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# United States Senate

SELECT COMMITTEE ON ETHICS

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August 8, 1990

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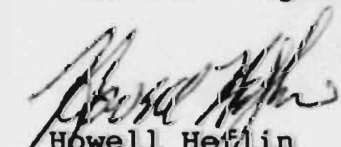
The Honorable Lee Ann Elliott  
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999 E. St. N.W.  
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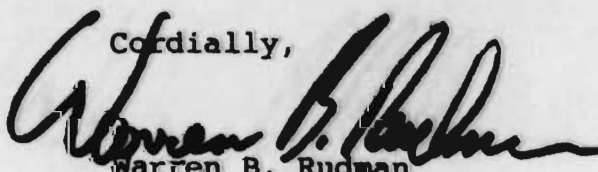
Dear Madam Chairman:

United States Senate Select Committee on Ethics Supplemental Procedural Rule 8(a) provides that whenever the Committee determines by majority vote that there is reason to believe that a violation of law may have occurred, it shall report such possible violation to the proper state and federal authorities.

Pursuant to this Rule, the Ethics Committee herewith encloses for your attention a copy of its Report to the United States Senate in the investigation of Senator David F. Durenberger. The enclosures include a copy of the evidence introduced at, and a transcript of, the Committee's June 12 and 13, 1990 adjudicatory hearings, and memoranda submitted to the Committee by counsel for Senator Durenberger.

With best regards,

  
Howell Heflin  
Chairman

Cordially,  
  
Warren B. Rudman  
Vice Chairman

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## INVESTIGATION OF SENATOR DAVID F. DURENBERGER

JULY 20 (legislative day, JULY 10), 1990.—Ordered to be printed

Mr. HELFIN, from the Select Committee on Ethics,  
submitted the following

### REPORT

[To accompany S. Res. 311]

The Select Committee on Ethics, having considered an original Resolution, reports favorably thereon and recommends that the Resolution do pass.

Pursuant to Article I, Section 5, Clause 2 of the United States Constitution, S. Res. 338 (88th Congress), as amended, and Rule 5(f) of the Committee's Supplementary Procedural Rules, the Select Committee on Ethics submits this Report in support of its recommendation to the Senate that Senator Durenberger be denounced.

#### I. PROCEDURAL HISTORY

On September 27, 1988, the Committee received a complaint against Senator David Durenberger from 39 members of the Minnesota Bar. The complaint alleged that the Senator had violated laws and rules within the Committee's jurisdiction, in part through an arrangement he had with a publisher, Piranha Press. The complaint was referred to the Senator for response on October 28, 1988.

The complaint and the Senator's response were considered by the Committee, which voted unanimously on March 1, 1989 to proceed with a Preliminary Inquiry into the issues raised therein. The following day, Senator Durenberger was advised that such an Inquiry would be undertaken, and he pledged and has since provided his complete cooperation.

Committee staff attorneys conducted the Preliminary Inquiry with the assistance of three investigators from the Office of Special Investigations of the General Accounting Office. Documents and tape recordings were provided by Senator Durenberger in response to the Committee's request. Subpoenas were issued and records were obtained from the publisher and others. Attorney-client privileges were waived by the Senator and the publisher, and records

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and testimony were provided by attorneys for the Senator and the publisher.

The Committee staff reported the results on the Preliminary Inquiry on June 19, 1989. On the basis of that report, the Committee unanimously concluded on August 3, 1989 that the evidence provided "reason to believe" that possible violations within the Committee's jurisdiction may have occurred. The Committee also retained Special Counsel, Robert S. Bennett, to assist in conducting an Initial Review.

Following his August 3, 1989 designation as Special Counsel, Mr. Bennett conducted an extensive examination into the facts. Senator Durenberger appeared personally before the Committee on February 8, 1990. On February 6, 1990 and February 20, 1990 Special Counsel submitted reports on the Initial Review.

On February 22, 1990, the Committee determined that there was "substantial credible evidence which provided substantial cause" to conclude that there were possible violations of law or Senate Rules within the Committee's jurisdiction, or that there was possible conduct which may reflect upon the Senate. Accordingly, the Committee voted unanimously to conduct an Investigation pursuant to Committee Rule 5. Senator Durenberger was promptly notified of the Committee's decision. By letter dated March 1, 1990, pursuant to Committee Rule 5(c), the Senator was formally notified of this decision and was provided with a description of the evidence. The Committee's Resolution and letter are attached as Appendix A to this Report.

Specifically, the Committee resolved that there was substantial credible evidence providing substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, as follows:

1. Senator Durenberger may have violated the honoraria limits established by 2 U.S.C. 31-1 and 2 U.S.C. 441i by accepting payments in excess of such limits as consideration for speeches or appearances during calendar years 1985 and 1986.

2. Senator Durenberger may have violated the provisions of Senate Rule 34 (The Ethics in Government Act of 1978, as amended) by failing to report in his financial disclosure reports for calendar years 1985 and 1986 the acceptance of reimbursement for the necessary expenses of travel undertaken in connection with appearances related to Piranha Press.

3. Senator Durenberger may have converted a campaign contribution to personal use in violation of Senate Rule 38, paragraph 2, and may have failed to report and deposit a campaign contribution in violation of Section 434(b)(2) of the Federal Election Campaign Act and FEC regulations, by transferring to Piranha Press Inc. a \$5,000 check made out to "Durenberger for U.S. Senate."

4. Senator Durenberger may have violated 40 U.S.C. 193d and the Senate Rules Committee's regulation prohibiting the commercial use of Senate space, when he was paid an honorarium or other fee for six appearances in Senate controlled space subject to the statutory and Rules Committee prohibition.

5. Senator Durenberger may have accepted gifts of ground transportation (limousine service) in the Boston area in violation of the

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Senate Gifts Rule (35) during 1985 and 1986, in connection with personal travel to Concord, Massachusetts.<sup>1</sup>

In December 1989, new allegations concerning Senator Durenberger's ownership and use of a Minneapolis condominium appeared in the Minnesota press. Following the publication of these reports, the Committee unanimously voted to initiate a Preliminary Inquiry concerning the condominium matter, and so notified the Senator.

Special Counsel submitted his Final Report on the Preliminary Inquiry into the condominium matter on May 8, 1990. Thereafter, the Committee unanimously determined that there was "substantial credible evidence providing substantial cause" to conclude that there was possible improper conduct which may reflect upon the Senate by Senator Durenberger, and possible violations of laws or Senate Rules within the Committee's jurisdiction.

Specifically, the Committee resolved on May 9, 1990 that there was substantial credible evidence providing substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, as follows:

Senator Durenberger may have abused his United States Senate Office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate. Such conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office, the misrepresentation of the ownership of the property for which he was claiming lodging reimbursement and the backdating of real estate transactions and certain documentation relating to those transactions.

Senator Durenberger also may have violated certain provisions of the Ethics in Government Act relating to the administration of his qualified blind trust, including those provisions relating to communications regarding the trust and its assets.

Senator Durenberger was notified of the Committee's decision immediately thereafter. Pursuant to Committee Rule 5(c), the Senator was formally advised of this action by letter dated May 14, 1990. The Committee's Resolution and letter are appended hereto as Appendix B.

The Committee, therefore, announced on May 9, 1990 that the condominium matter also would be the subject of an Investigation. The Committee further announced that the hearings previously scheduled to begin on June 12, 1990 would include all matters under Investigation. On May 16, 1990, the Committee heard further argument from the Senator's counsel, and on May 17, 1990 Senator Durenberger again appeared before the Committee to provide information and respond to questions.

<sup>1</sup> At the same time, the Committee announced that allegations in the original complaint concerning the use of Senate staff in connection with the Senator's books would not be a part of any investigation because of an absence of evidence of improper use of staff, and that allegations about the solicitation of appearances before various Boston groups also would not be a part of any investigation, because of an absence of evidence of improper influence.

Because the Investigations relating to both the Piranha Press and condominium matters were concerned with possible disciplinary action against Senator Durenberger, the hearings held on June 12 and June 13, 1990 were conducted as "adjudicatory" hearings pursuant to the Committee's Supplemental Procedural Rule 6 (c), and the procedures specified in Rule 6(j) were therefore followed.

Senator Durenberger was accorded all the rights and privileges guaranteed to a respondent under Rule 6, including the right to call and examine witness of his own choice and cross-examine other witnesses. In this case, the Committee subpoenaed all twenty-five potential witnesses identified by Senator Durenberger, as well as those thirty-two witnesses named by Special Counsel. At the close of opening statements in the hearing, Senator Durenberger waived his right to call and question witnesses, to testify as a witness, to have further hearings, to cross examine witnesses previously identified by Special Counsel from whom affidavits had been obtained, and any other due process rights provided by the Committee's Rules. The Senator, through counsel, requested that the Committee decide the case upon the written record contained in his and Special Counsel's exhibits.<sup>2</sup>

## II. EVIDENCE GATHERED BY SPECIAL COUNSEL DURING THE COMMITTEE'S PROCEEDINGS

The evidence gathered by Special Counsel and introduced at the hearing in this matter consisted largely of materials produced voluntarily to the Committee by Senator Durenberger, documents subpoenaed from third parties, and witness affidavits. This evidence is summarized in detail in the Report of Special Counsel. The Committee accepts the findings of Special Counsel, and by unanimous consent adopts the Report of Special Counsel which is incorporated herein and attached hereto as Appendix C.

Generally, the evidence shows that in the fall of 1984, Piranha Press published Senator Durenberger's first book, a collection of "white papers" on national defense and security issues entitled *Neither Madmen Nor Messiahs*. In April of 1986, Piranha Press published a second book by the Senator, a collection of speeches on health care topics entitled *Prescription for Change*.

In early 1985, Senator Durenberger entered into an agreement with Piranha Press pursuant to which he made 113 appearances before various trade associations and other businesses across the country in 1985 and 1986 in promotion of these books. These sponsoring organizations paid Piranha Press a fee, typically between \$1,000 and \$5,000 plus travel expenses, for the Senator's appearance. Pursuant to its agreement with the Senator, Piranha Press then paid Senator Durenberger \$100,000 in quarterly payments during the two year period at issue.

The evidence demonstrates that the arrangement between Senator Durenberger and Piranha Press was not a good faith book pub-

<sup>2</sup> Prior to waiving his rights under the Rules, Senator Durenberger was specifically informed that, although Special Counsel had made a recommendation as to the appropriate sanction, the Committee had made no decision and was not precluded from recommending any sanction, including expulsion.

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lishing or promotional contract, but was instead a means of converting into "stipendary income" fees which would otherwise have been treated as honoraria subject to 2 U.S.C. § 31-1 and 2 U.S.C. § 441i. The evidence further demonstrates that the principal purpose of the agreement was not to promote the sale of Senator Durenberger's books, but was rather to permit the Senator to earn fees for speaking engagements. Over the two year term of the arrangement, the Senator's "promotional appearances" generated approximately \$248,300 in speaking fees. In contrast, Piranha Press earned only approximately \$15,500 in book sales during that same time period.

The evidence further reveals that the Senator's Piranha Press speeches appear uniformly to have been the result of invitations extended to the Senator in his capacity as a United States Senator to deliver what would otherwise have been treated as traditional honoraria speeches. None was the result of invitations to the Senator to speak about or promote his books, nor were any initiated by Piranha Press.

The evidence also shows that, at the Senator's direction, his staff forwarded to the publisher a number of honoraria speech invitations to be handled instead as Piranha Press appearances. In addition, throughout the term of his agreement with Piranha Press, Senator Durenberger personally designated as Piranha Press appearances what were in reality honoraria appearances.

The evidence gathered by Special Counsel reflects that Senator Durenberger did not mention either his books or his publisher during a great many of his Piranha Press appearances. Often, in those instances when he did mention his books, his only reference was extremely brief or was belittling of the book's contents. The evidence further demonstrates that on several occasions, groups before which the Senator made "promotional appearances" were told that it would not be necessary to display the Senator's books at his appearance. Moreover, Senator Durenberger made a number of "promotional appearances" before health care groups well in advance of the publication of his book on health care—at the time, his only published book was a collection of "white papers" on national defense issues. The evidence further reflects that the Senator's Piranha Press speeches were indistinguishable in substance from his traditional honoraria appearances.

On approximately twenty-three occasions, Senator Durenberger spoke at an event addressed by other Members of Congress. While the other Members treated these appearances as traditional honoraria events, and reported fees received as honoraria, Senator Durenberger treated these appearances as Piranha Press "promotional appearances."

The evidence also shows that on several different occasions, members of the Senator's staff or a representative of Piranha Press insisted that a group before which the Senator was to appear pay a fee in excess of \$2,000 for the Senator's appearance. Often, the fee charged was as high as \$5,000.<sup>3</sup>

<sup>3</sup> Section 441i of the Federal Election Campaign Act (2 U.S.C. § 441i) prohibits the acceptance of honorarium of more than \$2,000 for each appearance, speech or article.

The evidence reflects that payment for these "promotional appearances" by the Senator typically was made directly to Piranha Press. However, on twenty-six occasions sponsoring organizations paid Senator Durenberger directly. These checks, totalling approximately \$56,000, were deposited into the Piranha Press bank account. Twenty-one of these checks reflected Senator Durenberger's personal endorsement to Piranha Press.

Prior to performing any services under his agreement with Piranha Press, Senator Durenberger through counsel requested and received an advisory opinion from the Federal Election Commission ("FEC") stating that income paid to him from the publisher would be considered a "stipend" rather than "honoraria." The evidence reflects that the request for this opinion did not fully disclose or accurately reflect the terms of the Senator's arrangement with Piranha, and in fact was highly misleading. Specifically, the request did not state that the groups before which the Senator would speak would pay a fee to Piranha Press for his appearance. The request also did not reflect that the Senator's appearances would be the result of invitations to deliver traditional "honoraria" speeches extended to him in his capacity as a United States Senator.

The evidence further reflects that in 1985 and 1986 the Senator failed to timely report his receipt of travel expense reimbursement from forty-three organizations before which he made Piranha Press and Boston area appearances.<sup>4</sup> In addition, on six separate occasions in 1985, Senator Durenberger made Piranha Press appearances in United States Capitol and Senate rooms. The sponsoring organizations paid Piranha Press fees ranging from \$250 to \$2,000 for these appearances.

In addition, on December 5, 1986 Senator Durenberger addressed the annual meeting of the Pathology Practice Association. In connection with this appearance, the Association's federal political action committee sent a check to the Senator's official campaign committee in the amount of \$5,000, payable to "Durenberger for U.S. Senate." This campaign contribution was deposited into the Piranha Press account, from which the Senator was paid by Piranha Press for his "promotional appearances."

As to Senator Durenberger's travel in the Boston metropolitan area, the evidence demonstrates that in 1985 the Senator began to have regular meetings for entirely personal reasons with Dr. Armand Nicholi in Concord, Massachusetts. On eleven occasions in 1985 and 1986 the Senator traveled to Boston to meet with Dr. Nicholi in Concord, and later met with a business or other group in the Boston area. On five additional occasions in 1985 the Senator travelled to Boston solely in order to meet with Dr. Nicholi in Concord, and did not meet with representatives of any business or organization. Typically, the Senator travelled from Boston to Concord, and returned to Boston, by rented limousine. The evidence shows that the cost of this and certain other limousine travel unrelated to official business in the Boston area was paid by various

<sup>4</sup> On July 27, 1989, Senator Durenberger filed amended Financial Disclosure Reports for the 1985 and 1986 calendar years, in which he listed reimbursements of travel expenses received from thirty-nine organizations. As of the date of the hearing in this matter, however, Senator Durenberger has not disclosed his receipt of travel reimbursements from four organizations for five trips he made in 1985.

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businesses or organizations with a direct interest in legislation within the meaning of Senate Rule 35.

Regarding the condominium matter, the evidence reflects that in 1979, Senator Durenberger purchased a one-bedroom condominium in Minneapolis, Minnesota in which he then stayed during his travels to that city. Senator Durenberger has represented that effective July 28, 1983, he formed a partnership with Roger Scherer, the owner of the condominium unit located directly above his. The Senator and Mr. Scherer each contributed their respective condominium units to this entity. Between August 1983 and March 31, 1987, Senator Durenberger rented his condominium from the partnership at a *per diem* rate of \$65. Senator Durenberger claimed and received reimbursement from the United States Senate for his stays in the unit.

The evidence demonstrates that the partnership entity was created as a means of permitting Senator Durenberger to claim reimbursement from the Senate for the cost of renting his condominium unit, and that Senator Durenberger knowingly participated in the backdating of the partnership transaction in order to justify his requests for Senate reimbursements. The evidence further reflects that the partnership entity itself was not conceived until the fall of 1983. The documents memorializing the creation of the partnership, and the transfer of the condominium to the partnership, were not created or executed until early 1984.

Even after the formal creation of the partnership, the Senator held a significant ownership interest in the unit. The evidence reflects that with the Senator's knowledge and authorization the name of the partnership was changed from the "Durenberger-Scherer Partnership" to the "703-603 Association." As a result, the Senator's ownership interest in the condominium was concealed from the Senate Disbursing Office.<sup>5</sup>

The evidence also reflects that in June 1985, the Senator deeded the condominium to a blind trust, established pursuant to the Ethics in Government Act, and approved by this Committee in February 1986. Thereafter, the Senator continued to be an active participant in the management of this trust asset. The evidence reflects that Senator Durenberger repeatedly consulted the trustee concerning the condominium, and further that he participated in negotiating the sale of the unit to the Independent Service Company ("ISC"). In addition, Senator Durenberger periodically requested and received financial information regarding the trust holding.

The evidence also reflects that in June 1987, following the termination of the partnership, Senator Durenberger's attorney informed him that he could not opine that the Senator's claims for Senate reimbursements for the period from 1983 through March 1987 were proper. Senator Durenberger failed to take any action at that time to determine the appropriateness of those reimbursements. Senator Durenberger did not undertake such action until 1989, when various press reports questioned these transactions.

The evidence demonstrates that following the termination of the partnership on March 31, 1987, Senator Durenberger structured a

<sup>5</sup> We also note that Senator Durenberger did not disclose his ownership interest in the partnership on his Financial Disclosure Report.



purported sale of the condominium unit to ISC, a Minnesota business operated by Paul Overgaard, the Senator's personal friend and 1982 Campaign Manager. According to Mr. Overgaard, he would not have entered into this transaction were it not for the Senator's agreement to rent the condominium from ISC, which both parties understood would be financed at least in part through Senate reimbursements.

The evidence reflects that the condominium sale to ISC was structured to be "effective" April 1, 1987. The documentation produced to the Committee in this matter, however, evidences that ISC was not identified as a potential purchaser until the summer of 1987, several months after the purported effective date of the sale. The evidence further demonstrates that the sale was made retroactive to April 1, 1987 in order to justify the Senator's claims of Senate *per diem* lodging reimbursement for his condominium stays back to that date. The documentation in this matter also reflects that the Senator and Mr. Overgaard agreed that ISC would reconvey the property to the Senator on demand.

The evidence shows that in December 1987, ISC generated invoices for the Senator's stays in the condominium for the period from April to October 1987. Based on these newly created invoices, in December 1987 the Senator claimed Senate reimbursement for the past lodging costs.

The evidence also shows that the lease agreement between the parties, pursuant to which Senator Durenberger was renting the property from ISC, was not signed by the Senator until April 1989. Although Mr. Overgaard repeatedly requested completed documentation of the transaction throughout 1988 and 1989, the letter agreement memorializing the terms of the sale, the deed and the related real estate documents were not delivered to Mr. Overgaard until October 1989. The evidence further demonstrates that the Senator's lawyer delayed in completing this paperwork because of the Senator's own dissatisfaction with the financial terms of the transaction. Moreover, because the necessary documentation was never filed with the county Registrar of Titles, as of the initiation of the Committee's proceedings in this matter ISC still did not hold legal title to the property.

Finally, the evidence in this matter reflects that Senator Durenberger claimed and received Senate reimbursement for his condominium lodging costs on a fairly regular monthly basis between February 1988 and November 1989. During this period, however, he made only nine lump sum rental payments to ISC. Senator Durenberger therefore had the use of Senate reimbursement funds for substantial periods of time.

### III. SENATOR DURENBERGER'S RESPONSE TO SPECIAL COUNSEL'S EVIDENCE

The evidence introduced by Senator Durenberger during the hearing in this matter consisted largely of documents also marked as exhibits by Special Counsel, and affidavits from former staff members and witnesses to the condominium transaction.

At the hearing, both Senator Durenberger and his counsel addressed the Committee. Senator Durenberger through his counsel

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admitted that mistakes were made and that there have been violations of rules. The Senator's counsel asserted, however, that the Senator acted throughout in good faith and upon the advice of lawyers and other advisors, that any mistakes or violations were the result of the Senator having been inattentive and unwise, and that the Senator had no intent to violate the rules.

