election for federal office."[4] The same law requires that any communication advocating the election or defeat of a clearly identified candidate contain a disclaimer stating whether the communication was authorized by any candidate.[5] The federal election laws also require that (1) independent

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1 *See* Attachment A.

2 2 U.S.C. §§ 431-455.

3 *Id.* § 441b.

4 *Id.* §§ 431 (8) & (9).

5 *Id.* § 441d.

expenditures in support or opposition to a federal candidate and costing in excess of two hundred and fifty dollars ($250) be publicly disclosed in a filing with the FEC,[6] and (2) any group of persons whose principle purpose is to influence federal elections register with the FEC as a federal political committee and disclose its contributions and expenditures.[7] The communication by the CRG, a Virginia corporation formed only three weeks ago for the express purpose of making political expenditures,[8] violates each and every one of these legal requirements.

We therefore call on the Federal Election Commission to investigate this matter, and if appropriate to seek an injunction to prevent this group from continuing to violate the federal election laws in this and other elections.

The activities of the CRG in this primary election do NOT constitute constitutionally-protected "issue advocacy." Rather, they present a prima facie case of a group organized for the express purpose of influencing federal elections publishing materials urging voters to oppose Tom Kean's election. This communications are not "issue advocacy," but pure campaign advocacy. There is no "message" or "issue" in the communications except the argument that "New Jersey needs New Jersey leaders" and Tom Kean is not a New Jersey leader and would need "on the job" training. . Under applicable Supreme Court precedent, discussed below, this language *and* message constitutes express opposition to Tom Kean's candidacy for Congress. Tom Kean does not object to honest opposition—in fact, he believes that his political opponents should reveal themselves and have a public debate on the issues of importance to voters in New Jersey's seventh District. However, the Kean campaign does object to a Virginia corporation spending large sums of secret money to campaign against him without any of the disclosure required by federal election law, and without following the rules of federal campaign finance law applicable to everyone else.

I. ANALYSIS

The Supreme Court has drawn a distinction between communications which "expressly advocate" the election or defeat of a federal candidate and those which refer to candidates but only constitute "issue advocacy." In *Buckley v. Valeo,* the Court held that the limits and restrictions of the federal election laws do not apply to issue advocacy (unless it is "controlled")

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6 11 C.F.R. § 109.2.

7 *See* 2 U.S.C. § 431(4).

8 *See* Attachment B.

by a candidate.[9] The Court said its holding was necessary to provide sufficient notice of government regulation to speakers, and to protect non-election speech.[10]

Therefore, the distinction between issue advocacy and express advocacy is crucial to determining the permissibility of financing political communications with certain sources of money. For instance, it is permissible to finance issue advocacy with corporate and labor contributions or treasury monies, but impermissible to use such funds for express advocacy of a candidate's election or defeat. Distinguishing between issue advocacy exempt from federal campaign finance regulation and express advocacy subject to reporting requirements and limits on sources of payment has proven contentious in practice in recent years. However, the communications in New Jersey's Seventh District fall clearly within the definition of express election speech, rather than issue advocacy, as described below.

A. Legal Standard

First, if a communication contains "*express advocacy*" of the election or defeat of a clearly identified candidate, the communication may be regulated under federal law. "Express advocacy" is a political communication which includes specific language advocating election or defeat of a candidate.

Second, if a communication does not contain "express advocacy"—it is not deemed to be "in connection with" a federal election (unless it raises coordination issues noted below). Thus, the sponsor may run an unlimited number of such "*issue advocacy*" communications and may pay for the communication however it chooses, including from sources (such as corporations and unions) and in amounts otherwise prohibited by federal election laws.

Third, if a communication containing issue advocacy has been made in consultation with a candidate, it may be considered "*coordinated*," and this *may* result in an in-kind contribution by the speaker to the candidate, depending upon the outcome of current and future legal battles over the definition of "coordination," and whether courts will allow coordinated issue advocacy to be regulated.

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9 424 U.S. 1, 46 (1976).

10 *Id.* at 41-44; *see also* FEC Advisory Opinion 1996-11, Fed. Election Camp. Fin. Guide (CCH) ¶ 6194 (1996) (holding that a nonprofit membership organization could invite candidates for federal office to speak at its convention on issues of interest to its members without violating federal election laws provided there was *no* express advocacy of the nomination, election or defeat of any candidate).

The *Buckley* case was a facial challenge to the constitutionality of FECA. In *Buckley*, the Supreme Court confronted a wide array of Congressionally enacted prohibitions and restrictions on contributions and expenditures in connection with federal elections. Congress had written the Act broadly, regulating all spending "in connection with," or "for the purpose of influencing" a federal election, or "relative to" a federal candidate. One of the questions the Court faced was whether these statutory phrases were so vague and overbroad as to provide an unconstitutional lack of notice to persons potentially affected by the Act. The Court stressed that vagueness concerns are especially acute where, as here, "the legislation imposes criminal penalties in an area permeated by First Amendment interests."[11] "The test is whether the language . . . affords the [p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."[12] The Court noted that Congress had failed to define "in connection with" an election or "relative to a candidate."