As evidence that he acted in good faith in entering into his arrangement with Piranha Press, Senator Durenberger emphasized that he obtained an advisory opinion from the FEC approving the arrangement and concluding that the income to him from the publisher would be a "stipend," not honoraria. Senator Durenberger further asserted that he also asked Ethics Committee staff about the arrangement with his publisher and was told that there was no problem, if the FEC approved.

The Senator's counsel asserted that Senator Durenberger relied upon his personal attorney, Michael Mahoney, to insure that the FEC opinion request included all relevant facts. He further asserted that the Senator relied upon Mr. Mahoney to insure that the Piranha Press arrangement complied with applicable laws and rules.

Senator Durenberger's counsel stated that the Senator proceeded in good faith in implementing his arrangement with Piranha Press. He noted that Senator Durenberger sought and received confirmation from Michael Mahoney that the FEC opinion contemplated the referral to Piranha Press of routine speaking requests made to his Senate office.

Senator Durenberger's counsel acknowledged that the Senator did not "promote" his books or his publisher at all of the Piranha Press appearances. He asserted, however, that Senator Durenberger believed that he fulfilled his obligations under the contract with Piranha Press, whether or not he explicitly promoted his books or the publisher, so that income from speeches held under the auspices of his publisher was covered by the "stipendary" arrangement. Counsel also noted that the publisher never told the Senator exactly what he should do to promote his books or complained about his presentations. Therefore, the Senator believed that he was justified in thinking that a good speech or appearance before an audience promoted his publisher and his books, even if neither was mentioned.

As further evidence of his belief that his Piranha Press income was a "stipend" and that he was proceeding in good faith, Senator Durenberger and his counsel noted that there was never an attempt to conceal the Senator's income from the Piranha Press arrangement, and that he disclosed it on his calendar year 1985 and 1986 Financial Disclosure forms. The Senator and his counsel further noted that, during the implementation phase of the Piranha Press arrangement, the Senator described his arrangement to several other Senators as a legitimate way of earning income not subject to the honorarium limits. The Senator's counsel argued that the Senator would not have done so had he believed that the arrangement was in any way unethical or improper.

Senator Durenberger's counsel submitted that the Senator's failure to disclose the travel reimbursements received in connection with the Piranha Press and Boston area appearances was due

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solely to the oversight of his lawyers and members of his staff who were handling this matter for him. Further, upon being informed of his "technical" violation, Senator Durenberger amended his reports. Thus, the Senator's counsel argued, no sanction for this mistake in reporting is required.

As to the handling of the campaign contributions from the political action committee of the Pathology Practice Association, Senator Durenberger's counsel asserted that the Senator likely never saw or knew of this check, that Piranha Press should have made some further inquiry upon receiving the check but did not, and that it would be inappropriate to impose a sanction under these facts.

Regarding the limousine services received in connection with his visits to Concord, Massachusetts, the Senator through counsel acknowledged violations of Senate Rule 35. His counsel asserted, however, that the Senator did not discover how expensive the use of these limousines was until this investigation began. Furthermore, the Senator's counsel stated that on many of the occasions when the Senator received such service it facilitated his attendance at an appearance which had brought him to Boston. The Senator's counsel therefore contended that a harsh sanction is not appropriate.

Senator Durenberger's counsel argued that the Senator's six Piranha Press speeches made in U.S. Capitol facilities in 1985 did not violate the law, that the Rules Committee had not specifically prohibited speaking for a fee in these rooms, and that it would therefore be inappropriate to sanction the Senator for this conduct.

As to the condominium matter, Senator Durenberger stated that he sought reimbursement for staying in the Minneapolis condominium in good faith reliance upon the advice of his lawyers and other advisors. Moreover, Senator Durenberger stated that his reliance upon his lawyers and advisors demonstrates his commitment to conduct himself in compliance with the rules.

Specifically, Senator Durenberger noted that he was advised in December 1983 by Randall Johnson that he could claim *per diem* reimbursement from the Senate for his condominium stays. He also pointed to a memorandum from a member of his Senate office staff advising him that the arrangement had been discussed with the staffs of the Senate Rules Committee and Senate Ethics Committee. Finally, the Senator noted that attorneys Richard Langlais, Donald Lattimore, Michael Mahoney and David Steingart all were involved in advising him on various aspects of the partnership arrangement.

Senator Durenberger's counsel also asserted that the Senator and Roger Scherer agreed to place their respective condominiums into some form of "joint business venture" as of July 28, 1983, and that the documents which were later created and signed merely reflected the historical date of that understanding.

Regarding the collection of Senate reimbursement after the termination of the partnership, the Senator stated through counsel, as did Mr. Overgaard in his affidavit, that Mr. Overgaard had agreed in late 1986 to buy the condominium. Although the sale initially was to be effective as of January 1, 1987, because the attorneys were slow to dissolve the partnership it could not be made effective until April 1, 1987.

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Mr. Overgaard and Mr. Mahoney stated in affidavits submitted by the Senator that the Senator's agreement with ISC was in the nature of a Contract for Deed. The Senator's counsel stated that the attorneys' failure to prepare the documents in a timely manner does not affect the April 1, 1987 "effective" date of the sale. The Senator also noted that he relied not only upon the advice of his personal attorney, Michael Mahoney, in claiming reimbursement after April 1, 1987, but also upon the advice of Douglas Kelley, his Administrative Assistant at that time and a former Assistant United States Attorney.

As to his conduct in connection with his Qualified Blind Trust, the Senator through counsel admitted to violations of the Ethics in Government Act. The Senator's counsel stated, however, that Mr. Mahoney (the Senator's trustee and attorney) never advised the Senator that he should refrain from any involvement in this real estate sale and that, in fact, Mr. Mahoney consulted with him about the sale. The Senator's counsel acknowledged that the condominium was not an appropriate asset for placement in a blind trust, because the nature of the asset and its continued use defied any notion that the Senator would not have knowledge of it.

#### IV. FINDINGS OF THE COMMITTEE

The Committee makes the following findings respecting the matters which are the subject of the Committee's Investigation.

Senator Durenberger did not proceed in good faith in instituting his arrangement with Piranha Press and in obtaining an advisory opinion from the FEC. Although the Senator's arrangement with Piranha Press was patently different from a customary author-publisher agreement, the facts which would clearly demonstrate the difference were not included in the FEC opinion request.

The Committee further finds that Senator Durenberger's arrangement with Piranha Press was simply a mechanism to evade the statutory limitations on honoraria, and that the monies paid for the Senator's Piranha Press appearances by the sponsoring organization were in reality honoraria. The Committee has concluded that none of Senator Durenberger's 113 "promotional" fee-earning Piranha Press appearances was initiated through the publisher, nor were any the result of requests for the Senator to appear to "promote" his book or publisher. Instead, each of the Senator's Piranha Press appearances resulted from routine honoraria speech requests made to the Senator personally or through his Senate office.

Senator Durenberger did not proceed in good faith in implementing his arrangement with Piranha Press. The Committee has found no evidence that the Senator made any credible effort to promote either his book(s) or the publisher at his Piranha Press appearances. At the Senator's direction, speaking invitations which were accepted as honoraria events prior to the existence of the Senator's arrangement with Piranha Press were treated as "promotional" appearances, and the money was treated as a "stipend" when in fact it was "honoraria" income. The Committee finds that Senator Durenberger personally designated routine honoraria speaking invitations as Piranha Press "promotional appearances." For exam-

ple, in one early appearance, the Senator arranged the event as an "honorarium" appearance, made no mention of his book or publisher during the appearance, and personally requested that the sponsor pay his appearance fee to Piranha Press.

The Committee finds that Senator Durenberger failed to disclose the receipt of certain reimbursements for trips during calendar year 1985 and 1986 in connection with the Piranha Press arrangement and his Boston area appearances. The disclosure requirement for travel reimbursements is well known to Members. In this regard, the Committee notes that while Senator Durenberger reported reimbursements paid to him in connection with his honorarium appearances, reimbursements received from certain groups which sponsored Piranha Press and Boston area appearances were omitted from his Financial Disclosure Reports.

The Committee further finds that Senator Durenberger knowingly accepted gifts of limousine service between Boston and Concord, Massachusetts and in the Boston area in connection with certain trips to Boston during 1985 and 1986. The Senator knew that the trips to Concord were to conduct personal business, and that the limousine service was not a "necessary expense" of any appearance he was making. The Senator knew or should have known that the groups providing the limousine service had a direct interest in legislation before Congress and that the value of the limousine service exceeded the limits established by the Senate Gifts Rule.

In connection with Senator Durenberger's 1985 appearance before the Pathology Practice Association, the Committee finds that the Association's political action committee paid to the Senator's reelection committee a \$5,000 campaign contribution in the form of a check made out to "Durenberger for U.S. Senate". The check was deposited into the account of the Senator's publisher, Piranha Press. The Committee concludes that this campaign contribution was converted to Senator Durenberger's personal use in violation of Senate Rule 38, paragraph 2.

In light of these factual findings and based upon the evidence before it, the Committee has unanimously concluded as follows with respect to the violations as noticed in the Committee's Resolution of February 22, 1990:

1. Senator Durenberger violated the honoraria limits established by 2 U.S.C. § 31-1 and 2 U.S.C. § 441i by accepting payments in excess of such limits as consideration for 113 speeches or appearances during calendar years 1985 and 1986.

2. Senator Durenberger violated the provisions of Senate Rule 34 (The Ethics in Government Act of 1978, as amended) by failing to report on his Financial Disclosure Reports for calendar years 1985 and 1986 the acceptance of reimbursement from forty-three organizations for the necessary expenses of certain travel connected with Piranha Press and Boston area appearances.

3. A campaign contribution was converted to Senator Durenberger's personal use in violation of Senate Rule 38, paragraph 2, by transferring to Piranha Press a \$5,000 check made out to "Durenberger for U.S. Senate."

4. Senator Durenberger accepted gifts of ground transportation (limousine service) in the Boston area in violation of the Senate

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Rule 35 during 1985 and 1986, in connection with personal travel to Concord, Massachusetts.<sup>6</sup>

As to the condominium transactions, the Committee finds that Senator Durenberger's partnership arrangement with Roger Scherer was conceived and structured solely as a mechanism to enable Senator Durenberger to claim Senate reimbursement for overnight stays in his condominium, thereby effectively transferring to the United States Senate and the American taxpayer the cost of maintaining what was essentially his personal Minneapolis residence.

The Committee further finds that Senator Durenberger knowingly participated in the backdating of this transaction, and that he knowingly participated in changing the name of the partnership from the "Durenberger/Scherer Partnership" to "703/603 Association." The clear effect of this name change was to conceal Senator Durenberger's ownership interest in the condominium from the Senate Disbursing Office.

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The Committee further finds that Senator Durenberger subsequently structured a purported sale of the condominium to ISC, and knowingly participated in the backdating of that transaction, in order to justify claims for Senate *per diem* lodging reimbursements. The Committee finds that Mr. Overgaard of ISC was induced to purchase the condominium by the Senator's agreement to rent the unit a sufficient number of days to pay all costs associated with the unit. Senator Durenberger entered into this agreement with the express understanding that such rent would be financed largely by Senate *per diem* reimbursement payments. The Committee also finds that Senator Durenberger was in effect only temporarily "parking" the condominium with ISC.

The Committee further finds that in late 1987, Senator Durenberger directed the submission to the Senate Disbursing Office of vouchers, supported by backdated invoices from ISC, claiming Senate reimbursement for his stays in the condominium during the period from April to June 1987, when he was the true owner of the property.

Finally, the Committee finds that after the condominium was placed in the Senator's Qualified Blind Trust, Senator Durenberger was aware on a continuing basis of the status of the condominium trust asset, was an active and knowing participant in the management of this asset, and repeatedly consulted with his trustee regarding the asset.

Finally, the Committee finds that Senator Durenberger did encounter severe emotional strain from events in his personal life. The Committee further finds that the severe emotional and traumatic events in the Senator's personal life impaired his judgement. The Committee finds that these factors do not excuse the Senator's conduct.

In light of these factual findings and based upon the evidence before it, as to the violations noticed in the Committee's Resolution dated May 9, 1990, the Committee has unanimously concluded that

<sup>6</sup> In accordance with the recommendation of Special Counsel, the Committee has concluded that it will not recommend sanction on the basis of the Senator's use of U.S. Senate and Capitol facilities in 1985 for fee-earning Piranha Press appearances.

Senator Durenberger abused his United States Senate Office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate. As part of his public trust, a Senator has a duty to deal honestly and forthrightly with the Senate and its Members, officers, and employees. This duty embodies an obligation not to conceal relevant information. The Committee concludes that Senator Durenberger violated his public trust in connection with his receipt of reimbursements for staying in a condominium which was essentially his personal residence in Minneapolis. A Senator's obligations to the public should not be subordinated to his personal financial interests. The Committee finds that this occurred here.

The Committee further concludes that Senator Durenberger knowingly communicated and corresponded with the trustee of his Qualified Blind Trust from February 1986 until December 1989, in violation of The Ethics in Government Act, specifically 2 U.S.C. § 702(e)(3)(C)(vii), 2 U.S.C. § 702(e)(3)(C)(vii), and 2 U.S.C. § 702(e)(6)(B).

#### V. RECOMMENDATIONS AND REFERRALS

##### A. Recommendation of Denouncement

Based on the findings specified above, the Committee hereby recommends that the Senate agree to the following Resolution:

*Resolved:* That the conduct of Senator Durenberger in connection with his arrangement with Piranha Press, his failure to report receipt of travel expenses in connection with his Piranha Press and Boston area appearances, his structuring of real estate transactions and receipt of Senate reimbursements in connection with his stays in his Minneapolis condominium, his pattern of prohibited communications respecting the condominium, his repeated acceptance of prohibited gifts of limousine service for personal purposes, and the conversion of a campaign contribution to his personal use, has been reprehensible and has brought the Senate into dishonor and disrepute;

That Senator Durenberger knowingly and willingly engaged in conduct which was in violation of statutes, rules and Senate standards and acceptable norms of ethical conduct;

That Senator Durenberger's conduct was clearly and unequivocally unethical, and;

That, therefore, pursuant to Article 1, Section 5, Clause 2 of the United States Constitution and Senate Resolution 338 of the 88th Congress, as amended, Senator David Durenberger be, and hereby is:

- (1) denounced by the United States Senate;
- (2) referred to the Republican Party Conference for attention; and
- (3) directed to reimburse \$29,050 plus interest to the Senate; and to pay to charities with which he has no affiliation \$93,730, less state and federal taxes previously paid on that amount, in excess honoraria im-

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(Page 14 of 25)

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properly retained during 1985 and 1986, such payments to be made at the regular intervals over the balance of his United States Senate term.

*B. Recommendation Regarding Senate Rules*

Pursuant to Supplementary Rule 9(c) the Committee recommends the following changes in Senate Rules and policies.

The Committee's investigation revealed much uncertainty surrounding the interpretation of 40 U.S.C. § 193d, and the Committee on Rules and Administration's "Policy for Use of Senate Rooms, The Russell Rotunda and Courtyard, and The Hart Atrium." To provide clear and unequivocal guidance for the future, the Committee recommends that the Rules Committee's Policy be amended to expressly provide that "honorarium" and other "fee-earning" appearances or speeches are prohibited in Senate controlled space.

*C. Reporting to the Federal Election Commission and the Department of Justice*

Pursuant to Rule 8(a) of the Committee's Rules, the Committee will refer the matter to the Federal Election Commission and the Department of Justice for their attention.

This Report of the Senate Select Committee on Ethics on the Investigation of Senator David Durenberger is approved for submission to the Senate, and we recommend expeditious consideration of the Resolution contained herein.

HOWELL HEFLIN,  
Chairman.  
WARREN B. RUDMAN,  
Vice Chairman.  
DAVID PRYOR.  
TERRY SANFORD.  
JESSE HELMS.  
TRENT LOTT.

JULY 18, 1990.

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APPENDIX A

RESOLUTION FOR INVESTIGATION

Whereas, the Select Committee on Ethics on March 1, 1989 initiated a Preliminary Inquiry into allegations of misconduct by Senator David Durenberger, and notified Senator Durenberger of such action on March 2, 1989; and

Whereas, on August 3, 1989, on the basis of information which became available during the Preliminary Inquiry the Committee voted to retain Special Outside Counsel Robert Bennett to conduct an Initial Review into certain of the allegations; and

Whereas, the Committee has received the Final Report of Special Outside Counsel relating to the allegations; and

Whereas, on the basis of such evidence, there are possible violations of law, or violations of Senate Rules within the Committee's jurisdiction under Senate Resolution 338 (88th Congress), as amended, or there is possible improper conduct which may reflect upon the Senate (as contemplated in Section 2(a)(1) of S. Res. 338, 88th Congress, as amended);

It is therefore resolved:

(a) That the Committee determines there is substantial credible evidence which provides substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, to wit:

(1) Senator Durenberger may have violated the honoraria limits established by 2 U.S.C. 31-1 and 2 U.S.C. 441i by accepting payments in excess of such limits as consideration for speeches or appearances during calendar years 1985 and 1986.

(2) Senator Durenberger may have violated the provisions of Senate Rule 34 (The Ethics in Government Act of 1978, as amended) by failing to report in his financial disclosure reports for calendar years 1985 and 1986 the acceptance of reimbursement for the necessary expenses of travel undertaken in connection with appearances related to Piranha Press Inc.

(3) Senator Durenberger may have converted a campaign contribution to personal use in violation of Senate Rule 38, paragraph 2, and may have failed to report and deposit a campaign contribution in violation of Section 434(b)(2) of the Federal Election Campaign Act and FEC regulations, by transferring to Piranha Press Inc. a \$5,000 check made out to "Durenberger for U. S. Senate."

(4) Senator Durenberger may have violated 40 U.S.C. 193d and the Senate Rules Committee's regulation prohibiting the commercial use of Senate space, when he was paid an honorar-

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ium or other fee for six appearances in Senate controlled space subject to the statutory and Rules Committee prohibition.

(5) Senator Durenberger may have accepted gifts of ground transportation (limousine service) in the Boston area in violation of the Senate Gifts Rule (35) during 1985 and 1986, in connection with personal travel to Concord, Massachusetts.

(b) That the Committee shall proceed to an Investigation under Committee Supplementary Procedural Rule 5; and

(c) That Senator Durenberger shall be given timely written notice of this resolution and informed of a respondent's rights pursuant to the Rules of the Committee; and that Special Outside Counsel shall provide to the Chairman and Vice Chairman a preliminary draft of such written notice no later than February 26 1990.

[BY HAND]

MARCH 1, 1990.

Hon. DAVID F. DURENBERGER,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR DURENBERGER: On Thursday, February 22, 1990 the United States Senate Select Committee on Ethics voted to conduct an Investigation, pursuant to Committee Supplementary Rule 5, of certain matters which previously had been the subject of a Preliminary Inquiry and Initial Review. By this letter, the Committee is providing notice of that decision to you, together with a statement of the possible violations, as required by Committee Supplementary Rule 5(c). Relevant evidence has been marked and is referred to herein as "Special Counsel Ex." Copies of these exhibits are appended hereto.

The Committee has determined that there is substantial credible evidence providing substantial cause for the Committee to conclude that violations within its jurisdiction may have occurred. Accordingly, the Investigation will examine the following matters:

1. Whether you may have violated 2 U.S.C. § 31-1 and 2 U.S.C. § 441i through an arrangement with your publisher, Piranha Press, pursuant to which you made approximately 11: appearances and/or speeches during 1985 and 1986 before various businesses, associations and other organizations, each of which was charged a fee for your appearance, and in exchange for which you received \$100,000 from Piranha Press. See Special Counsel Exs. 1-32, 34-49, 51-66, 67-78, 80-118, 120-125, 128-150, 152-154, 157-160.

2. Whether you may have violated Senate Rule 34 (The Ethics In Government Act, as amended) by failing to disclose in a timely fashion on your annual financial disclosure forms for 1985 and 1986 the reimbursement of travel expenses related to approximately forty-three appearances and/or speeches. See Special Counsel Exs. 4, 6, 9-10, 17, 21, 27, 30, 37, 39, 40, 42, 44, 46, 48, 51, 52, 57, 74, 80-81, 84-87, 92, 95, 100, 103, 106-107, 109, 111, 114, 116-118, 121-123, 125, 129, 131, 135-136, 141-142, 146-150, 152, 160-161.

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3. Whether you may have converted a campaign contribution to your personal use in violation of Senate Rule 38, paragraph 2, and failed to report and deposit a campaign contribution in violation of 2 U.S.C. § 434 and 11 CFR § 103.3, by transferring to Piranha Press the Pathology Practice Association Federal Political Action Committee check number 144 in the amount of \$5,000, dated December 30, 1986, made payable to "Durenberger for U.S. Senate." See Special Counsel Ex. 25.

4. Whether you may have violated 40 U.S.C. § 193d, as interpreted by the Senate Committee on Rules and Administration, by giving speeches in U.S. Capitol and Senate facilities on or about March 3, 1985; March 25, 1985; April 11, 1985; April 24, 1985; September 9, 1985; and November 12, 1985, in exchange for payments directed to Piranha Press totalling approximately \$6,250. See Special Counsel Exs. 41, 60, 61, 157.

5. Whether you may have violated Senate Rule 35 by accepting gifts of limousine service for round trip transportation between the Boston metropolitan area and Concord, Massachusetts, on approximately 21 occasions in 1985 and 1986 for a total value of approximately \$4,935. See Special Counsel Exs. 5, 17, 21, 33, 42, 50, 67, 76, 79, 107, 119, 126-127, 151, 155-156, 160.

6. Whether you may have engaged in conduct, as described above, which reflects upon the Senate as set forth in Section 2(a)(1) of Senate Resolution 338, as amended. See Special Counsel Exs. 1-161.

The Committee will consider all relevant and probative evidence relating to these matters, including but not limited to that cited above, documents and other materials provided to the Committee by the individuals and organizations listed in Attachment A, deposition testimony of witnesses listed in Attachment B, and materials previously provided to the Committee by you.

You will be afforded all the rights provided by the Committee Supplementary Rules (copy enclosed), including the opportunity to present a statement and to respond to questions from Members of the Committee, Committee staff, or Special Counsel. Finally, should you elect to avail yourself of the right to a hearing pursuant to Rule 5(d), the Committee would ask that your counsel and Special Counsel to the Committee agree on a date for the hearing to commence.

Sincerely,

HOWELL HEFLIN,  
Chairman.  
WARREN B. RUDMAN,  
Vice Chairman.

Attachments.

ATTACHMENT A—ORGANIZATIONS AND INDIVIDUALS THAT PRODUCED DOCUMENTS TO THE U.S. SENATE SELECT COMMITTEE ON ETHICS IN THE MATTER OF SENATOR DAVID F. DURENBERGER

A&A Limousine Renting, Inc.  
A.B. Laffer Associates  
Abbott Northwestern Hospital  
Ackerly Communications, Inc.

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(Page 18 of 25)

Ad Hoc Committee for Western Utilities  
 American Association of Equipment Lessors  
 American Association of Nurse Anesthetists  
 American Association for Respiratory Therapy  
 American Bankers Association  
 American Business Conference  
 American College of Cardiology  
 American College of Physician Executives  
 American College of Radiology  
 American College of Surgeons—Minnesota Chapter  
 American Council for Capital Formation  
 American Group Practice Association  
 American Healthcare Institute  
 American Healthcare Systems  
 American Hospital Association  
 American Insurance Association  
 American International Automobile Dealers Association  
 American Medical Association  
 American Medical Association Auxiliary, Inc.  
 American Medical Association Political Action Committee  
 (AMPAC)  
 American Occupational Therapy Association, Incorporated  
 American Podiatric Medical Association  
 American Protestant Health Association  
 American Psychiatric Association  
 American Society of Association Executives  
 American Society of Internal Medicine  
 American Society of Plastic & Reconstructive Surgeons  
 American Southwest Financial Corp.  
 American Waterways Operators  
 Americans for Generational Equity  
 Annenberg Center for Health Sciences, Eisenhower Medical Center  
 Arthur Anderson & Co.  
 Association of Academic Health Centers  
 Association of Data Processors  
 Association of Metropolitan Water Agencies  
 Bartlett, Charles  
 Bishop, Cook, Purcell & Reynolds  
 Blue Cross/Blue Shield of Michigan  
 Blue Cross of California  
 Bristol-Myers Company  
 Brown University  
 Campbell—Raupe Associates, Inc.  
 Capitol Associates, Incorporated  
 Carey of Boston  
 Castroviejo Society—World Congress on the Cornea  
 Catholic Charities USA  
 Cedars—Sinai Medical Center  
 Center for Cost Effective Care (Brigham and Women's Hospital,  
 Harvard Medical School)  
 Chemical Manufacturers Association  
 Chicago Council on Foreign Relations  
 Civil Services, Incorporated  
 Clark Abt for Congress

Attachment 2

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Computer & Business Equipment Manufacturers Association  
(CBEMA)

CooperVision, Incorporated  
Coopers & Lybrand  
Council of Community Hospitals  
Council for Responsible Nutrition  
Council of Industrial Development Bond Issuers  
Council of Medical Specialty Societies  
Curtin, Mahoney, Cairns & Walling  
D.C. Society of Internal Medicine  
Distilled Spirits Council of the United States, Inc.  
Drexel Burnham Lambert, Incorporated  
Duffy Wall, Incorporated  
Economic Club of Detroit  
Employers Council on Flexible Compensation  
Equitable Life Assurance Society  
Farmland Industries, Incorporated  
Federation of American Hospitals  
Financial Executives Institute  
Fleishman—Hillard, Inc.  
Foundation for American Communications  
General Electric Company  
General Mills  
Goldman, Sachs and Company  
Graefe, Fred  
Grocery Manufacturers of America, Incorporated  
Group Health Association of America, Inc.  
Hale and Dorr  
Harvard School of Health Policy  
Health America Corporation  
Health Care Financial Management Association  
Health Data Institute  
Health Industry Distributors Association  
Health Industry Manufacturers Association  
Herrick and Smith  
Hospital Corporation of America  
Hospital Council of Central California  
Hospital Council of Southern California  
Hughes Aircraft Company  
Information Resources, Inc.  
Invest to Compete Alliance  
Investors Marketing Association  
John Hancock Mutual Life Insurance Company  
Johnson & Johnson  
Kaiser Foundation Health Plan of G.A., Inc.  
Kendall and Associates  
King & Spaulding  
Laxalt, Washington, Perito & Dubue  
Lewin & Associates, Incorporated  
Liberty Mutual Insurance Co.  
Life Insurance Association of Massachusetts  
Liz Robbins Associates  
Lockheed Corporation  
Mahoney, Michael

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Manning, Selvage & Lee  
Maryland Hospital Association  
Massachusetts Mutual Life Insurance Co.  
McDermott, Will & Emery  
McGraw-Hill  
Medical Group Management Association  
Medical Society of the District of Columbia  
Medtronic, Incorporated  
Midwest Pension Conference, Chicago Chapter  
Miller & Schroeder Municipals, Inc.  
Mintz, Levin, Cohen, Ferris, Glovsky and Popeo, P.C.  
Montgomery County Medical Society  
Morgan Guaranty Trust Company  
National Association of Alcoholism Treatment Programs, Inc.  
National Association of Bond Lawyers  
National Association of Chain Drug Stores, Inc.  
National Association of Container Distributors  
National Association of Realtors  
National Association of Senior Living Industries  
National Association of Wholesale Distributors  
National City Bank of Cleveland  
National Council on Alcoholism  
National Grocery Association  
National Health Lawyers Association  
National Homebuilders  
National Machine Tool Builders Association (NMTBA)  
National Medical Enterprises, Inc.  
National Multi-Housing Council  
National Restaurant Association  
National Rural Electric Cooperative Association (NRECA)  
New England Mutual Life Insurance Company  
Northrop Corporation  
Norwest Bank Midland, N.A.  
O'Conner & Hanan  
Outdoor Advertising Assoc. of America, Incorporated  
Outpatient Ophthalmic Surgery Society  
Owens Illinois  
Paine Webber  
Palo Alto Medical Foundation  
Pathology Practice Associates  
Pathology Practice Association Federal Politicial Action Commit  
Pfizer, Incorporated  
Pitney Bowes, Incorporated  
Powers, Pyles, Sutter & O'Hare  
Project HOPE  
Prudential-Bache Securities  
Public Securities Association  
Puerto Rico Hospital Association  
Puerto Rico, USA Foundation  
R.J.R. Nabisco, Inc.  
R.J.R. Tobacco, Inc.  
Raytheon Company  
Renewable Fuels Association  
Riverside Methodist Hospital

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Rochester Area Hospital Corporation  
 Russell Reynolds Associates, Inc.  
 Salomon Brothers, Incorporated  
 Sarasota Memorial Hospital  
 Shawmut Bank, N.A.  
 Securities Industry Association  
 Stanford University Center for Economic Policy Research  
 State Government Education and Research Foundation  
 The Fertilizer Institute  
 The Health Central Corporation  
 The Hospital Association of Pennsylvania  
 The Tobacco Institute  
 The Washington Campus  
 Thompson, Hine & Flory  
 Travenol Laboratories, Incorporated  
 TRW, Incorporated  
 U.S. Chamber of Commerce  
 U.S. Health Corp.  
 University of Wisconsin World Affairs Seminar  
 Valve Manufacturers Association  
 W.R. Grace & Company  
 Warner Lambert Company  
 Washington Discussion Group  
 Weil, Gotshal & Manges  
 White, Fine & Verville  
 William & Jensen

ATTACHMENT B—DEPOSITIONS CONDUCTED IN THE MATTER OF  
 SENATOR DAVID F. DURENBERGER

DEPONENT AND DATE

Diamond, Gary, 4/26/89, 5/24/89; Graefe, Frederick, 1/11/90;  
 Hanbery, Donna, 4/28/89, 5/24/89; Horner, Thomas, 4/27/89, 5/24/  
 89; Kelley, Douglas, 4/27/89, 5/24/89; Mahoney, Michael, 4/27/89,  
 5/24/89, 2/20/90; Mathison, Jodi, 5/5/89; Roan, Jim, 4/26/89;  
 Schraeder, Jon, 4/28/89; Shaw, Heidi, 5/08/89; Stern, Samuel, 4/  
 26/89; Wilbur, Robert, 12/19/89.

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## APPENDIX B

### RESOLUTION FOR INVESTIGATION

Whereas, the Select Committee on Ethics on December 21, 1989 initiated a Preliminary Inquiry into allegations of misconduct by Senator David Durenberger respecting his receipt of Senate reimbursements for use of a Minneapolis condominium, and notified Senator Durenberger of such action; and

Whereas, the Committee retained Special Counsel Robert S. Bennett to conduct the Inquiry under the direction of the Chairman and Vice Chairman; and

Whereas, the Committee has received the Report of Special Counsel relating to the allegations; and

Whereas, on the basis of such evidence there is possible improper conduct which may reflect upon the Senate (as contemplated in Section 2(a)(1) of S. Res. 338, 88th Congress, as amended) and possible violations of laws or Senate Rules within the Committee's jurisdiction under Senate Resolution 338 (88th Congress);

It is therefore resolved:

(a) That the Committee determines that there is substantial credible evidence which provides substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, to wit:

(1) Senator Durenberger may have abused his United States Senate Office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate. Such conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office, the misrepresentation of the ownership of the property for which he was claiming lodging reimbursement, and the backdating of real estate transactions and certain documentation relating to those transactions.

(2) Senator Durenberger also may have violated certain provisions of the Ethics in Government Act relating to the administration of his qualified blind trust, including those provisions relating to communications regarding the trust and its assets.

(b) That the Committee, pursuant to Committee Supplementary Procedure Rules 3(d)(5) and 4(f)(4), shall proceed to an Investigation under Committee Supplementary Procedural Rule 5; and

(c) That Senator Durenberger shall be given timely written notice of this resolution and informed of a respondent's rights pursuant to the Rules of the Committee.

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(PAGE 23 OF 25)

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25  
MAY 14, 1990.

Hon. DAVID F. DURENBERGER,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR DURENBERGER: On Wednesday, May 9, 1990, the United States Senate Select Committee on Ethics voted to conduct an Investigation, pursuant to Committee Supplementary Rule 5, of a matter which previously had been the subject of a Preliminary Inquiry. By this letter, the Committee is providing notice of that decision to you, together with a statement of the possible violations, as required by Committee Supplementary Rule 5(c).

The Committee has determined that there is substantial credible evidence which provides substantial cause for the Committee to conclude that a violation within its jurisdiction may have occurred. The Investigation concerns certain transactions involving a condominium in Minneapolis, Minnesota, as well as your receipt of Senate reimbursements for using the condominium on certain days between August 1983 and mid-November 1989.

The Investigation will examine whether you may have abused your United States Senate Office, and misused United States Senate funds through a pattern of improper conduct which brings discredit upon the United States Senate. Such conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office; the misrepresentation of the ownership of the property for which you claimed lodging reimbursement from the United States Senate; and the back dating of the "Durenberger-Scherer" partnership, the transfer of the condominium property to that partnership, and the purported sale of the condominium to the Independent Service Company, and documentation relating to those transactions.

The Investigation also will examine whether you may have violated the provisions of the Ethics in Government Act relating to qualified blind trusts, including Sections 702(e)(3)(c) and 702(e)(6) relating to communications regarding the trust and its assets. See Special Counsel Exs. 258-352, attached hereto.

The Committee will consider all relevant and probative evidence relating to this matter, including but not limited to that cited above, documents and other materials provided to the Committee by other individuals and organizations, and deposition testimony of witnesses. Copies of these materials have previously been provided to your counsel. The Committee also will consider materials previously provided to the Committee by you.

You will be afforded all the rights provided by the Committee Supplementary Rules (copy attached), including the opportunity to present a statement and to respond to questions for Members of the Committee, Committee Staff, or Special Counsel.

Finally, please be advised that the Committee has voted to conduct public adjudicatory hearings in connection with the Investigation of this matter, and the Investigation into other matters previously announced by the Committee on February 22, 1990 and will be held in Room 216, Hart Senate Office Building, Washington,

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ATTACHMENT 2  
(PAG 240725)

D.C. Hearings will commence at 9:30 a.m. on June 12, 1990. Two weeks of hearings have been scheduled.

Cordially,

HOWELL HEFLIN,  
Chairman.

WARREN B. RUDMAN,  
Vice Chairman.

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APPENDIX C

FINAL REPORT OF SPECIAL COUNSEL IN THE MATTER OF SENATOR  
DAVID F. DURENBERGER

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## I. INTRODUCTION

Special Counsel submits this Report in the matter of Senator David F. Durenberger pursuant to Rule 5(f)(1) of the Supplementary Procedural Rules of the United States Senate Select Committee on Ethics<sup>1</sup> (the "Committee"). This Report contains findings and recommendations based upon the evidence gathered during the course of the Committee's proceedings in this matter.

Initially, the Report reviews the procedural background of the matters which are the subject of the Committee's Investigation. The scope and extent of the Committee's examination of the evidence relating to each of these matters is discussed, and the proceedings before the Committee during the public adjudicatory hearing are described.

The Report then addresses the scope of the Committee's authority to investigate and sanction misconduct of Members, and briefly reviews Senate precedents. A listing of the laws, Senate rules and other ethical considerations applicable to the Committee's Investigation in this matter also is included.

The Report then discusses in detail the evidence relevant to each of the matters under Investigation. Based upon this evidence, and pursuant to Committee Rule 5(f), Special Counsel makes a number of findings of violations of law and Senate Rules by Senator Durenberger, as well as findings regarding his asserted defenses. Finally, also pursuant to Committee Rule 5(f), Special Counsel submits a recommendation as to the sanction to be imposed on Senator Durenberger for the violations that he committed.

## II. SUMMARY

The relevant factual background and Special Counsel's findings in this matter are summarized briefly below.

### A. Piranha Press, Gifts Of Limousine Transportation and Related Matters.

#### 1. SENATOR DURENBERGER'S ARRANGEMENT WITH PIRANHA PRESS

Between 1984 and 1986, Piranha Press published two books authored by Senator Durenberger: *Neither Madmen nor Messiahs* and *Prescription for Change*. Under the terms of his agreement with Piranha Press, Senator Durenberger made approximately 113 book "promotional appearances" before various trade associations, colleges and businesses during 1985 and 1986. Each of these groups paid Piranha Press a fee for the Senator's appearance, typically between \$1,000 and \$5,000 plus travel expenses. Piranha Press in turn paid the Senator \$100,000 in quarterly installments over a two year period.

Special Counsel finds that the arrangement between Senator Durenberger and Piranha Press was simply a means of converting into "stipendiary income" that which would otherwise have been honoraria income, and that Senator Durenberger therefore violated 2 U.S.C. § 31-1 and 2 U.S.C. § 441i. Special Counsel also finds that

<sup>1</sup> Hereinafter cited as the "Committee Rules."

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Senator Durenberger knowingly and actively participated in this arrangement, the obvious effect of which was to circumvent statutory limitations on honoraria income.

Specifically, Special Counsel finds as follows:

The Senator's contract with Piranha Press did not constitute a good faith book publishing or promotional arrangement and instead was, in the words of a publishing industry expert, an "extraordinary" arrangement as measured against the norms within the industry.

The principal purpose of the Senator's agreement with Piranha Press was to permit the Senator to earn fees for speaking engagements, rather than to promote the sale of his books. Over the term of the agreement, Senator Durenberger's appearances generated approximately \$248,300 in speaker's fees, as compared to approximately \$15,500 in book sales.

None of the Senator's 113 Piranha Press appearances was the result of invitations to the Senator to appear and promote his books. Similarly, neither Gary Diamond nor Piranha Press initiated any of these appearances. Instead, all were the result of invitations to deliver a traditional honorarium speech, extended to the Senator in his capacity as a United States Senator.

Throughout the term of his agreement with Piranha Press, Senator Durenberger personally designated as Piranha Press speeches certain honorarium speech invitations received in his United States Senate office.

As Senator Durenberger approached his honoraria income ceiling in 1985, speech invitations simply were forwarded by his United States Senate staff to Piranha Press to be treated as promotional appearances.

Senator Durenberger made a number of "promotional appearances" in which he mentioned neither his books nor his publisher. Often, the groups before which the Senator made these appearances were told that it was not necessary to display the books. Other organizations, after being notified that the Senator's appearance would be in promotion of his books, were unable to obtain copies of those books to distribute to their attendees.

The Senator made a number of "promotional appearances" before health care groups well before the publication of his book on health care topics.

Twenty-six payment checks payable to Senator Durenberger for his appearances, totalling \$56,750, were deposited into the Piranha Press bank account—twenty-one of which reflected Senator Durenberger's personal endorsement to Piranha Press.

At twenty-three appearances treated by Senator Durenberger as Piranha Press events, other Members of Congress also spoke. Unlike Senator Durenberger, these other Members reported receipt of honoraria income for their appearances.

On several occasions members of the Senator's staff or representatives of Piranha Press insisted that a group for which the Senator was to appear pay a fee in excess of \$2,000 for the Senator's appearance.

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Senator Durenberger was cautioned against the arrangement with Piranha Press by several of his advisors.

Special Counsel finds that through this pattern of conduct, Senator Durenberger has brought discredit upon the United States Senate.

## 2. GIFTS OF LIMOUSINE TRANSPORTATION

In 1985, Senator Durenberger began to have regular meetings for personal reasons with Dr. Armand Nicholi in Concord, Massachusetts, approximately twenty miles from Boston. Senator Durenberger often made the trips from Boston to Concord and back to Boston by limousine, rented from A and A Limousine Renting, Inc. The cost of this limousine travel and other limousine travel in the Boston area, estimated at \$3,500, was paid by various organizations with a direct interest in legislation.

Specifically, on eleven occasions in 1985 and 1986 Senator Durenberger traveled to Boston to meet with a company or business and accepted the unnecessary expense of limousine service to and from Concord. On five additional dates when Senator Durenberger received limousine transportation, he met with Dr. Nicholi in Concord, but did not meet with representatives of any business or organization.

Special Counsel finds that Senator Durenberger accepted these gifts of limousine transportation in the Boston, Massachusetts area in 1985 and 1986 in violation of Senate Rule 35. Senator Durenberger, through counsel, has admitted that his conduct violated this Rule.

## 3. OTHER MATTERS RELATED TO PIRANHA PRESS

### a. Failure to Report Reimbursements

On May 15, 1986, Senator Durenberger filed his Financial Disclosure Report for the 1985 calendar year. At that time, the Senator failed to report his receipt of travel expense reimbursements from twenty-seven organizations before which he made Piranha Press or Boston area appearances in 1985. Similarly, Senator Durenberger's 1986 Financial Disclosure Report, filed on May 15, 1987, did not include his receipt of travel expense reimbursements from sixteen organizations before which he made such appearances in 1986.

On July 27, 1989, several months after the Committee initiated these proceedings, Senator Durenberger filed amended Financial Disclosure Reports for the 1985 and 1986 calendar years. These Reports include lists of reimbursements for travel expenses that Senator Durenberger received from thirty-nine organizations in 1985 and 1986. To date Senator Durenberger has failed to disclose reimbursements for travel expenses that he received from four organizations for five trips that he made in 1985.