The Supreme Court held that greater precision and clarity were required to avoid unconstitutional vagueness and held that "*explicit* words of advocacy of election or defeat" are required for candidate-related speech to fall within the Act's provisions.[13] The Court gave examples of terms which would satisfy the strict "express advocacy" test: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"

In narrowing the reach of the Act to avoid declaring it unconstitutionally vague, the Court in *Buckley* significantly restricted the reach of the federal election laws. Instead of Congress's intended broad coverage of "all spending" to "influence" federal elections (phrases presumably to be defined with greater specificity over time by the courts and the Federal Election Commission), the law as interpreted by the Supreme Court was narrowed (at least for non-candidate and non-political committee purposes) to speech that constituted "express advocacy." While that new term was not yet defined in practice, it clearly meant that much political speech Congress had intended to be regulated and disclosed would instead be beyond the reach of the campaign finance laws.

Although the Supreme Court enunciated the express advocacy test in *Buckley* in 1976, it was not until ten years later, in *FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*,[14] that the

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11 *Buckley,* 424 U.S. at 41.

12 *Id.* (internal quotation omitted).

13 *Id.* at 43 (emphasis added).

14 479 U.S. 238 (1986).

Supreme Court had occasion to apply the test to an actual communication. *MCFL* was a non-profit, non-stock corporation organized to advance anti-abortion goals. In 1972, *MCFL* began publishing a newsletter which typically contained information on the organization's activities, including the status of various proposed bills and constitutional amendments. In September, 1978—just weeks before the primary elections—*MCFL* published a special edition of the newsletter. While prior newsletters had been sent to approximately 2,000-3,000 people, *MCFL* published more than 100,000 copies of the special edition. The front page of the publication was headlined, "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were reminded that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" appeared in large black letters on the back page, and a coupon was available to clip and take to the polls to remind voters of the names of the "pro-life" candidates. Next to this statement was the following disclaimer: "This special election edition does not represent an endorsement of any particular candidate." An accompanying flyer placed a "y" next to the names of candidates who supported the *MCFL* view on a particular issue; an "n" indicated that a candidate opposed *MCFL*'s position.

Section 441b of the Act prohibits any corporation from using treasury funds "in connection with" a federal election, and requires that any expenditures for such purpose be financed by voluntary contributions into a PAC. The FEC alleged that *MCFL*'s expenditures in financing the special election newsletter constituted an illegal corporate contribution to the candidates named in the newsletter. As in *Buckley*, the Court ruled that an expenditure "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."[15]

The court held that the *MCFL* newsletter **was** express advocacy because it urged readers "to vote for 'pro-life' candidates," and provided the names and photographs of candidates meeting that description. Said the court:

> The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral

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15 *Id.* at 249.

advocacy. The disclaimer of endorsement cannot negate this fact.[16]

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[16] *Id.* Because the Court found the *MCFL* newsletter to be express advocacy, it ruled that *MCFL*'s expenditures violated the Act. The Court then ruled that the ban on federal election expenditures by incorporated entities was unconstitutional as applied to issue-oriented organizations such as *MCFL*, and other 501(c)(4)-type organizations that are not themselves funded by for-profit corporations. *Id.* at 264.

In the wake of these Supreme Court rulings, as well as other lower court decisions, in 1995 the FEC promulgated new regulations on what kinds of communications constitute express advocacy. The regulation states:

> *Expressly advocating* means any communication that –
>
> (a) uses phrases such as "vote for the President," "re-elect your congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life," or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!"; *or*
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
>
> > (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(Continued...)

The Court's application of the express advocacy test in *MCFL* is noteworthy because the Court either extended or clarified (depending on the analyst's positioning) the *Buckley* definition of express advocacy to include words which are "in effect" an explicit directive "marginally less direct" than the *Buckley* language.[17]

B. CRG Activities in New Jersey

The communications by the "Accountability Project of the Council for Responsible Government" parallels the election speech in the flyers from Massachusetts Citizens for Life that the Supreme Court found expressly advocated the election of pro-life candidates. The CRG communications identify their position: "New Jersey Needs New Jersey Leaders;" and states that Tom Kean does not meet this criteria for election: "Tom Kean moved to New Jersey to Run for Congress," "Tom Kean lived in Massachusetts and Washington," "We can't afford on the job training" "Tom Kean may be a nice young man...but he needs more experience dealing with local issues and concerns." Thus, "Vote Pro Life" in the MCFL case is the functional equivalent here of "New Jersey needs New Jersey leaders": an admonition to vote only for candidates with New Jersey experience. Just as the MCFL flyer then listed the candidates who were pro-life, the CRG mailers identify Tom Kean as the candidate who does NOT have New Jersey "experience."