Special Counsel finds that Senator Durenberger violated Senate Rule 34 by failing to report on his Financial Disclosure Reports for calendar years 1985 and 1986 the acceptance from forty-three organizations of reimbursement for the necessary expenses of travel, in connection with his Piranha Press "promotional appearances" and certain travel to the Boston metropolitan area.

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*b. Improper Conversion of a Campaign Contribution*

Senator Durenberger addressed the Pathology Practice Association's annual meeting on December 5, 1986. The Association did not pay the Senator an honorarium or fee for this appearance. Instead, the Association's Federal Political Action Committee sent a check in the amount of \$5,000 and payable to "Durenberger for U.S. Senate" to the Senator's official campaign committee in Minneapolis.

This check, which was intended as a campaign contribution, was deposited without endorsement to the Piranha Press account, from which Senator Durenberger was paid for his many "promotional appearances." Special Counsel finds that this conduct violates Senate Rule 38, paragraph 2, which prohibits the conversion of contributions to personal use.

*c. Use of United States Capitol and Senate Facilities*

On six separate occasions in 1985, Senator Durenberger made Piranha Press "promotional appearances" in United States Capitol and Senate rooms. For each of these appearances, Piranha Press was paid a fee ranging from \$250 to \$2,000. It is clear that Senator Durenberger's conduct was contrary to the regulations adopted by the Rules Committee governing the use of these Senate facilities. The Rules Committee has communicated its regulations on this subject numerous times to Members of the Senate in "Dear Senator" letters.

From Special Counsel's investigation, however, it appears that these regulations are not well known or understood by the Senate Members. In addition, there is some question as to whether 40 U.S.C. § 193d governs the Senator's conduct. Accordingly, Special Counsel further recommends that the Committee provide to Senator Durenberger the benefit of the doubt on this issue, and not find a violation or recommend disciplinary sanctions for this conduct.

Special Counsel recommends that, in order to eliminate any further confusion on this issue, pursuant to Committee Rules 8(c) the Committee take such appropriate action as is necessary to clearly and unequivocally prohibit such conduct by all Members in the future.

*B. Condominium Transactions*

**1. OUTLINE OF RELEVANT FACTS**

In June 1979, Senator Durenberger purchased a one-bedroom condominium (unit 603) in Minneapolis, which he then used during his frequent travels to that city. In 1983, the Senator began to explore various dispositions of the property, including a possible exchange of condominiums with Roger Scherer and a lease-back of his former unit (#603) from Mr. Scherer. Senator Durenberger has represented that ultimately, "effective" July 28, 1983 he formed an investment partnership with Mr. Scherer, to which both the Senator and Mr. Scherer contributed their respective condominium units. Senator Durenberger rented his unit (#603) from the partnership at a *per diem* rate of \$65. The deed conveying the Senator's

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unit to the partnership was filed with the county Registrar of Titles on May 14, 1984.

In June 1985 Senator Durenberger placed his interest in this partnership into a qualified blind trust established pursuant to the Ethics in Government Act. Subsequently, in his capacity as general partner, he deeded the condominium property to Michael Mahoney as trustee of that trust.<sup>2</sup>

In August 1986, Mr. Scherer notified the Senator of his intent to withdraw from the partnership. Accordingly, the partnership affairs were terminated as of March 31, 1987. "Effective" April 1, 1987, the Senator sold the condominium unit for \$52,804 to the Independent Service Company ["ISC"], a Minnesota business owned by Paul Overgaard. Following this sale, the Senator rented the condominium from ISC at a *per diem* rate of \$85. The necessary legal documents evidencing this sale were not delivered to Mr. Overgaard until October 1989, and have never been filed with the Registrar of Titles. Accordingly, legal title to the property has never been transferred to ISC.

Throughout this period from August 1983 to mid-November 1989, Senator Durenberger claimed and received \$40,055 in Senate travel reimbursements for the costs incurred in renting the condominium from the partnership and ISC.<sup>3</sup>

## 2. THE PARTNERSHIP TRANSACTION AND SALE TO INDEPENDENT SERVICE COMPANY, INC.

Special Counsel finds that in this matter Senator Durenberger engaged in a pattern of conduct which has served to bring discredit upon the United States Senate. Specifically, the facts evidence that Senator Durenberger participated in the creation of backdated documentation of the real estate transactions at issue.

Special Counsel further finds that these transactions were conceived and orchestrated wholly as a means of permitting the Senator to claim Senate *per diem* reimbursements for staying in what was in essence his Minnesota residence. Finally, Special Counsel finds that at various times the Senator concealed from the Senate Disbursing Office his interest in the condominium property, and thereby misrepresented to that Office the true ownership of the condominium for which he was claiming rental reimbursements.

Specifically, Special Counsel makes the following findings:

The partnership entity was conceived and structured as a mechanism to enable Senator Durenberger to claim Senate reimbursement for overnight stays in his condominium, and thereby effectively to transfer to the United States Senate and the American taxpayer the cost of maintaining what was essentially his personal Minneapolis residence.

Until the fall of 1983, Senator Durenberger intended simply to exchange condominium units with Roger Scherer, and then lease his former unit from Mr. Scherer. This contemplated ex-

<sup>2</sup> This deed was not filed until August 24, 1988, and a new Certificate of Title was not issued by the county Registrar of Titles until October 26, 1988.

<sup>3</sup> The Senator has refunded \$11,005 of this sum, in response to a recent ruling by the Rules Committee.

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change was no more than a mechanism to allow the Senator the benefit of Senate reimbursements.

In the fall of 1983 the parties learned that the planned exchange would result in capital gains tax to the Senator, and abandoned that transaction in favor of a partnership. The parties then simply backdated the partnership to July 1983 in order to justify the Senator's acceptance of Senate *per diem* lodging reimbursements from July 1983 forward.

The documents purporting to memorialize the creation of the partnership and the transfer of the condominium to that entity in July 1983 were not created and executed by the parties until early 1984.

Legal title to the condominium ultimately was not transferred to the partnership until May 1984. Even after that date, the Senator held a fifty percent interest in the property by virtue of his position as a general partner.

With the Senator's knowledge, the name of the partnership entity was changed from the "Durenberger-Scherer Partnership" to the "703-603 Association." The effect of that name change was to conceal from the Senate Disbursing Office the Senator's interest in the entity.

As to the sale of the condominium to ISC "effective" April 1, 1987 Special Counsel finds as follows:

ISC was not identified as a buyer for the condominium until the summer of 1987—several months after the purported effective date of the sale to ISC.

The transaction was made retroactive to April 1, 1987, the date immediately following the partnership's termination, in order to permit the Senator to claim Senate *per diem* lodging reimbursement for his condominium stays back to that date.

In December 1987, ISC generated invoices for the Senator's stays in the condominium for the period from April to October 1987. Based on these newly created invoices, in December 1987 the Senator sought Senate reimbursement for these past lodging costs.

Mr. Overgaard would not have entered into the sales transaction if the Senator had not agreed to rent the condominium back from ISC. Mr. Overgaard further understood that this rental was to be financed to a significant extent through Senate reimbursements. This being the case, it appears that Senator Durenberger used the promise of Senate funds to secure personal gain.

The lease agreement was not executed by the Senator or his representatives until April 1989 and the letter agreement reflecting the purchase, the deed and related real estate documents were not delivered to Mr. Overgaard until October 1989—almost three years after the April 1, 1987 "effective" date of the sale.

The documents reflect that the Senator and Mr. Overgaard agreed that Mr. Overgaard would reconvey the condominium to the Senator on demand. It therefore appears that Senator Durenberger in fact did not intend to surrender all rights in the property.

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By virtue of the principals' failure to file the necessary documents with the Registrar of Titles, ISC still does not have legal title to the condominium.

Although the Senator received Senate reimbursement on a fairly regular monthly basis between February 1988 and November 1989, during that same period he made only nine lump sum rental payments to ISC—thereby effectively having the use of Senate reimbursement funds for substantial periods of time.

The evidence therefore strongly suggests that the Senator intended to do little more than "park" the condominium with Overgaard, so that he could continue to reap the benefits of Senate *per diem* reimbursements. Special Counsel finds that, through this conduct, Senator Durenberger has abused his United States Senate Office and misused United States funds.

Special Counsel also finds that Senator Durenberger repeatedly violated the provisions of the Ethics in Government Act governing qualified blind trusts. Specifically, it is clear that the Senator frequently consulted with the trustee of his blind trust regarding the disposition of the condominium, a principal asset of the trust, in violation of 2 U.S.C. § 703(e)(3)(C)(vii).

He personally negotiated the terms of the condominium sale to ISC, and personally was involved in the efforts to bring that transaction to closure. In addition, Senator Durenberger periodically requested and received financial information regarding the trust holdings, in violation of 2 U.S.C. § 702(e)(3)(C)(viii).

#### C. Recommendation of Sanction

Special Counsel respectfully submits that through this pattern of reprehensible conduct, Senator Durenberger has violated laws and Senate Rules and has brought discredit upon the United States Senate. Special Counsel therefore recommends that this Committee report to the full Senate a Resolution denouncing Senator Durenberger.

### III. PROCEDURAL BACKGROUND

Since these proceedings were initiated approximately sixteen months ago, Committee staff and Special Counsel have conducted an exhaustive investigation seeking to discover all relevant facts. Throughout the Preliminary Inquiry, Initial Review and Investigation stages of the matters under review, documents were subpoenaed from 198 individuals and organizations. An additional twenty-one individuals and organizations provided documents voluntarily to the Committee. Approximately 240 witnesses were interviewed, fourteen witnesses deposed, and eighty-one affidavits obtained. The inquiry culminated in a two day public hearing held on June 12 and June 13, 1990.

#### A. Preliminary Inquiry Regarding Piranha Press and Related Matters

Allegations involving Senator Durenberger were first brought to the Committee's attention on September 27, 1988, when thirty-nine

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members of the Minnesota Bar filed a complaint with the Committee.<sup>4</sup> The principal issues raised in the complaint involved Senator Durenberger's receipt of income from Piranha Press, Inc. ("Piranha Press") for a series of "promotional appearances," and his possible use of improper influence to solicit speaking engagements in the Boston metropolitan area to coincide with scheduled appointments with a counselor. In addition, the complaint alleged that the Senator received gifts of limousine service in connection with these Boston area appearances.<sup>5</sup>

Senator Durenberger was notified of the Committee's receipt of the complaint, and was invited to respond to the complaint in writing. Thereafter, through his counsel James Hamilton, Senator Durenberger submitted a lengthy written response to the complaint.<sup>6</sup>

On March 1, 1989, the Committee voted unanimously to conduct a Preliminary Inquiry into the issues raised in the complaint. Senator Durenberger was notified of this decision on March 2, 1989. Special Counsel Ex. 1. This Inquiry was conducted by Committee staff counsel. As part of the Preliminary Inquiry, the Committee requested and received Senator Durenberger's files relating to the issues under review. Committee staff counsel interviewed twenty witnesses, and obtained affidavits from six of these witnesses. Staff counsel also deposed ten other key witnesses including the Senator's former Administrative Assistants, Thomas Horner and Douglas Kelley; his scheduler, Jodi Mathison; and Heidi Shaw, his bookkeeper. Staff counsel also deposed Michael Mahoney, the Minnesota counsel who negotiated the Senator's agreement with Piranha Press on the Senator's behalf and who later acted as Piranha Press' agent, and Gary Diamond, the president of Piranha Press. In addition, the Committee subpoenaed relevant documents from Piranha Press, as well as certain records from Piranha Press' Minnesota bank.<sup>7</sup>

During the course of the Preliminary Inquiry, additional questions were raised relating to the Senator's relationship with Piranha Press. These questions included whether Senator Durenberger violated Senate Rule 34 by failing to timely report reimbursements for travel expenses received in connection with certain Piranha Press and Boston appearances; whether Senator Durenberger violated Senate Rule 35 by accepting certain travel and entertainment expenses during a trip to Puerto Rico in late December 1985 and early January 1986; whether Senator Durenberger violated Senate

<sup>4</sup> Senator Durenberger noted in the public hearing in this matter that the Committee proceedings were the result of a complaint filed by his political opponents. *Transcript of Hearings Before the United States Senate Select Committee on Ethics, Hearing on the Matter of Senator David Durenberger* (June 13, 1990) at 39, 42 (hereinafter cited as "Hearing Transcript"). It must be noted, however, that Special Counsel's findings in this matter are based not upon partisan politics, but upon a review of documents provided to the Committee by the Senator himself, his advisors, and disinterested third parties, and upon statements of the Senator's former staff members, his attorneys and the individuals who arranged the Senator's appearances.

<sup>5</sup> The complaint also alleged that Senator Durenberger misappropriated federal funds by improperly using Senate staff and facilities to produce manuscripts for his books and to arrange for book promotional appearances.

<sup>6</sup> This response is discussed at further length in Section III, D below.  
<sup>7</sup> A limited number of organizations and individuals also provided documents to the Committee voluntarily as part of its Inquiry. During the course of the Preliminary Inquiry, Mr. Hamilton was provided with copies of deposition transcripts, affidavits and reports of witness interviews shortly after these became available to Committee staff.

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Rule 38, paragraph 2 and the Federal Election Campaign Act by converting to his personal use a campaign contribution; and whether Senator Durenberger violated the regulations of the Senate Committee on Rules and Administration ("Rules Committee") by making Piranha Press appearances in Senate rooms.

After consideration of staff counsel's report of the Preliminary Inquiry, on August 3, 1989 the Committee voted unanimously to proceed to an Initial Review pursuant to Committee Rule 4, and to retain Special Counsel in this matter. Senator Durenberger was notified of these decisions by letter dated August 4, 1989. Special Counsel Exs. 2-4. At that time, Senator Durenberger was advised that the Initial Review would include an examination of whether the Senator violated: (i) the statutory honorarium limitations set forth in 2 U.S.C. § 31-1 and 2 U.S.C. § 441i through his relationship with Piranha Press; (ii) Senate Rule 34 by failing timely to report the receipt of certain travel reimbursements; (iii) Senate Rule 38, paragraph 2 by converting to his personal use a campaign contribution; (iv) Senate Rule 37, paragraph 1 by soliciting sponsors in the Boston area to pay the expenses of personal travel; (v) Senate Rule 35 by accepting payment of personal travel expenses in the Boston area and miscellaneous personal expenses during a trip to Puerto Rico; and (vi) Senate Rules Committee regulations and 40 U.S.C. § 193d by using United States Capitol and Senate rooms for Piranha Press appearances. Special Counsel Ex. 4.

#### *B. Initial Review Regarding Piranha Press and Related Matters*

The Initial Review commenced promptly thereafter with an examination of all documents provided by the Senator, in order to identify each group or organization before which the Senator spoke during 1985 and 1986 pursuant to his agreement with Piranha Press, as well as each group with which he met in the metropolitan Boston area. A total of 182 subpoenas then issued to such "sponsoring organizations" and other individuals and groups which participated in the Senator's appearances before these organizations.<sup>8</sup>

Documents also were subpoenaed from Michael Mahoney, Senator Durenberger's Minnesota counsel. In addition, Piranha Press banking records were subpoenaed from the Norwest Bank, N.A. in Minneapolis, Minnesota. Records of a Boston limousine company used by the Senator during his trips to Boston also were subpoenaed. Seven individuals and organizations were asked to produce material voluntarily. Special Counsel also reviewed documents made available to the Committee by the Rules Committee regarding the use of Senate facilities for certain appearances by Senator Durenberger.

Following the review of these materials, 191 witnesses were interviewed.<sup>9</sup> These witnesses included principally individuals em-

<sup>8</sup> In addition, Special Counsel identified a number of organizations which extended invitations or the Senator to speak, but which withdrew their invitations or canceled the Senator's appearance after some contact with Piranha Press. Special Counsel also identified a number of appearances which at some point were treated by the Senator's staff or his publisher as promotional events, the payment for which ultimately either was not remitted or was reported by the Senator as an honorarium. See Special Counsel Exs. 20, 24, 26, 31, 44, 69, 71, 74.

<sup>9</sup> These witnesses were interviewed during both the Initial Review and Investigation stages of the inquiry.

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played by or affiliated with the organizations which invited the Senator to speak, or before which the Senator spoke, in 1985 and 1986. Special Counsel also interviewed several former members of the Senator's staff, including Jimmie Powell, the Senator's Legislative Director from 1983 to August 1985; Charles Kahn, the Senator's Legislative Assistant for health policy from 1984 to 1986; and Anne Kelly Planning, the Senator's personal secretary and scheduler from late 1983 to 1985. Special Counsel obtained affidavits from seventy-five of the witnesses interviewed.

Two individuals, Robert Wilbur of the Health Industry Manufacturers Association, and Frederick Graefe, Esquire, formerly of the law firm of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, were deposed. In addition, Michael Mahoney was deposed by Special Counsel. Special Counsel also transcribed and reviewed audio and video tape recordings of thirty-five of Senator Durenberger's "promotional appearances" which were provided either by the Senator or by the various subpoenaed organizations.

Special Counsel provided to Senator Durenberger's counsel copies of all documents received in response to subpoenas and informal requests during the Initial Review and Investigation, copies of the tape transcripts referenced above, and copies of relevant correspondence from the Rules Committee to all Senators.<sup>10</sup>

On February 6, 1990, Special Counsel submitted a Confidential Status Report regarding the Initial Review. On February 20, 1990, Special Counsel submitted a Supplemental Confidential Report to the Committee. Together, these reports constituted Special Counsel's final report of the Initial Review, pursuant to Committee Rule 4(e).

On February 22, 1990, the Committee found "substantial credible evidence providing substantial cause" to find violations of applicable Senate Rules and laws regarding the Senator's receipt of income from Piranha Press, the acceptance of gifts of limousine transportation in the Boston area, the conversion of a campaign contribution, the receipt of fees for appearances in United States Capitol and Senate facilities, and the failure to report certain travel reimbursements received in connection with his Piranha Press "promotional appearances." Accordingly, the Committee voted unanimously to conduct an investigation of these matters pursuant to Committee Rule 5. Special Counsel Ex. 5. Senator Durenberger was informed of this decision immediately thereafter.

Pursuant to Committee Rule 5(c), Senator Durenberger was formally notified of the Committee's decision and was provided with a description of the evidence supporting the relevant allegations by letter dated March 1, 1990. At that time, the Senator and his counsel also were provided with four volumes of evidentiary materials, including witness affidavits and memoranda of interviews. Special Counsel Ex. 6. An additional three volumes of supplementary evidentiary materials were provided to the Senator's counsel on May 10, 1990. On May 2, 1990, the Committee voted to conduct a public

<sup>10</sup> On January 9, 1990, Special Counsel provided Senator Durrenberger's counsel with copies of all documents received pursuant to subpoena and informal request as of that date. Additional documents were sent to counsel on January 31, 1990. On February 5, 1990, transcripts of tape recordings were provided, followed by three deposition transcripts and additional documents on February 28, 1990.

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hearing beginning on June 12, 1990, as part of its Investigation. The Senator was advised of this decision through counsel shortly thereafter. On May 3, 1990, the Committee publicly announced its intention to hold a hearing in this matter.

### C. Proceedings Regarding the Condominium Matter

The allegations regarding Senator Durenberger's Minneapolis condominium came to the Committee's attention in December 1989, following numerous press reports on the matter and certain proceedings before the Rules Committee. Generally, the allegations in this matter have focused upon Senator Durenberger's receipt of Senate *per diem* lodging reimbursements for the cost of renting his former condominium property in Minneapolis.

#### 1. PROCEEDINGS BEFORE THE RULES COMMITTEE

On December 1, 1989, Senator Durenberger requested that the Rules Committee review his claims for *per diem* reimbursements for stays in the Minneapolis condominium. The Senator submitted to the Rules Committee a statement of facts and discussion of rules regarding this matter on December 22, 1989. Special Counsel Ex. 294. Senator Durenberger emphasized in this submission that he had relied upon his counsel's conclusion that he was entitled to collect reimbursement for the daily rental costs of the condominium, both when the Senate was and was not in session. The Senator asked that the Rules Committee review this conclusion, and offered to refund to the Senate any reimbursements that were received improperly.

By letter dated January 24, 1990, the Rules Committee advised Senator Durenberger that during the *sine die* and August recesses a Member is not entitled to reimbursement for expenses incurred while at his/her official duty station, deemed during those periods to be the Member's "residence" city in his/her home state. The Committee further clarified that a Member's "residence city" is the Member's usual place of residence. See Special Counsel Ex. 295.

In response to this letter, Senator Durenberger has refunded to the Senate \$11,005 as repayment of reimbursements which he received for lodging in the condominium during the referenced recess periods between August 1983 and November 1989. Special Counsel Ex. 296.

#### 2. PROCEEDINGS BEFORE THE ETHICS COMMITTEE

On December 21, 1990, this Committee voted unanimously to initiate a Preliminary Inquiry regarding certain real estate and related transactions by the Senator involving the Minneapolis condominium. The Committee notified Senator Durenberger of its decision immediately thereafter.

Subsequently, on December 28, 1989, Minnesota State Senator William Luther filed a complaint with the Committee, alleging generally that Senator Durenberger received Senate reimbursement for staying in the condominium at a time when the Senator was the sole owner of the unit. This complaint also asserted that Senator Durenberger later failed to disclose to the Senate his interest in the partnership from which he rented the condominium, and

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that in 1985 he may have placed his interest in the partnership in a blind trust in order to evade Senate disclosure requirements.<sup>11</sup> Special Counsel Ex. 293.

By letter dated January 8, 1990, the Committee requested that Senator Durenberger provide to it certain relevant documents. On January 24, 1990, Senator Durenberger produced to the Committee approximately 3,800 pages of documents in response to this request.<sup>12</sup> In addition, the Committee subpoenaed documents from nine individuals and companies identified as participants in various transactions involving the Senator's condominium from 1983 through 1989. These individuals and companies included the Senator's former partner in the real estate partnership, Roger Scherer; attorneys Randall Johnson, Richard Langlais and Michael Mahoney, each of whom advised the Senator regarding condominium transactions; and Paul Overgaard and the Independent Service Company, the purported purchaser of the condominium in 1987.

In addition, in early March 1990 the Committee subpoenaed documents from Eugene Holderness, Senator Durenberger's former campaign manager. Finally, documents were provided voluntarily to the Committee by Jean Stow, the partnership's bookkeeper. Certain materials also were provided to the Committee by the Senate Disbursing Office.

Between February and April 1990, twelve witnesses were interviewed, including certain former members of the Senator's staff. Subsequently, interviews also were conducted of seven current and former staff members of the Rules and Ethics Committees. Two individuals, Paul Overgaard of the Independent Service Company and Michael Mahoney, were deposed. The deposition transcripts and documents received pursuant to subpoena and informal request were provided to Senator Durenberger's counsel on May 4, 1990.

On May 8, 1990, Special Counsel submitted to the Committee his Confidential Report of the Preliminary Inquiry into this matter.<sup>13</sup> On May 9, 1990, the Committee found "substantial credible evidence providing substantial cause" to find that a violation within its jurisdiction had occurred and voted to conduct an Investigation regarding the condominium matter in accordance with Committee Rules 3(d)(5) and 4(f)(4). Special Counsel Ex. 7. The Committee notified the Senator of this decision immediately thereafter.

Pursuant to Committee Rule 5(c), by letter dated May 14, 1990, the Committee formally notified Senator Durenberger of this decision. The notice stated that the Investigation would examine whether the Senator abused his United States Senate office and misused United States Senate funds, and whether he may have violated provisions of the Ethics in Government Act relating to qualified blind trusts. Special Counsel Ex. 8. Two volumes of evidentiary

<sup>11</sup> Finally, the complaint alleged that Senator Durenberger failed to report properly to the Senate certain transactions involving the condominium, and questioned whether the Senator might have violated the Internal Revenue Code in connection with these transactions.

<sup>12</sup> The Senator's January 24, 1990 submission also included some documents regarding the Piranha Press matter. On April 30, 1990, Senator Durenberger submitted additional documentation regarding the condominium matter.

<sup>13</sup> Special Counsel previously had given the Committee several oral reports regarding the condominium matter.

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materials were provided to the Senator with this notification letter.<sup>14</sup> The Committee further notified the Senator that the public adjudicatory hearings previously scheduled to commence on June 12, 1990 would encompass the condominium investigation. Special Counsel Ex. 8.

*D. Senator Durenberger's Presentations to the Committee Prior to the Public Hearing*

Throughout these proceedings, Senator Durenberger made numerous presentations to the Committee, both orally and in writing, addressing the allegations and the evidence.

Initially, in a lengthy written response to the original complaint in this matter, the Senator argued that in entering into the agreement with Piranha Press he relied upon an advisory opinion issued by the Federal Election Commission ("FEC") and the advice of his counsel. As to his speeches in the Boston metropolitan area, the Senator admitted that on some occasions his staff solicited meetings for him in the Boston area to coincide with personal travel to Boston. He also acknowledged that on certain occasions his travel expenses were paid by the groups with whom he met. The Senator contended that such dual or multi-purpose trips—i.e., those which serve both business and personal objectives—are not prohibited by Senate Rules.

On December 22, 1989, counsel to the Senator provided to Special Counsel his written submission to the Rules Committee addressing the condominium matter. The Senator and his counsel then met with the Committee in Executive Session on February 8, 1990. Senator Durenberger addressed the Committee, discussing the Piranha Press, Boston limousine and condominium matters during this session.

On May 16, 1990, Senator Durenberger's counsel submitted a lengthy memorandum to the Committee addressing each of the matters under investigation. In response to the Senator's request, and pursuant to Committee Rule 5(c), the Senator and his counsel also appeared personally before the Committee in Executive Session on May 16 and 17, 1990. At this time, both the Senator and Mr. Hamilton made statements to the Committee and responded to questions by Committee members regarding the Piranha Press, condominium and other matters under review.

*E. The Adjudicatory Hearing*

As was noted above, on May 2 and May 14, 1990 the Committee notified Senator Durenberger of its intention to hold a public hearing, commencing on June 12, 1990, as part of its investigation of the Senator's conduct. Because the investigation concerned possible disciplinary action against Senator Durenberger, this hearing was an "adjudicatory" hearing as defined in Committee Rule 6(c). The procedural protections set forth in Committee Rule 6(j) therefore applied.

<sup>14</sup> At that time Special Counsel also provided to Mr. Hamilton memoranda of interviews of witnesses contacted regarding the condominium matter.

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On May 11, 1990, the Committee sent a draft Prehearing Order to Mr. Hamilton and informed him that any objections to the draft Order would be heard at the Committee's May 16, 1990 meeting. The Order provided for the exchange of documents to be introduced as evidence at the hearing; stated that affidavits would be admissible as evidence, subject to the right of Special Counsel and the Respondent to subpoena such witnesses to testify at the hearing; and provided that documents, affidavits and testimony would be admissible at the hearing without formal proof, subject to timely objections during the hearing. No objections were raised by Mr. Hamilton at the Committee's May 16, 1990 meeting and the Order was entered on May 17, 1990. Special Counsel Ex. 9.<sup>15</sup>

At Special Counsel's request, thirty-two subpoenas to testify at the hearing were served between May 21-29, 1990. On May 29, 1990, twenty-five additional subpoenas for witnesses were issued in response to Mr. Hamilton's request. Pursuant to the Prehearing Order and Committee Rule 6(j), on June 4, 1990, Special Counsel provided Mr. Hamilton with the exhibits intended to be introduced as evidence at the hearing. These 447 exhibits, contained in twenty-three volumes, included eighty affidavits, 113 exhibits containing documents relevant to Piranha Press appearances, transcripts of forty-four of the Senator's Piranha Press speeches, eighteen exhibits containing documents related to the Senator's receipt of limousine service in the Boston area, excerpts from deposition transcripts, copies of the Senator's travel vouchers for 1983 through 1989, and other documents related to the matters under investigation.<sup>16</sup> Also marked as exhibits were the Senator's books, *Neither Madmen Nor Messiahs* (Special Counsel Ex. 448) and *Prescription for Change* (Special Counsel Ex. 449).

On June 9, 1990, Mr. Hamilton provided Special Counsel with 110 exhibits to be introduced at the hearing, including twenty-three affidavits obtained by Mr. Hamilton during the first week of June 1990; thirteen letters to Senator Durenberger regarding his book, *Neither Madmen Nor Messiahs*; excerpts from depositions taken by Committee staff counsel and Special Counsel; and documents related to the Piranha Press and condominium matters, most of which also had been marked as exhibits by Special Counsel.

The hearing commenced on June 12, 1990. Pursuant to Committee Rule 6(j), Senator Durenberger was afforded all rights to which a Respondent is entitled at an adjudicatory hearing. In particular,

<sup>15</sup> By letter to Special Counsel dated May 24, 1990, Mr. Hamilton objected to certain provisions of the Order. Specifically, Mr. Hamilton objected to the requirement that exhibits to be used in cross-examination of witnesses be exchanged prior to the hearing; that affidavits and depositions be admitted into evidence; and that documents be admitted without formal proof, subject to timely objections made during the hearing. Mr. Hamilton requested that Special Counsel forward his comments to the Committee. In response, the Committee informed Mr. Hamilton on May 29, 1990 that its Order would stand, but that any questions or uncertainties about the Order should be discussed with Special Counsel.

Mr. Hamilton then renewed his objections to the admission of evidence by letter to Special Counsel dated June 5, 1990. Special Counsel responded in writing to these objections on June 11, 1990. Mr. Hamilton did not renew these objections during the hearing in this matter, and specifically did not object to the admission of any of Special Counsel's exhibits at that time.

<sup>16</sup> These documents previously had been provided to Mr. Hamilton as they were received and generated during the course of the Initial Review and Investigation.

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Senator Durenberger was represented by counsel, and was free to call witnesses on his behalf.

At the outset of the hearing, following statements by the Chairman, Vice Chairman and each Member of the Committee, Special Counsel delivered his opening statement. Special Counsel provided a detailed account of the evidence in these matters, concluding that Senator Durenberger knowingly and willfully engaged in conduct which violated statutes, Senate Rules, and standards and acceptable norms of ethical conduct. *Hearing Transcript* (June 12, 1990) at 106. On the basis of the evidence gathered during the Committee's inquiries, Special Counsel recommended to the Committee that it pass a Resolution calling for the full Senate to denounce Senator Durenberger for conduct which has brought dishonor and disrepute to the Senate. *Id.* at 107.

At the conclusion of Special Counsel's statement, Senator Durenberger's counsel made an opening statement on behalf of Senator Durenberger. The Senator's counsel did not contest the fact that Senator Durenberger violated certain Senate Rules, nor did he contend that a sanction was unwarranted. *Id.* at 109-110. He argued instead that Senator Durenberger acted in good faith, without an intent to violate the Rules, and upon the advice of counsel. *Id.* at 110. He further argued that the sanction of denouncement was not justified. *Id.*

Senator Durenberger's counsel concluded his presentation on the morning of June 13, 1990. At that time, he informed the Committee that Senator Durenberger would submit the matter to the Committee on the basis of the documentary evidence introduced on the Senator's behalf and that submitted by Special Counsel. Senator Durenberger's counsel specifically declined the right to call any witnesses. *Hearing Transcript* (June 13, 1990) at 15.

Senator Durenberger then addressed the Committee, reiterating his counsel's statements that he acted "in good faith, with no intent whatsoever to violate the rules of the Senate" and upon the advice of counsel. *Id.* at 20. Following Senator Durenberger's remarks, Special Counsel concluded his opening statement.

The Chairman then questioned Mr. Hamilton about Senator Durenberger's decision to waive his rights, including the right to call witnesses and to cross-examine Special Counsel's witnesses.<sup>17</sup> The Chairman specifically explained that Special Counsel's recommendation of sanction did not preclude the Committee from recommending a different, and possibly more severe sanction. *Id.* at 72-73. In response, Senator Durenberger's counsel reaffirmed that the Senator was waiving any due process rights, and was specifically waiving the right to call or cross-examine witnesses, as well as the right to any further hearing.

The Chairman then queried Senator Durenberger, who stated that he concurred with his counsel's waiver of his rights available during an adjudicatory hearing. *Id.* at 77. Following this discussion of the Senator's waiver of rights, Special Counsel moved into evi-

<sup>17</sup> The Chairman specifically inquired of the Senator's counsel whether he had any objection to the Senator being called as a witness during the hearing. Such a procedure is authorized by Committee Rule 6(d). In response, the Senator's counsel stated that the Senator wished to submit the matter to the Committee on the existing record.

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dence Special Counsel Exhibits 1-447, 448 and 449 (the Senator's books) and 450-452.<sup>18</sup> These exhibits and Senator Durenberger's 112<sup>19</sup> exhibits were received in evidence without objection. The Committee then excused from their subpoenas the thirty-two witnesses who had been subpoenaed to testify at Special Counsel's request and the additional witnesses subpoenaed at Mr. Hamilton's request. The hearing concluded with the Committee's direction that Special Counsel promptly submit his Final Report.<sup>20</sup>

#### IV. THE COMMITTEE'S AUTHORITY TO INVESTIGATE AND SANCTION MISCONDUCT OF MEMBERS

##### A. Constitution and Senate Rules

Article I, Section 5, Clause 2 of the United States Constitution provides:

Each House [of Congress] may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Pursuant to this mandate, in 1964 authority to investigate and report to the Senate possible unethical conduct was delegated to the former Senate Select Committee on Standards and Conduct. In 1977 this authority was delegated to the newly created Select Committee on Ethics.

It is the duty of the Committee, under its authorizing resolution, S. Res. 338, as amended in 1977, to

receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as Members of the Senate, or as officers or employees of the Senate, and to make appropriate findings of fact and conclusions with respect thereto. . . .

S. Res. 338, 88th Cong., 2d. Sess. § 2(a)(1) (1964), as amended by S. Res. 110, 95th Cong., 1st Sess. § 201 (1977). The legislative history of this Resolution reflects the Senate's intent to delegate substantial authority to the Committee to investigate allegations of misconduct by Members.<sup>21</sup>

<sup>18</sup> Special Counsel Exhibits 450-452 were rebuttal exhibits.

<sup>19</sup> Exhibits 111 and 112 were provided to the Committee by Mr. Hamilton on June 13, 1990.

<sup>20</sup> The Senator's counsel also was informed that he had the right to submit expeditiously a final briefing of the matters under investigation.

<sup>21</sup> During its consideration of Resolution 338, the Senate Rules Committee rejected Senator Cooper's proposal to create a select committee authorized "to receive complaints of unethical, improper, [and] illegal conduct of members. . . ." S. Rep. No. 1125, 88th Cong., 2d. Sess. 13 (1964). Instead, the Rules Committee reported a resolution which proposed to vest itself with the limited authority "to investigate alleged violations of the rules of the Senate. . . ." S. Rep. No. 1147, 88th Cong., 2d. Sess. 1 (1964).

On the floor, Senator Cooper was able to persuade the full Senate to enact his version of Resolution 338. 110 Cong. Rec. 16930 (1964) Senator Case, speaker in favor of the Cooper substitute, stated that "unlike the resolution in its original form. . . the [Cooper] proposal would not be limited to alleged violations of Senate Rules, but it would take into account all improper conduct of any kind whatsoever." *Id.* at 16933 Senator Dirksen similarly stated that a "very careful reading . . . of the Cooper amendment will disclose the broad delegation of power it contains with respect to discipline, matters of conduct, performance, standards, and so forth." *Id.* at 16940.

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In order to fulfill this mandate, the Committee is authorized to hold hearings, issue subpoenas, administer oaths, take testimony, including by deposition, and retain outside counsel. The Committee further is authorized, with the prior consent of the department or agency involved, to utilize the services, information and facilities (and to employ the services of personnel) of any such department or agency of the government.

Pursuant to the Committee's Rules, the Committee is authorized to address inadvertent, technical, or *de minimus* violations through informal methods. Committee Rule 4(f)(2). The Committee is further authorized to propose remedial actions against a Member for violations which, while not inadvertent or *de minimus*, are not sufficiently serious to warrant imposition of the severe sanctions of expulsion, censure or reporting to the appropriate party conference, specified in S. Res. 338. Committee Rule 4(f)(3).

In those situations in which the violations are sufficiently serious to warrant such severe sanctions, as in the instant case, the Committee is not authorized to discipline the Member unilaterally. Such sanctions may only be imposed by the full Senate. Accordingly, pursuant to S. Res. 338 the Committee is authorized to recommend to the Senate by report or Resolution serious disciplinary action. S. Res. 338, § 2(a)(2).

#### B. Prior Senate Disciplinary Cases

The Senate has never adopted a fixed set of standards for the imposition of particular sanctions. Instead, the Senate has considered each case on its individual facts. While it is difficult to identify any precise guidelines from the cases in which the Senate has considered disciplinary action against one of its own Members, some general principles emerge from an examination of these precedents. Generally, in cases involving treasonous conduct or disloyalty to the United States, the appropriate Senate committee has recommended expulsion.<sup>22</sup> Similarly, cases involving charges of bribery or receipt of compensation for services rendered before government departments have resulted in recommendations of expulsion.<sup>23</sup>

In contrast, cases involving misuses of campaign or office funds, or abuse of senatorial office and authority, have typically resulted in a recommendation of a lesser, but nonetheless very severe sanction. In the case of Senator Thomas Dodd, for example, the Senate imposed a sanction of censure based upon the following findings:

[F]or having engaged in a course of conduct . . . from 1961 to 1965 of exercising the influence and power of his office as a United States Senator . . .

(a) to obtain, and use for his personal benefit, funds from the public through political testimonials and a political campaign, and

(b) to request and accept reimbursements for expenses from both the Senate and private organizations for the same travel,

<sup>22</sup> E.g., Senator William Blount (1797).

<sup>23</sup> John F. Simmons (1862); James W. Patterson (1873); Charles H. Dietrick (1904); Joseph R. Burton (1906); Burton F. Wheeler (1924); Harrison Williams (1982).

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[Senator Dodd] deserves the censure of the Senate; and he is so censured for his conduct, which is contrary to accepted morals, derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and disrepute.

S. Rep. No. 193, 90th Cong., 1st Sess. 26-27 (1967).

In the more recent case of Senator Herman Talmadge, the Committee found that the Senator had grossly neglected his duty to faithfully administer the affairs of his office. Specifically, the Committee found that Senator Talmadge either knew or should have known of certain acts or omissions, including the failure to report and the diversion of campaign contributions to non-campaign purposes, the claiming of Senator reimbursements of over \$43,000 for official expenses which were not incurred, and the filing of inaccurate Financial Disclosure Reports and candidate's receipts and expenditure reports. Based on these findings of financial improprieties, the Committee voted unanimously on September 15, 1979 to denounce the Senator, characterizing his conduct as "reprehensible." S. Rep. No. 337, 96th Cong., 1st Sess. 17-18 (1979). Senator Talmadge was denounced by the full Senate thereafter. S. Res. 249, 96th Cong., 1st Sess. (1979).<sup>24</sup>

*C. Laws, Senate Rules and Other Ethical Considerations Applicable to the Committee's Present Investigation*

In its Resolution for Investigation in connection with the Piranha Press and related matters, the Commission set forth the allegations against Senator Durenberger. Special Counsel Ex. 5. That Resolution stated that the Investigation would include an examination of whether Senator Durenberger may have violated the honoraria limitations established by 2 U.S.C. § 31-1 and 2 U.S.C. § 441i through his arrangement with his publisher, and Senate Rule 34 by failing to timely report the receipt of certain travel expense reimbursements during 1985 and 1986.

The Resolution further stated that the Committee would examine whether Senator Durenberger may have violated Senate Rule 38, paragraph 2 by converting a campaign contribution to personal use and 2 U.S.C. § 434 and FEC regulations by failing to properly report and deposit a campaign contribution; Senate Rules Committee regulations and 40 U.S.C. § 193d by making Piranha Press speeches in U.S. Capitol and Senate facilities; and Senate Rule 35 by accepting payment for the unnecessary expenses of limousine transportation from organizations with a direct interest in legislation before the Congress.

The Resolution for Investigation involving the condominium matter stated that the Investigation would examine whether Senator Durenberger may have abused his United States Senate office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate as contemplated by Section 2(a)(1) of S. Res. 338, 88th Congress as amended. The Resolution stated that this improper con-

<sup>24</sup> Senate disciplinary precedents are reviewed in greater detail in *Senate Election, Expulsion and Censure Cases from 1793 to 1979*, S. Doc. No. 7, 92nd Cong., 1st Sess.

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duct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office, the misrepresentation of the ownership of the property for which he was claiming lodging reimbursement, and the back dating of real estate transactions and certain documentation relating to those transactions. Special Counsel Ex. 7.

The Resolution further cited possible violations of the Ethics in Government Act, including Sections 702(e)(3)(c) and 702(e)(6), regarding the administration of the Senator's blind trust.

#### V. EVIDENCE REGARDING SENATOR DURENBERGER'S RELATIONSHIP WITH PIRANHA PRESS

Between 1984 and 1986, Piranha Press published two books authored by Senator Durenberger: *Neither Madmen Nor Messiahs*, a collection of "white papers" on national security issues released in September 1984, and *Prescription for Change*, a collection of speeches on health care issues released in April 1986. Piranha press was the corporate successor to Fair Enterprises, Inc., which in the 1960s published a photographic book of wrestling holds, and which more recently printed fliers for state fairs.