(...Continued)

> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22.

Part (a) of these regulation includes all of the express advocacy terms that the Supreme Court identified in *Buckley* and thereby incorporates and broadens the Court's decision into the Commission's regulations. Part (b) incorporates the more flexible *Furgatch* Ninth Circuit express advocacy standard into the FEC's regulations, which are in effect throughout the country. *But see Maine Right to Life Comm. v. FEC*, 914 F. Supp. 8 (D. Me.) (holding that subpart (b) of the Commission's new regulations is unconstitutional on its face, regardless of how it might be applied), *aff'd*, 98 F.2d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997).

[17] *See id.* at 249 (concluding that the *MCFL* publication provides "*in effect* an explicit directive: vote for these (named) candidates") (emphasis added); *see also id.* (acknowledging that the electoral message in *MCFL* is "marginally less direct than 'Vote for Smith' [and other terms identified in *Buckley*]").

As the Supreme Court noted in MCFL, the communication "cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians." Rather it provides in effect an explicit directive-vote for these named candidates (here, to vote against Kean in the CRG communications). The fact that this communication is marginally less direct that "Vote for Smith" does not change its essential nature. The Edition goes "beyond issue discussion to express electoral advocacy."[18] The CRG communications do not even *purport* to be a discussion of any "issue" other than the qualifications of Tom Kean to hold federal office and does not *purport* to propose any other action than to elect someone with New Jersey experience. Its "message" is clear and not subject to multiple interpretations: "tell Tom Kean" he is not qualified to be elected to Congress from New Jersey. Under these circumstances, it is a communication expressly advocating the defeat of Tom Kean, a federal candidate, and not a discussion of issues that incidentally includes reference to candidates. As such, CRG is required to register with the FEC as a federal political committee, must disclose its donors, and may not accept contributions from any corporation or from any individual in excess of $5,000 per year. In addition, if the CRG coordinated its activities with any federal candidate, then the communication must be reported by such federal campaign as an in-kind contribution: here the likely cost of the communication makes it probable the inkind contribution would be in excess of the $5,000 per election limit for in-kind contributions to a campaign.

Very little is known about the Council for Responsible Government beyond the fact that it is a Virginia corporation first registered with the Virginia State Corporation Commissions several weeks ago. The sources of its funding are completely unknown. However, a May 24, 2000 article in the Star-Ledger contains the following quotation from Gary Glenn, identified by the reporter as "a CRG board member":

> The very purpose of our group is to influence the outcome of elections . . . . The outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy. Clearly, we believe Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy.[19]

Another article, an Associated Press report, states that Bill Wilson is a consultant in Virginia who claims to "run the group's Board," and then quotes him as follows:

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18 *MCFL* at 249.

19 *See* Attachment B.

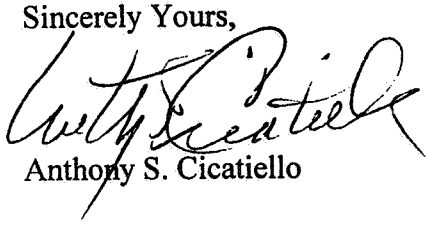
> Wilson said the group hopes to raise and spend $3 million this year in primary and general campaigns.[20]

What these statements demonstrate is that it is the purpose and express intention of the CRG is to engage in federal election activity requiring registration and reporting at the FEC.

II. CONCLUSION

For all of the above reasons, the Kean for Congress campaign calls upon the FEC to expeditiously investigate the election communications from CRG, and take all necessary actions to ensure that CRG and any candidate with whom it has been coordinating are brought into full compliance with the federal election laws.

Sincerely Yours,



Anthony S. Cicatiello

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20 *See* Attachment C.

Verification

I, Anthony S. Cicatiello, swear that the facts set out above are true and correct to the best of my knowledge and belief, based on publicly available information and news articles.

Anthony S. Cicatiello

May 31, 2000
Dated

Sworn and subscribed to
before me this 31st day of
May, 2000.

Barbara A. Townley
Notary Public
My Commission expires: APRIL 29, 2003

BARBARA A. TOWNLEY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 29, 2003

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For the last 5 years Tom Kean Jr. has lived in Massachusetts.

Before that, he lived in Washington, D.C.

And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector.

And until he decided to run for Congress— Tom never paid property taxes.

No experience.

New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion.

Pat Morrisey has experience dealing with important issues.

It takes more than a name to get things done.

Tell Tom Kean Jr....