Under the terms of his agreement with Piranha Press, Senator Durenberger made approximately 113 book "promotional appearances" before various trade associations, colleges and businesses during 1985 and 1986. Each of these groups paid Piranha Press a fee for the Senator's appearance, typically between \$1,000 and \$5,000, plus travel expenses. Piranha Press in turn paid the Senator \$100,000 in quarterly installments over a two year period.

Special Counsel finds that the arrangement between Senator Durenberger and Piranha Press was simply a means of converting into "stipendiary income" that which would otherwise have been honoraria income, and that Senator Durenberger therefore violated 2 U.S.C. § 31-1 and 2 U.S.C. § 441i.<sup>25</sup> Special Counsel also finds that Senator Durenberger knowingly and actively participated in this arrangement, the obvious effect of which was to circumvent the statutory limitations on honoraria income.

The groups before which Senator Durenberger made speeches pursuant to this arrangement did not invite him to promote his books, and only rarely characterized his appearance as a promotional event. See Special Counsel Exs. 45, ¶ 8; 80, ¶¶ 4-5. In addition, the Senator frequently failed to mention either his books or his publisher at these appearances. When he did, the references were often only fleeting and did little more than belittle the books or the publisher.

Moreover, the principal outcome of Senator Durenberger's arrangement with Piranha Press was to produce income in the form of speaker's fees, not book sales. Available financial records show that Piranha Press earned approximately \$248,300 in speaker's fees between 1985 and early 1987, as compared to approximately

<sup>25</sup> In 1985 2 U.S.C. § 31-1 imposed an annual cap on honoraria income of thirty percent of a Member's salary. Effective in 1986, this percentage was raised to forty percent. Section 441i of the Federal Election Campaign Act (2 U.S.C. § 411i) prohibits the acceptance of an honorarium of more than \$2,000 for each appearance, speech or article.

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\$15,000 in book sales.<sup>26</sup> Not surprisingly, the Senator never received any royalties from the book sales. The books therefore appear to have been little more than a pretext for the Senator's speaking engagements that would otherwise have been treated as traditional honoraria events.

*A. Contractual Arrangement Between Senator Durenberger and Piranha Press*

The evidence in this matter demonstrates that the Senator's contract with Piranha Press did not constitute a good faith book publishing or promotional agreement. The written agreement between the Senator and Piranha Press varied in many key respects from a standard book publishing contract. Most importantly, the agreement obligated the Senator to make "special appearances to discuss, speak on or otherwise promote the [books] as are mutually agreed upon by Publisher and Author."<sup>27</sup> Special Counsel Exs. 252, 253. The agreement further provided that the Senator was to be paid by Piranha Press in consideration "of the rights to the [book] granted by the author to publisher hereunder, and in consideration of the author's services to be rendered in promoting the [book] and the author." *Id.*

While authors frequently make public appearances in an effort to promote their publications, they typically are not compensated by their publishers for such appearances. In his affidavit in this matter, Samuel Vaughan, the Senior Vice President and Editor of the Trade Department at Random House, Inc., described the usual industry practice as follows:

Publishers do not customarily or traditionally pay an author to promote the author's books. Although an author may make some promotional appearances on behalf of his/her book, and the publisher usually pays all or some of the travel expenses associated with such appearances, no fees or other compensation are normally paid to the author.

Special Counsel Ex. 81.

In at least this respect the "promotional appearance" provisions of the Piranha Press agreement more closely resembled a "speaker's bureau" contract than a traditional book publishing agreement.<sup>28</sup>

<sup>26</sup> See Special Counsel Ex. 277. The analysis of Piranha Press cash disbursements and receipts reprinted as Special Counsel Exs. 277 and 278 were prepared by Special Counsel. These documents are based on a review of Piranha Press bank account records produced by the publisher and his banking institution in response to Committee subpoenas, as well as a limited number of documents produced by B. Dalton Bookseller, which purchased 1,604 copies of the Senator's first book.

<sup>27</sup> The parties apparently never reached any agreement on the actual number of appearances which would be made by Senator Durenberger. In agreeing to pay quarterly installments of \$12,500, Mr. Diamond estimated that the Senator would make approximately fifty appearances each year. Special Counsel Ex. 433 at 47. Mr. Mahoney, in contrast, testified that the parties agreed to approximately only twelve appearances each year. Deposition of M. Mahoney (4/27/89) at 57.

<sup>28</sup> Pursuant to such agreements, the "speaker's bureau" typically makes all arrangements for appearances by its client, and collects all speaker's fees for these events. The client is then paid a percentage of the speaker's fees collected by the "speaker's bureau."

It is interesting to note that on at least one occasion, a representative of Piranha Press characterized the publisher's role as that of a "speaker's bureau." Susan Dempsey of the Healthcare

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The agreement between the Senator and Piranha Press also structured these appearances and payments over a two year period running from the date of the agreement, without any reference whatsoever to the publication date of the books themselves. Mr. Vaughan of Random House, Inc. characterized such an agreement as "extraordinary." *Id.* As Mr. Vaughan further explained, appearances by an author to promote book sales typically are concentrated within the several month period surrounding the official publication or release date of the book. *See Id.* In contrast, many of the Senator's "promotional appearances" occurred well after the publication of his first book, and well before the publication of his second book.<sup>29</sup>

Materials produced to the Committee by Mr. Mahoney suggest that from its inception the principal purpose of the Senator's agreement with Piranha Press was to permit the Senator to earn fees for speaking engagements, rather than to promote the sale of his books. From the outset the parties seem to have recognized little if any hope of earning money from the actual sale of the book.

In an August 13, 1984 memorandum to Mr. Mahoney from Thomas Horner, the Senator's Administrative Assistant, Mr. Horner requested "specific advice on setting up fee-earning appearances in connection with the Senator's defense book, *Neither Madmen Nor Messiahs*." Special Counsel Ex. 247. Significantly, Mr. Horner acknowledged in this memorandum that the parties did not expect that the books would actually generate any income through sales:

The book will be distributed for sale in 40-some B. Dalton Bookstores in Minnesota and in the Washington, D.C., area. *Income from the sale of the books will go to Gary [Diamond of Piranha Press], although he does not expect to break even.* His goal was to get into publishing and to help the Senator.

Please advise on how we should structure speaking events connected with the promotion of the book that could potentially be income-producing to the Senator; is there an advantage to the Senator providing some of the funds for promotion; etc.

*Id.* (emphasis added).

Early the following month, Mr. Horner forwarded to Mr. Mahoney a draft author-publisher agreement prepared by Piranha Press' counsel. Again, Mr. Horner emphasized the importance of a provision for fee-earning appearances:

Financial Management Association ("HFMA") recalled the following conversation with a representative of Piranha Press:

[T]he representative explained that Piranha Press acted as a "speakers' bureau" and that Piranha's payments to Senator Durenberger were separate from HFMA's payment to the publisher.

Special Counsel Ex. 25, ¶ 6

<sup>29</sup> Unlike a typical book publishing agreement, which provides for royalties based on the retail price of the book, the agreement prepared by Senator Durenberger's counsel provided for royalty payments based on the net profits resulting from the sale of the book. In his affidavit, Mr. Vaughan stated that such a royalty agreement tied to net sale profits is not customary in either general or trade publishing. *See* Special Counsel Ex. 81.

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[W]e would like a paragraph inserted in which it is made clear that the publisher or some other entity may pay the Senator a fee for the series of speeches or other promotional activity. This would be along the lines of your earlier conversations with the Senator.

Special Counsel Ex. 248.<sup>30</sup> As ultimately structured and administered, the arrangement between Piranha Press and the Senator accommodated this goal strikingly well. The income generated by the Senator's "promotional appearances" over the two year period of the agreement far exceeded the income generated in book sales—approximately \$248,300 in speaking fees as compared to only approximately \$15,500 in book sales. See Special Counsel Exs. 277, 278.

The quoted memoranda also clearly reflect Senator Durenberger's personal involvement in the structuring of the contract with Piranha. The Senator is shown as a copy recipient on the August 13, 1984 memorandum from Mr. Horner, seeking Mr. Mahoney's advice on structuring fee-earning speeches. See Special Counsel Ex. 247. The subsequent September memorandum specifically references conversations between Mr. Mahoney and the Senator about such an arrangement.<sup>31</sup> See Special Counsel Ex. 248.

Moreover, both Mr. Horner and Mr. Mahoney testified that the Senator participated in discussions concerning the arrangement throughout the contract drafting period. See Special Counsel Exs. 438 at 14; 442 at 9-10, 177-178; Durenberger Ex. 103 at 144. The evidence therefore demonstrates that Senator Durenberger actively participated in the creation of this "extraordinary" promotional contract.

#### *B. The Nature of the Senator's Appearances*

As was noted above, during 1985 and 1986, Senator Durenberger made 113 "promotional appearances" pursuant to his arrangement with Piranha Press. On none of these 113 occasions was the Senator invited to appear for the purpose of promoting or discussing his book.<sup>32</sup> Moreover, none of these appearances was the result of an inquiry made of Gary Diamond or Piranha Press. Instead, the Senator's Piranha Press appearances uniformly were the result of invitations extended to the Senator in his capacity as a United States Senator, either directly or through his Senate staff.

Generally, in response to an invitation to deliver an honorarium address, an organization was advised of the Senator's relationship with Piranha Press, either by the Senator's staff or the publisher. Piranha Press then typically sent a two page form letter to the sponsoring organization, summarizing the terms and conditions of

<sup>30</sup> Shortly thereafter, Mr. Horner spoke with Donna Hanbery, Mr. Mahoney's partner, about these arrangements. Ms. Hanbery's notes of that conversation reflect that she too was asked to structure a contract between the Senator and Piranha Press in which the Senator would do promotions "for a fixed fee." Special Counsel Ex. 249.

<sup>31</sup> Mr. Horner testified generally that the concept of promotional appearances may have originated with Mr. Mahoney. Special Counsel Ex. 438 at 13-14. The referenced documents, however, suggest that the concept originated in the Senator's office.

<sup>32</sup> Throughout the course of the Committee's proceedings, Special Counsel repeatedly asked Senator Durenberger's counsel to provide any available evidence of invitations to the Senator to promote his books. No such evidence was proffered.

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the Senator's scheduled appearance. Although this form letter began with a statement that the addressee had "inquired regarding a promotional appearance by Senator Durenberger," as was noted above Special Counsel has found no instance in which a sponsoring organization actually invited the Senator to appear to promote his book.<sup>33</sup>

Instead, organizations before which Senator Durenberger spoke invited him, not because of his role as an author, but because of his position as a United States Senator. Often, the representative of the organization responsible for selecting Senator Durenberger as a speaker did not even know of the Senator's books. See, e.g., Special Counsel Exs. 23, ¶ 3; ¶ 30, ¶ 3; 50, ¶ 3. Most frequently, the Senator appears to have been selected as a speaker because of his membership on the Senate Finance Committee or the Health Subcommittee of the Finance committee. See, e.g., Special Counsel Exs. 12, ¶ 2; 18, ¶ 3; 61, ¶ 3; 68, ¶ 2. In short, Senator Durenberger was invited by groups to give what, absent the Senator's arrangement with Piranha Press, would have been treated as traditional honoraria speeches.

The evidence demonstrates that Senator Durenberger knew that his "promotional appearances" were the result, not of requests for book promotions, but instead of speech invitations extended to him as a United States Senator. Throughout the term of his agreement with Piranha Press, Senator Durenberger personally designated as Piranha Press "promotional events" certain honorarium speech invitations received in his Senate office. See Special Counsel Ex. 440 at 37-38.

For example, on February 18, 1986, Senator Durenberger received an invitation to address a policy conference sponsored by Capitol Associates, Inc., which offered the Senator a \$2,000 honorarium. Senator Durenberger wrote on the invitation, "OK D PP," indicating his direction that the speech be treated as a Piranha Press "promotional appearance." Special Counsel Ex. 121 at B. The Senator made similar notations on invitations for traditional honorarium appearances extended by the American Society of Association Executives (Special Counsel Ex. 113 at A), the Association of Metropolitan Water Agencies (Special Counsel Ex. 118 at B), the Council of Industrial Development Bond Issuers (Special Counsel Ex. 130 at A), the Washington Campus (Special Counsel Ex. 151 at B), the National Association of Bond Lawyers (Special Counsel Ex. 163 at A), and the Singer Company (Special Counsel Ex. 191 at A).

Anne Kelly (now Planning), the Senator's scheduler until August 1985, described the process of selecting and scheduling Piranha Press events as follows:

I placed all written invitations for speeches in a folder for Senator Durenberger's review.

Senator Durenberger then returned the invitation folder to me with his notations on the invitation, reflecting

<sup>33</sup> See, e.g., Special Counsel Exs. 14, ¶ 2; 23, ¶ 3; 57, ¶ 3; 63, ¶ 3; 82, ¶ 4. In fact, Special Counsel repeatedly was informed by witnesses that the Piranha Press form letter was in error in this respect. See, e.g., Special Counsel Exs. 60, ¶ 7; 66, ¶ 5; 82, ¶ 8.

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whether he would accept the speech. Sometimes he would seek the guidance of a legislative aide as to whether or not he should speak to the group. *If he ultimately accepted the speech and if the organization was paying a fee, he would also indicate whether the speech was to be treated as an honorarium speech or as a Piranha Press speech.*

Special Counsel Ex. 65, ¶¶ 4, 5 (emphasis added). Jodi Mathison, the scheduler who assumed Ms. Kelly's responsibilities, similarly testified that Senator Durenberger himself designated some speech invitations received in his U.S. Senate office as Piranha Press appearances. Deposition of J. Mathison (5/5/89) at 18.<sup>34</sup>

In fact, as the Senator approached his honoraria income ceiling in 1985, speech invitations simply were forwarded by his United States Senate staff to Piranha Press to be treated as "promotional appearances." On February 15, 1985, shortly before the Senator made his first Piranha Press appearance, his Administrative Assistant forwarded to Mr. Mahoney a set of speech invitations which as of that date had already been accepted as honorarium speeches. Mr. Horner stated:

At the direction of Senator Durenberger I am forwarding to you the upcoming invitations that have been accepted on his behalf. These invitations were accepted prior to the agreement between the Senator and his publisher; therefore, the honoraria agreed upon is \$2,000 or less, the limit allowed by the U.S. Senate.

Special Counsel Ex. 258.

A listing of the Senator's honoraria speeches created in 1985 by Anne Kelly, his scheduler, reflects that by the end of February of that year, the Senator had collected a total of \$22,500 in speaking fees—\$19,500 in honoraria and \$3,000 in fees paid to Mr. Mahoney. Ms. Kelly's handwritten note on this list states: "After this amount was collected, Mahoney took over with speaking fees." Special Counsel Ex. 263. In her affidavit, Ms. Kelly stated:

I came to understand that after Senator Durenberger had almost reached his limitation on honoraria income for 1985, most speeches for which he was to receive an honorarium were to be handled as Piranha Press speeches.

Special Counsel Ex. 65, ¶ 6.

The Senator's Financial Disclosure Report for 1985 tends to confirm this understanding. That Report reflects eleven separate honoraria speeches, generating \$19,500 in honoraria income, between January 21, 1985 and February 22, 1985. Special Counsel Ex. 266. The Senator reported receipt of an honorarium from only one addi-

<sup>34</sup> Jimmie Powell, the Senator's Legislative Director from 1983 to August 1985, confirmed this procedure. In his affidavit, Mr. Powell stated:

My understanding of the scheduling procedures with respect to the publishing contract is that when an organization invited Senator Durenberger to speak and offered an honorarium payment, the invitation was forwarded to Michael Mahoney and arranged as a Piranha Press appearance. If no honorarium payment was available, the Senator's personal secretary and scheduler, Anne Kelly, handled the appearance.

Special Counsel Ex. 67, ¶ 7.

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tional speech, in December of that year, bringing his total disclosed honoraria income to \$21,500, just under the cap imposed by law.<sup>35</sup>

Yet the Senator actually made fifty-eight additional fee-earning speeches in 1985. Fees for all these events—totaling approximately \$129,000—were paid to Piranha Press. There does not appear to be any basis for the characterization of these other speaking fees as book promotions rather than honoraria, other than the fact that the Senator had come close to his limit on honoraria by the end of February 1985.<sup>36</sup>

On May 15, 1986, five days prior to the Senator's scheduled engagement [before the conference], I received a telephone call from Jodi Mathison of Senator Durenberger's office. . . . On or about that date, I spoke with a staff member from the Senator's office. Although I do not specifically recall, I believe that this conversation was with Ms. Mathison. *This staff member informed me that Senator Durenberger had exceeded his honorarium limit and as a result we should pay the honorarium we had agreed to pay for the Senator's appearance to his publisher.* This staff member stated that they would treat this trip as a book promotion appearance. This staff member indicated that someone from the Senator's publisher would be contacting me to arrange for payment of the speaking fee to the publisher.

Special Counsel Ex. 44 ¶ 5 (emphasis added). Mr. Kelley objected strenuously to this arrangement, and the Conference ultimately did not pay either the Senator or Piranha Press for the Senator's speech.

The lack of any meaningful distinction between an honorarium speech and a Piranha Press appearance by Senator Durenberger is also evident from a review of the Senator's copanelists and speakers. At twenty-three of the events at which Senator Durenberger made a Piranha Press "promotional appearance," other Members of Congress also spoke—in exchange for traditional honorarium payments.<sup>37</sup> For example, in July 1986, the Equitable Life Assur-

<sup>35</sup> In 1985, 2 U.S.C. § 31-1 imposed an annual limit of 30 percent of a Senator's Senate salary, or \$22,530, that could be earned through honoraria income.

<sup>36</sup> The lack of a meaningful distinction between the Senator's honoraria and "promotional" appearances also is demonstrated by the fact that the Senator sometimes gave addresses to an organization's annual meeting for several years, designating some of these speeches as honoraria and others as Piranha Press events. For example, the Senator addressed the American Protestant Health Association Forum in 1985, 1986 and 1988. Although the Senator's speeches have been characterized as being very similar, the Senator received a standard honorarium payment for the 1988 speech, but directed that the payments for the 1985 and 1986 speeches be made to Piranha Press. See Special Counsel Ex. 64, ¶ 12.

<sup>37</sup> These events are: American Association of Nurse Anesthetists (Special Counsel Ex. 82, ¶ 13; 95); American Group Practice Association (Special Counsel Ex. 29, ¶ 13; 101); American Hospital Association (Special Counsel Ex. 104, 275); American International Automobile Dealers Association (Special Counsel Ex. 106); American Medical Association (Special Counsel Ex. 107, 271); American Protestant Health Association—April 24, 1985 (Special Counsel Ex. 64, ¶ 7; 110); American Protestant Health Association—April 16, 1986 (Special Counsel Ex. 64, ¶ 9; 111); American Society of Association Executives (Special Counsel Ex. 113, 272); Association of Metropolitan Water Agencies (Special Counsel Ex. 118); Catholic Charities, U.S.A. (Special Counsel Ex. 123); The Equitable Life Assurance Society (Special Counsel Ex. 34, ¶ 138; 275); Federation of American Hospitals (Special Counsel Ex. 140); General Electric Company (Special Counsel Ex. 62, ¶ 7; 146; 273); Health Industry Manufacturers Association (Special Counsel Ex. 72, ¶ 7; 150); National Association of Senior Living Industries (Special Counsel Ex. 167); National Gro-

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ance Society sponsored a Group Health Policy Forum Breakfast, which was attended by approximately ten high level officials of the Equitable and the Health Care Financing Administration. Both Senator Durenberger and Congressman Pete Stark addressed the breakfast and each was paid a \$2,000 honorarium. However, Senator Durenberger endorsed his honorarium check to Piranha Press. Special Counsel Exs. 54, 275.

Similarly, in February 1986 both Senator Durenberger and Senator Dale Bumpers spoke at the American Medical Association conference, "Participation '86." While Senator Bumpers reported receipt of a \$2,000 honorarium on his Financial Disclosure Report, Senator Durenberger had his \$2,000 payment made payable to Piranha Press. Special Counsel Exs. 63, 75, 107. Roy Pfautch, one of the organizers of the event, stated in his affidavit: "I considered the payment to Piranha Press to be an honorarium payment, identical in all respects to the honorarium payment to Senator Bumpers." Special Counsel Ex. 63, ¶ 9.

*C. The Role of the Senator's Books at his "Promotional Appearances"*

The lack of any clear substantive distinction between the Senator's own honorarium speeches and his "promotional appearances" is underscored by the fact that the Senator made a number of "promotional appearances" during which he did not mention either his books or his publisher. As was noted above, on those occasions on which he did mention either or both of his books, the references were extremely brief.<sup>38</sup> Often, they were disparaging of the books' contents.

For instance, in an apparent reference to his book *Prescription for Change* during a November 1986 speech before the U.S. Health Corporation, Senator Durenberger said:

But I'm trying to write a real book on health policy, so that these speeches would be shorter, but it's really hard to do. I mean, things are happening so quickly out here, and they're so hard to understand, that I can't get my book done.

So this is a book. But what this really is, is 44 speeches. . . .

Special Counsel Ex. 237, p. 6. On another occasion, the Senator's only mention of his books was his observation that they did not sell as well as Lee Iacocca's book. See Special Counsel Ex. 223, p. 10. During several speeches he made light of the name of his publisher, and admitted that the audience would have trouble finding the book in any place but his office. See, e.g., Special Counsel Exs. 205,

cers Association (Special Counsel Ex. 169); National Multi Housing Council (Special Counsel Ex. 173, 270); National Restaurant Association (Special Counsel Ex. 174); Owens-Illinois (Special Counsel Ex. 179, 275); Prudential-Bache Securities (Special Counsel Ex. 184, 274); Securities Industry Association (Special Counsel Ex. 76, ¶ 8, 190); Washington Campus—March 25, 1985 (Special Counsel Exs. 39, ¶ 10; 151); Washington Campus—November 12, 1985 (Special Counsel Ex. 39, ¶ 21; 152).

<sup>38</sup> These references were often so brief that, when questioned as part of Special Counsel's inquiry, many witnesses present at these speeches stated that they had no recollection that the Senator had mentioned his books. See, e.g., Special Counsel Exs. 11, ¶ 6; 35, ¶ 8; 64, ¶ 9.

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p. 15; 218, p. 23. These comments hardly seem intended to encourage the public to purchase his books.<sup>39</sup>

Of the 113 "promotional appearances" made by Senator Durenberger during 1985 and 1986, Special Counsel has found only three in which the sponsoring organization purchased the Senator's books.<sup>40</sup> In addition, Special Counsel has found only one appearance, the July 1986 meeting of the Outpatient Ophthalmic Surgery Society, at which the Senator's books were actually sold at the event itself. See Special Counsel Ex. 70, ¶ 21. The Senator occasionally held up a single copy of his book during his speech; on a few other occasions, additional copies were on display.<sup>41</sup>

On several occasions, sponsoring organizations were told that it was not necessary to display the Senator's books, notwithstanding the request for such space in the standard Piranha Press confirmation letter. See Special Counsel Exs. 28, ¶¶ 7; 57, ¶¶ 10; 66, ¶ 6; 86, ¶ 6. In addition, while many groups were willing to display the Senator's books they were unable to obtain copies of the books. See, e.g., Special Counsel Exs. 29, ¶ 8; 50 ¶ 11; 58 ¶¶ 5, 11.

For instance, the Senator was invited to give a traditional honorarium speech at the November 1985 Business Issues Seminar sponsored by the State Government Education and Research Foundation. Martha McNelis, who managed the Seminar, learned that the Senator was to publish a book on health care issues. She hoped to make the book available to Seminar participants. Despite efforts to obtain copies of the Senator's books, no books were made available to the Foundation. Ms. McNelis stated: "I recall being frustrated, disappointed and somewhat confused that our original plans to distribute the Senator's books were unsuccessful." Special Counsel Ex. 58, ¶ 11.

The Invest to Compete Alliance, before which the Senator spoke in February 1986, similarly was unsuccessful in its efforts to acquire the Senator's books. Jeanne Campbell, a lobbyist who coordinated the activities of the Alliance, was instructed by a member of the Senator's staff to purchase copies of the Senator's books instead of paying an honorarium for the Senator's appearance. Ms. Campbell stated in her affidavit that sometime after the \$2,000 payment was made to the publisher:

I called the Senator's office because copies of the Senator's books had not been received and was told to contact Piranha Press. I telephoned Piranha Press and believe that I spoke with Gary Diamond who told me he would

<sup>39</sup> The lack of any clear nexus between the Senator's books and the groups before which he was speaking may account for the often trivial character of the Senator's speech references to his books.

<sup>40</sup> Massachusetts Mutual Life Insurance Company purchased 100 copies of *Neither Madmen Nor Messiahs* in connection with the Senator's appearance on May 15, 1985, and 100 copies of *Prescription for Change* in connection with his appearance on September 15, 1986. Special Counsel Ex. 34. The National Association of Senior Living Industries (NASLI) purchased and distributed approximately 143 copies of *Prescription for Change*, in connection with the Senator's appearance on May 19, 1985. Special Counsel Ex. 47. However, NASLI's Executive Director Robert Kramer stated in his affidavit that he was instructed to make a \$1,000 honorarium payment and a \$1,001 payment for the purchase of books. Mr. Kramer further stated: "At no time did I or NASLI request to receive the Senator's book, *Prescription for Change*. I did not want the books and would not have purchased \$1,001 of *Prescription for Change* other than to have Senator Durenberger speak." Special Counsel Ex. 47, ¶ 9.

<sup>41</sup> See, e.g., Special Counsel Exs. 12, ¶ 15; 16, ¶ 5; 29, ¶ 9; 45, ¶ 8; 79, ¶ 8.



look into the matter. The books were not received nor did I ever hear back from Mr. Diamond.

Special Counsel Ex. 15, ¶ 7.

Piranha Press also promised in its standard confirmation letter to provide to the sponsoring organization "all necessary promotional literature." No such literature has been provided to the Committee by the Senator, his Minnesota counsel or Piranha Press as part of the Committee's proceedings in this matter. Special Counsel has not discovered a single occasion on which Gary Diamond or Piranha Press actually provided promotional literature to the sponsoring group. See, e.g., Special Counsel Exs. 29, ¶ 8; 32, ¶ 8; 45, ¶ 6.

In fact, Gary Diamond admitted in his affidavit that he rarely provided any materials to the organizations before which Senator Durenberger spoke:

On a few occasions, I forwarded copies of the Senator's books to organizations that agreed to display them at the Senator's appearances. However, in the majority of cases, I did not provide copies of the books or other promotional materials to the organizations.

Durenberger Ex. 3, ¶ 6.

#### *D. The Nature of the Groups Before Which the Senator Appeared*

The transparent character of the Senator's "promotional" arrangement with Piranha Press is apparent from a simple comparison of the groups before which he spoke and the subject matter of the books which he claims to have been promoting. The Senator's first book, a collection of white papers on national security and defense policy issues entitled *Neither Madmen Nor Messiahs*, was published on September 10, 1984. His second book, a collection of speeches on health care issues entitled *Prescription for Change*, was not released until April 1986.

Yet between February 1985 and April 1986, many of the Senator's "promotional appearances" were before health care groups or groups interested in the Senator's views on tax reform—not national defense policy. During this time period, the Senator made two speeches, both now characterized as "promotional appearances," before defense contractors. Although these organizations might have provided an appropriate forum for promotion of the Senator's defense book, in both cases the contractors declined to pay Piranha Press. Instead, the contractors issued checks payable to Senator Durenberger—which he then endorsed to Piranha Press. See Special Counsel Exs. 19, 156 at O-P, 196 at BB-CC. One of these defense contractors, TRW, explicitly rejected the proposal that the Senator's appearance be treated as a book promotion.<sup>42</sup> See Special Counsel Ex. 19.

The incongruity of making "promotional appearances" before health groups without having published a health book appears to have been obvious at the time to both the Senator's staff and his

<sup>42</sup> During this same time period, Senator Durenberger also appeared before representatives of Northrop and Hughes Aircraft Company. Both of these defense contractors expressly rejected proposed book promotion by Piranha Press. See Special Counsel Exs. 13, 88. The Senator reported his income from these appearances as honoraria.

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counsel.<sup>43</sup> On May 23, 1985, Mr. Mahoney forwarded a memorandum to Douglas Kelley in which he stated: "It is extremely important that the Senator complete a book on health matters for distribution by Piranha Press to groups that the Senator speaks to under the terms and conditions of his contract with Piranha Press." Special Counsel Ex. 260. In fact, Mr. Mahoney went so far as to say that this book "need not be of the same caliber" as one written by a professional author. *Id.* This memorandum reflects Mr. Mahoney's sensitivity to the fact that the Senator was making appearances that were characterized as book promotions before numerous health issues groups, but had not yet authored a book on topics of interest to these groups.

No health book was produced in 1985, however, and at the end of the year the matter was raised by Jon Schroeder, a member of the Senator's staff in Minneapolis. In a memorandum to Mr. Kelley and Kitty Gamble, also of the Senator's Minneapolis staff, Mr. Schroeder summarized his thoughts on the need to assemble and publish a health care book. He stated:

I understand and agree with the necessity of doing this, because of the desirability of broadening the audience of the Senator's health speeches and enhancing his role and perception as the "Health Senator" and to make sure we have a sound justification for the compensation which he is receiving from Piranha for delivering health speeches around the country.

I believe the linkage between the speeches, the book, and the compensation is important in explaining 1985 compensation from Piranha.

Along the way, we have to remember that this is something of a "quick and dirty." It has to get out within a certain timeframe, it is not the "ultimate" Dave Durenberger piece on health issues. . . . But again, it must not be an embarrassment; and it must justify the compensation involved to the Senator.

Special Counsel Ex. 262 (emphasis added). The health care book ultimately published by the Senator in the spring of 1986 was simply a collection of speeches which he had previously given on health care issues.<sup>44</sup> Ironically, four of these speeches were Piranha Press "book promotions" that had been presented by the Senator during the previous fourteen months.<sup>45</sup>

<sup>43</sup> In fact, the Senator apparently had made some effort to author a health care book as early as the summer of 1984, when he hired William Swanson as a professional ghost writer. Mr. Swanson completed a manuscript in early 1985, which was never published. Special Counsel was informed that Mr. Swanson was paid \$15,000 for these efforts by the Durenberger Volunteer Committee.

<sup>44</sup> This book was largely assembled and edited by Mr. Schroeder, whose Senate salary was reduced to reflect time devoted to the book, and who was paid \$3,944 by Piranha Press for his services.

<sup>45</sup> These were as follows: Association of Academic Health Centers—October 5, 1985 (Special Counsel Ex. 117); Brown University—March 13, 1985 (Special Counsel Ex. 120); Employers Council on Flexible Compensation—February 28, 1985 (Special Counsel Ex. 137); Pfizer, Inc.—April 28, 1985 (Special Counsel Ex. 182).

E. Payments to Piranha Press

In many instances, the Senator did not designate a speech as a "book promotion" until after the speech itself. Not surprisingly, therefore, the Senator frequently was compensated by the sponsoring organization as if his appearance were a traditional honorarium speech—by paying the Senator directly.

Twenty-six separate payment checks made payable to Senator Durenberger, totalling \$56,750, were deposited into the Piranha Press bank account—twenty-one of which reflected Senator Durenberger's personal endorsement to Piranha Press.<sup>46</sup> Four of these checks reflected on their face the payer's designation as "honorarium." See Special Counsel Exs. 122, 167, 188, 201.

Three of these organizations were contacted by Piranha Press only after the Senator's appearance. See Special Counsel Exs. 112, 136, 174. Ten of these organizations had no contact with Piranha Press, and were never told of the arrangement between Piranha Press and the Senator.<sup>47</sup> Until they reviewed their cancelled payment check, they often had no knowledge that the Senator had characterized his speech before their group as a book promotion. See, e.g., Special Counsel Ex. 30, ¶¶ 5-7.

Moreover, on several occasions these same organizations had expressly rejected a proposed "promotional appearance," instead insisting that the Senator's appearance be handled as a traditional honorarium event. See, e.g., Special Counsel Exs. 12, 19, 23, 33, 46, 54. For example, John Carter, Jr., of TRW, Inc., who arranged for Senator Durenberger to visit several defense contractor facilities in California in January 1986, stated in his affidavit:

Prior to the visit, I recall being contacted by someone from Piranha Press, advising me that they were handling the Senator's speaking engagements. They also indicated that payment for the Senator's appearance was to be made to Piranha Press, and that part of the visit would include promotion of his book . . . . I advised the individual from Piranha Press that the Senator's visit to TRW would be handled as a straight honorarium visit, and we would make payment directly to the Senator. I also indicated

<sup>46</sup> These twenty-one payments were provided to Senator Durenberger by American Bankers Association (Special Counsel Ex. 96 at F-G); American Hospital Association (Special Counsel Ex. 104 at G-H); American Insurance Association (Special Counsel Ex. 105 at B-C); American Psychiatric Association (Special Counsel Ex. 112 at V-W); American Society of Association Executives (Special Counsel Ex. 113 at I-J); Annenberg Center for Health Sciences (Special Counsel Ex. 115 at O-P); The Chicago Council on Foreign Relations (Special Counsel Ex. 126 at N-O); The Economic Club of Detroit-Blue Cross/Blue Shield of Michigan (Special Counsel Ex. 136 at S-T); The Equitable Life Assurance Society (Special Counsel Ex. 138 at F-G); The Fertilizer Institute (Special Counsel Ex. 142 at G-H); Grocery Manufacturers of America, Inc. (Special Counsel Ex. 147 at D-E); Lockheed Corporation (Special Counsel Ex. 156 at O-P); Memorial Hospital (Special Counsel Ex. 159 at B-C); National Association of Senior Living Industries (Special Counsel Ex. 167 at Q-R); National Restaurant Association (Special Counsel Ex. 174 at G-H); Owens-Illinois (Special Counsel Ex. 179 at G-H); Renewable Fuels Association (Special Counsel Ex. 188 at L-M); Stanford University Center for Economic Policy Research (Special Counsel Ex. 192 at J-K); TRW, Inc. (Special Counsel Ex. 196 at BB-CC); Washington Discussion Group (Special Counsel Ex. 201 at I-J); and Williams & Jensen (Special Counsel Ex. 202 at E-F).

The five checks made payable to Senator Durenberger and deposited without endorsement to Piranha Press were provided by American Association of Equipment Lessors (Special Counsel Ex. 93 at B-C); The Castroviejo Society (Special Counsel Ex. 122 at F-G); Drexel Burnham Lambert, Inc. (Special Counsel Ex. 134 at H-I); National Association of Realtors (Special Counsel Ex. 166 at G-H); and Pathology Practice Association (Special Counsel Ex. 181 at H-K).

<sup>47</sup> See Special Counsel Exs. 93, 96, 104, 105, 126, 147, 159, 166, 188, 192.

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that the visit to TRW would not include promotion of the Senator's book.

Special Counsel Ex. 19., Notwithstanding this insistence, the Senator endorsed this honorarium check to Piranha Press. See, Special Counsel Ex. 196 at BB-CC.

On at least two separate occasions, Senator Durenberger delivered a speech in which he did not mention either his books or his publisher, and later personally instructed the sponsoring organizations to make payment to Piranha Press. See, Special Counsel Exs. 21, 51.

The majority of the groups before which the Senator spoke made payment for the Senator's appearance to Piranha Press as requested. On more than one occasion, a member of the Senator's staff, a representative of Piranha Press, or Mr. Mahoney attempted to coax groups that had invited the Senator to speak to increase the payment offered, often to as much as \$5,000.<sup>48</sup> For example, Robert Lively of the National Rural Electric Cooperative Association was told by a representative of Piranha Press that Senator Durenberger would not appear before his group unless a \$5,000 fee were paid, instead of the \$2,000 honorarium offered. Special Counsel Ex. 50, ¶¶ 7-8. See, also, Special Counsel Exs. 30, ¶¶ 9, 12; 50, ¶¶ 7, 60, ¶ 5; 87, ¶ 7.<sup>49</sup> Many organizations acceded to these requests, in order to assure that a United States Senator would address their meetings. See, e.g., Special Counsel Exs. 60, ¶ 5; 30, ¶ 12.

Some organizations found Mr. Mahoney's request for a higher payment to be "heavy-handed." Some refused to comply, in part because they were aware of the \$2,000 per appearance limitation on an honorarium payment. See, e.g., Special Counsel Ex. 14, ¶ 3. For instance, Mary Samoszuk of the Council of Community Hospitals ("CCH") was informed by a representative of Piranha Press that a \$5,000 payment to the publisher was required to secure the Senator's appearance. Ms. Samoszuk stated in her affidavit: "I was concerned that this arrangement might be a way to avoid some limit on honoraria income." Special Counsel Ex. 71, ¶ 8.

Many organizations objected to the arrangements proposed by Piranha Press. See, e.g., Special Counsel Exs. 13; 44, ¶¶ 5-7; 88. For example, James Doherty, President of The Group Health Association of America, Inc. ("GHAA"), reacted as follows after receiving an initial memorandum from Piranha Press: "I recall that the memorandum struck me as harsh, abrupt, and heavy handed." Spe-

<sup>48</sup> Senator Durenberger's Counsel has argued that the \$2,000 per appearance limitation on honoraria (2 U.S.C. 441d) was not violated because Senator Durenberger received, on average, only \$1,800 per appearance from Piranha Press. *Hearing Transcript* (June 12, 1990) at 131. Special Counsel submits that the relevant payments are those that would have been paid to the Senator, and which instead were channeled through the publisher. Twenty checks, each in excess of the \$2,000 cap, were deposited into the Piranha Press account. See, Special Counsel Exs. 94 (\$3,000), 95 (\$5,000), 102 (\$2,500), 108 (\$3,000), 126 (\$5,000 payable to Senator Durenberger), 127 (\$5,000), 114 (\$5,000 payable to Senator Durenberger), 148 (\$5,000), 149 (\$2,500), 154 (\$4,000), 157 (\$4,000), 164 (\$5,000), 168 (\$2,500), 179 (\$5,000), 181 (\$5,000), 185 (\$5,500), 186 (\$2,500), 189 (\$5,000), 198 (\$5,000), 199 (\$4,000).

<sup>49</sup> Although the agreement between the parties apparently contemplated that the Senator's staff would not be involved in the negotiation of speaking fees (see, Special Counsel Ex. 252, 253), in practice the staff members did occasionally become involved in this process. See, e.g., Special Counsel Ex. 60, ¶ 3. For example, Charles Kahn, the Senator's Health Legislative Aide in 1984 and 1986, stated in his affidavit that his duties included making assessments regarding the amount of money specific groups could pay for the Senator's appearance. Special Counsel Ex. 42, ¶ 5.

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cial Counsel Ex. 26, ¶ 8. Mr. Doherty then received the standard confirmation letter from the publisher. He described his reaction to this letter as follows:

This letter made me very angry. Mr. Diamond's letter presumed that GHAA had inquired about the Senator doing a book promotion, and that the Senator's appearance at the June 1986 GHAA conference would be a book promotion. GHAA, however, had invited the Senator to speak about health care. I believed that GHAA was being "hustled" by Piranha Press.

*Id.*, ¶ 11.

Some organizations objected so strenuously to the terms required by Piranha Press for the Senator's appearance that they withdrew their invitations. See, e.g., Special Counsel Exs. 31, 26, 69, 71 and 74. For instance, Ms. Samoszuk of CCH stated: "I decided that it would not be feasible or proper to have the Senator speak at the conference, given the conditions imposed by the attorney for the publisher." Special Counsel Ex. 71, ¶ 10.

#### *F. Representative Appearances During 1985 and 1986*

Summarized below are the relevant facts concerning four separate "promotional appearances" by Senator Durenberger during 1985 and 1986. These appearances are illustrative of the Senator's conduct during this time frame, and serve to demonstrate the lack of meaningful distinction between the promotional and honoraria appearances that he made.

##### 1. MARCH 1985 AMERICAN PSYCHIATRIC ASSOCIATION SPEECH

In January 1985, the American Psychiatric Association ("APA") invited the Senator to deliver the keynote address at the APA's Federal Legislative Institute in March of that year. Jay Cutler, Special Counsel and Director of Government Relations for the APA, stated in an affidavit that the Senator was invited to participate in this event because of his position as Chairman of the Health Subcommittee of the Senate Finance Committee. Special Counsel Ex. 23, ¶ 3.

In a series of telephone conversations prior to the Senator's appearance between Anne Kelly of the Senator's staff and Linda Hughes of the APA staff, arrangements were made for the payment of a \$2,000 honorarium to the Senator. Ms. Hughes stated in her affidavit that there was no mention of the Senator's books during any of these conversations. Special Counsel Ex. 39, ¶ 6. Neither Mr. Cutler nor Ms. Hughes, both of whom were present for the Senator's speech, recalls any mention by the Senator of his book or his publisher during his speech. In addition, both stated in their affidavits that the Senator's books were neither sold nor displayed during the APA meeting. Special Counsel Exs. 23, ¶ 6; 39, ¶ 5.

Immediately following the Senator's speech, Ms. Hughes was informed by a member of the Senator's staff that the honorarium payment was to be made payable to Piranha Press. Mr. Cutler was troubled by this proposed payment because, in his words, he "knew

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that the Senator's address [to the APA] was not a book promotion. The Senator did not speak about his book(s) and no books were sold." Special Counsel Ex. 23, ¶ 9. Accordingly, Mr. Cutler consulted with Joel Klein, the APA General Counsel, who advised the APA not to make the payment in this manner, precisely because of his concern that the arrangement represented an effort to evade the honoraria limitations. Special Counsel Ex. 46, ¶ 3.

In January of the following year, Gary Diamond wrote to Mr. Cutler demanding payment for the Senator's appearance. Mr. Cutler referred this letter to Mr. Klein, who in turn wrote to Mr. Diamond to request, among other things, a legal opinion from Piranha Press counsel sanctioning the payment. In response, Mr. Klein received a copy of the FEC advisory opinion from Mr. Mahoney's office. In his affidavit, Mr. Klein summarized his reaction to these events as follows:

Notwithstanding this communication, in light of my understanding that the APA had not promoted, displayed or purchased the Senator's book(s), it was my view that payment should not be made to Piranha Press. Accordingly, I advised the APA to issue a check payable to Senator David Durenberger as payment for his speech at the 1985 Legislative Institute.

Special Counsel Ex. 46, ¶ 7.

Consistent with this advice, the APA issued a check in the amount of \$2,000 to Senator Durenberger. As the cancelled check reflects, the Senator endorsed this payment check to Piranha Press, and it was deposited into the Piranha Press bank account. See Special Counsel Ex. 112 at V-W.

## 2. MARCH 1985 THE TOBACCO INSTITUTE SPEECH

Senator Durenberger was invited to speak at a breakfast meeting of twenty-five to thirty members of the Government Operations Committee of the Tobacco Institute on March 21, 1985 by former Senator Marlow Cook.<sup>50</sup> Senators Cook and Durenberger discussed that the Institute would pay an honorarium of \$2,000 in connection with his appearance. Special Counsel Ex. 21, ¶ 3. Senator Durenberger did not advise Senator Cook of his arrangement with Piranha Press during this discussion, nor did he even mention his book. *Id.* Senator Cook, who attended the breakfast meeting, described Senator Durenberger's speech as follows:

While I did not specifically recall the substance of Senator Durenberger's remarks, I do recall that they related generally to then current legislative issues. I do not recall Senator Durenberger mentioning either his book(s) or his publisher during his remarks before the Institute. The Senator did not display any of his books at the meeting, or otherwise offer those books for sale at the meeting.

Special Counsel Ex. 21, ¶ 4.<sup>51</sup>

<sup>50</sup> Senator Cook served in the United States Senate from 1968 to 1975.

<sup>51</sup> Robert Lewis, the Institute's Senior Vice President for Federal Relations, also attended the breakfast meeting and does not recall any mention or display of the Senator's books. Mr. Lewis

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At the conclusion of the meeting, Senator Durenberger apparently was offered a Tobacco Institute check in the amount of \$2,000. Senator Durenberger then asked Senator Cook to have a replacement check in the amount of \$2,000 issued payable to Piranha Press. Special Counsel Ex. 21, ¶ 5. Although Senator Cook found this request to be "somewhat unusual," he complied with Senator Durenberger's wishes and on March 28, 1985 the Tobacco Institute sent a check in that amount to Piranha Press. Special Counsel Ex. 21, ¶ 6.

### 3. APRIL 1986 MIDWEST PODIATRY CONFERENCE SPEECH

In February 1986, Senator Durenberger was invited by the American Podiatric Medical Association ("APMA") to address a Midwest Podiatry Conference in Chicago, Illinois. The Senator was invited to speak at this event because of his position as Chairman of the Health Subcommittee of the Senate Finance Committee. Special Counsel Ex. 18, ¶ 3. John Carson, Director of Governmental Affairs for the APMA, coordinated the logistics of the Senator's appearance. Mr. Carson was informed by the Senator's staff of the Senator's relationship with Piranha Press and subsequently received the standard Piranha Press confirmation letter. As requested, the APMA made payment to Piranha Press within ten days of the letter, approximately three weeks in advance of the conference.

Several weeks before the event, Mr. Carson contacted Piranha Press to discuss the book display. In his affidavit, Mr. Carson described the ensuing events as follows:

The person with whom I spoke—I believe it was Gary Diamond—informed me that it would be necessary for the APMA to make a table available at its annual meeting for a display of the Senator's book(s). I was both willing and prepared to act on this request . . . . However, I then received a telephone call from Jodi Mathison or someone from Piranha Press informing me that there was no need to display or otherwise promote the Senator's book(s) at the annual meeting.

Special Counsel Ex. 18, ¶ 6. Not surprisingly, the APMA did not display or sell the Senator's books at its meeting. Senator Durenberger did not mention his book or his publisher, or any plans to publish books, at his speech for the APMA. Special Counsel Ex. 18, ¶ 8.

It is noteworthy that the Senator also spoke before the APMA's annual Leadership Conference in March 1987. Mr. Carson again was responsible for arranging the logistics of the Senator's appearance. Although the Senator's speech at the 1987 APMA was described by Mr. Carson as very similar to his 1986 speech, the APMA was not asked to and did not make payment for the Senator's 1987 appearance to Piranha Press. Special Counsel Ex. 18, ¶ 11.

characterized the Senator's appearance as "a traditional honorarium event." Special Counsel Ex. 43, ¶ 4.

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4. NOVEMBER 1986 NATIONAL RURAL ELECTRIC COOPERATIVE  
ASSOCIATION SPEECH

Senator Durenberger also was invited to speak before the National Rural Electric Cooperative Association ("NRECA") Cooperative Leadership Orientation Conference on November 18, 1986. In its letter of invitation, NRECA offered an honorarium payment of \$2,000. See Special Counsel Ex. 175, p. B. This invitation was accepted by the Senator through Ms. Mathison of his staff. Robert Lively of the NRECA staff and Ms. Mathison discussed the details of the Senator's appearance, including the \$2,000 honorarium payment. Special Counsel Ex. 50, ¶ 5. Ms. Mathison informed Mr. Lively generally of the Senator's arrangement with Piranha Press. She did not, however, mention the Senator's books during this conversation. *Id.*

Sometime thereafter, Mr. Lively received a memorandum from Piranha Press regarding the arrangements for the Senator's appearance. He then had three separate conversations with a representative of the publisher. The representative indicated that the \$2,000 honorarium previously agreed upon would not be sufficient under the terms of the Senator's arrangement with Piranha Press. She further informed Mr. Lively that the fee would be \$5,000 and the NRECA would be required to purchase 500 of the Senator's books. *Id.*, ¶ 7.

On behalf of NRECA, Mr. Lively objected strenuously to this request. As Mr. Lively stated in his affidavit, he felt that Piranha Press was pressuring NRECA. *Id.*, ¶ 9. Ultimately, the representative from Piranha Press agreed to the \$2,000 figure, and further agreed that NRECA would not be required to purchase any books. *Id.*, ¶ 10.

Bob Bergland,<sup>52</sup> the Executive Vice President and General Manager of NRECA, stated in his affidavit that Senator Durenberger had been invited to speak before NRECA's Cooperative Leadership Orientation Conference because he was a member of the Senate Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs. Special Counsel Ex. 11, ¶ 3. Mr. Bergland stated in his affidavit as follows:

The Senator never discussed his book(s) or his publisher with me privately. While I do not specifically recall the topic of the Senator's speech, I know that he did not discuss his book(s) or publisher during his speech. I did not see any display of the Senator's book(s) at the Conference, nor to my knowledge were his book(s) available for sale. The Senator's appearance before NRECA was not a book promotion. NRECA treated his appearance in the same manner as any traditional honorarium event.

Special Counsel Ex. 11, ¶ 6. It should be noted that there is no apparent nexus between NRECA's interests in energy matters and the Senator's role on the Governmental Affairs Committee on the

<sup>52</sup>Mr. Bergland served as the member of the United States House of Representatives from Minnesota's Seventh Congressional District from 1971 to 1977, and then as the Secretary of the U.S. Department of Agriculture from 1977 to 1981.



one hand, and the Senator's books on national defense and health policy issues on the other.

*G. Advice to Senator Durenberger Counseling Against his Relationship With Piranha Press*

Many of Senator Durenberger's advisors and staff members were troubled by his arrangement with Piranha Press. Several personally cautioned the Senator against his continued participation in that arrangement.

Jimmie Powell, the Senator's Legislative Director from 1983 to August 1985, stated in his affidavit that he was concerned that the arrangement "would have the appearance of avoiding the overall limitation on honoraria income." Special Counsel Ex. 67, ¶ 2. Mr. Powell discussed these concerns with his staff colleagues, Messrs. Horner and Kahn, whom he understood shared his concern. The Senator's arrangement with Piranha Press was one of the factors that ultimately contributed to Mr. Powell's decision to leave the Senator's staff. *Id.*, ¶ 11.

Mr. Kahn stated in his affidavit that he received complaints about Mr. Mahoney's approach in negotiating the Senator's book promotion appearances and discussed the issue with Messrs. Mahoney and Kelley, and perhaps with the Senator himself. Special Counsel Ex. 42, ¶ 8. In particular, Mr. Kahn stated that he received complaints about Mr. Mahoney's efforts "to negotiate for the highest promotional fee possible for the organizations in question." *Id.*

Michael Bromberg, a campaign fundraiser for Senator Durenberger, reacted similarly to the Senator's arrangement with his publisher. Mr. Bromberg was so concerned that he raised the matter with the Senator personally in 1985. He specifically told the Senator that the business community was being antagonized by Mr. Mahoney's dealings with them on Piranha Press' behalf, and that the arrangement created an appearance of impropriety. Special Counsel Ex. 14 ¶ 9.

This view apparently was shared by many of the Senator's advisors. Dr. Donald Fisher, once a member of the Senator's re-election Steering Committee, stated in his affidavit that the Senator's arrangement with his publisher had been discussed during Steering Committee meetings, and that many of the Committee members were uncomfortable with the Senator's relationship with Piranha Press. Special Counsel Ex. 29, ¶¶ 5, 6. Similarly, Frederick Graefe, an attorney and friend of the Senator, testified that he recommended that the Senator terminate his relationship with Piranha Press. Special Counsel Ex. 435 at 102-104. Inasmuch as the questionable character of the Senator's promotional arrangement seemed obvious to those around him, one might fairly question why the Senator himself allowed it to continue.<sup>53</sup>

<sup>53</sup> Senator Durenberger acknowledged in his presentation to the Committee that his relationship with Piranha Press "sure as heck looks like a way of getting around the law limiting honoraria . . . I should have know it and I should have avoided it." *Hearing Transcript* (June 13, 1990) at 43.

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## VI. EVIDENCE REGARDING THE CONDOMINIUM TRANSACTIONS

Following his election to the Senate in June 1979, Senator Durenberger purchased a one-bedroom condominium (#603) located at 1225 LaSalle Avenue in Minneapolis for \$48,000, which he used during his frequent travels to that city. Senator Durenberger has represented that effective July 28, 1983 he formed an investment partnership with Roger Scherer, a personal friend and the owner of the unit (#703) directly above the Senator's. Both the Senator and Mr. Scherer contributed their respective condominium units to the partnership entity. Senator Durenberger then rented his unit (#603) from the partnership at a *per diem* rate of \$65.

In June 1985 Senator Durenberger placed his interest in his partnership into a qualified blind trust established pursuant to the Ethics in Government Act. In his capacity as general partner, the Senator deeded the property to Michael Mahoney as trustee of that trust.

On March 31, 1987, in response to Mr. Scherer's request, the partnership was terminated. The Senator then sold the condominium unit to the Independent Service Company ("ISC"), a Minnesota business owned by Paul Overgaard, "effective" April 1, 1987. Following this sale, the Senator rented the condominium from ISC at a *per diem* rate of \$85. Because the deed and related documents evidencing this sale have never been filed with the county Registrar of Titles, legal title to the property has never been transferred to ISC.

Through this entire period, from August 1983 to mid-November 1989, Senator Durenberger claimed and received \$40,055 in Senate travel reimbursements for the costs incurred in renting the condominium from the partnership and ISC.<sup>54</sup>

Special Counsel finds that in these matters, Senator Durenberger engaged in a pattern of improper conduct which has brought discredit upon the United States Senate. Special Counsel specifically finds that Senator Durenberger was a participant in the back dating of the two real estate transactions here at issue, and that these transactions were conceived and orchestrated wholly as a means of permitting the Senator to claim Senate *per diem* reimbursement for staying in what was in essence his Minnesota residence.

The effect of these transactions was to transfer to the Senate, and ultimately the American taxpayer, the cost of maintaining property which served as the Senator's second home.<sup>55</sup> Indeed, it would seem that the character of the Senator's use of the condominium essentially has not changed since he purchased the property in 1979. Since that time, the Senator has maintained his personal belongings in the condominium, stayed in the unit during his

<sup>54</sup> Senator Durenberger has refunded \$11,005 of this sum to the Senate. See Special Counsel Ex. 296.

The Senator also received \$7,755 in reimbursements from the Durenberger Volunteer Committee, his official election committee, as payment for the condominium rental costs incurred during travel to Minnesota. See Special Counsel Ex. 407.

<sup>55</sup> In his statement to the Committee, Senator Durenberger stated that the partnership was not "a financial windfall for me." *Hearing Transcript* (June 13, 1990) at 33-34. However, reimbursements received from the Senate inured directly to the Senator's benefit by helping to pay the mortgage on the Senator's condominium.

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travel to Minneapolis, and generally had unrestricted access to the property at all times.

Finally, Special Counsel finds that at various times the Senator's interest in the condominium was concealed from the Senate Disbursing Office. The true ownership of the condominium for which the Senator was claiming rental reimbursements was thereby misrepresented to that Office.

Special Counsel finds that Senator Durenberger's conduct in these matters reflects an abuse of his United States Senate office and a misuse of United States government funds. Taken collectively, this conduct is of such a nature as to bring discredit upon the United States Senate.

#### A. The Condominium Transactions with Roger Scherer

Special Counsel finds that the real estate partnership between Senator Durenberger and Mr. Scherer was conceived and structured expressly for the purpose of permitting Senator Durenberger to receive Senate *per diem* lodging reimbursement. Special Counsel further finds that Senator Durenberger participated in what was in essence the back dating of this entire transaction. Finally, it is obvious that through the partnership vehicle the Senator retained a significant ownership interest in a condominium unit which served as his personal residence in Minneapolis, and that this ownership interest effectively was concealed from the Senate Disbursing Office.

#### 1. CONTEMPLATED EXCHANGE OF CONDOMINIUMS

Following the November 1982 election, Eugene Holderness, Senator Durenberger's personal friend and 1982 Campaign Manager, advised the Senator to sell his Minneapolis condominium as a means of reducing his monthly expenses. Durenberger Ex. 7, ¶ 4.<sup>56</sup> Roger Scherer, who apparently was aware of Senator Durenberger's efforts to minimize his personal expenses, subsequently began to explore with Senator Durenberger ways in which the Senator could reduce the costs of maintaining his condominium residence. Durenberger Ex. 21, ¶¶ 4-5.<sup>57</sup>

By the end of July 1983 Mr. Scherer and the Senator had agreed to enter into some form of business venture with regard to their respective condominium units.<sup>58</sup> However, it is clear from the documents produced to the Committee in this matter that the parties originally did not contemplate a partnership or similar joint business venture. Instead, the parties intended to exchange their respective condominium units pursuant to § 1031 of the Internal Revenue Code, which permits the tax free exchange of like properties. Senator Durenberger then would lease unit 603, his former condo-

<sup>56</sup> Mr. Holderness also suggested to the Senator that, during his future travel to Minneapolis, he instead stay in a hotel or similar public lodging. See Durenberger Ex. 7, ¶ 4.

<sup>57</sup> During the course of the Preliminary Inquiry in this matter, Special Counsel interviewed a number of the participants in the relevant transactions, including Eugene Holderness, Douglas Kelley, Lori Krage (now Edstrom), Richard Langlais, Roger Scherer and Heidi Shaw. Recollections of these witnesses as provided to Special Counsel during those interviews will be referred to periodically throughout this Report.

<sup>58</sup> See Durenberger Exs. 21, ¶ 5; 7, ¶ 5.

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minium, from Mr. Scherer and would finance this lease in large part through Senate reimbursement payments.

In connection with these plans, Mr. Holderness sought the advice of Randall Johnson, a former attorney for the Federal Election Commission and the Senator's 1982 Campaign Treasurer, concerning the Senate *per diem* reimbursement regulations. See Durenberger Ex. 9, ¶¶ 3-4. Those regulations generally allow reimbursement for lodging expenses incurred on official Senate business. In accordance with those regulations, however, Members are not permitted to claim reimbursement for costs of staying in their "residence cities in their home states" during adjournment *sine die* or the traditional August recess. See *United States Senate Travel Regulations* § I(C) (1980).<sup>59</sup>

Mr. Johnson concluded that the Senator could claim Senate reimbursement for his overnight lodging in Minneapolis if he changed his voting registration to Avon, Minnesota, a small town in rural Minnesota in which the Senator's parents lived. See Durenberger Exs. 7, ¶ 6; 8, ¶ 5. Avon would then be deemed to be the Senator's "residence city" in Minnesota, and according to Mr. Johnson, the Senator would be eligible to receive Senate reimbursement for the cost of overnight lodging in Minneapolis, even if the Senator was simply renting back his former unit from Mr. Scherer.<sup>60</sup>

Thus, in a June 28, 1983 letter to the Senator, Mr. Johnson stated:

Gene Holderness and Roger Sherer [sic] have talked to me about the proposed transactions involving the condominium. I told them that I am ready to proceed with the papers as soon as you give the word. *In order to minimize any possible concern about receiving reimbursement out of Senate funds for nights spent at the condominium, I believe it is important for you to list your new unit immediately and sell it within a reasonable period of time.* You will have to change your legal and voting residence to somewhere outside the Twin Cities area. I think Gene suggested that you will probably use your parents' address, which is perfectly acceptable under Minnesota law.

<sup>59</sup> The relevant regulation provides in pertinent part:

Traveling expenses which will be reimbursed are confined to those expenses essential to the transaction of the official business while away from the official station or post of duty.

The official duty station of all Senate Members and employees shall be considered to be the metropolitan area of Washington, D.C. For this purpose, the official duty station of Senators shall be considered to be their residence cities in their home States during adjournment *sine die* or the adjournment period authorized in odd-numbered years by Public Law 91-510, approved October 26, 1970.

*United States Senate Travel regulations* § I(C) (1980). As was noted above, the Senate Rules Committee recently has opined that this regulation does not permit reimbursement for expenses incurred while a Member is residing in his/her usual place of residence in his/her home state during the *sine die* or traditional August recesses authorized by Public Law 91-510.

<sup>60</sup> It is interesting to note that in a series of opinions interpreting the Federal Travel Regulations, the Comptroller General has held that an employee on temporary duty may not be reimbursed for the expenses of staying in a personally owned rental property, absent clear and convincing evidence that but for his temporary lodging in the premises, the premises would have been rented to some third party. See, e.g., *In re Doubtful or Fraudulent Travel Claims*, B-230385 (unpublished opinion of Comptroller General, January 15, 1990).

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Special Counsel Ex. 298 (emphasis added).<sup>61</sup> Obviously, Mr. Johnson recognized that the contemplated exchange of properties could be viewed as no more than a gimmick to allow the Senator to claim reimbursement for the costs of renting his own former residence. He therefore cautioned the Senator to dispose of his new unit quickly.

Thereafter, the parties took several steps in an effort to accomplish the planned exchange of condominiums. On or about July 15, 1983, Senator Durenberger and Mr. Scherer executed a form "Contract of Exchange of Land." See Special Counsel Ex. 299. As required by that contract, in early August 1983 the parties also executed deeds conveying to one another their respective condominium units, and Senator Durenberger executed a form "Certificate of Real Estate Value." See Special Counsel Exs. 300, 301.<sup>62</sup>

In addition, Mr. Johnson drafted a residential lease agreement between Mr. Scherer and the Senator, providing for the daily rental of unit 603 at a *per diem* rate of \$65. See Special Counsel Ex. 302.<sup>63</sup> Although this agreement was signed by the Senator, it apparently was not executed by Mr. Scherer. In September, the Senator and Mr. Scherer submitted the exchange contract to the condominium building Board of Trustees for approval. By letter dated September 26, 1983, Senator Durenberger registered with the Minneapolis Comptroller as the new owner of unit 703.

Throughout this period, Senator Durenberger claimed and received Senate reimbursements for the cost of renting the condominium, ostensibly from Mr. Scherer. In support of these Senate reimbursement vouchers, Senator Durenberger proffered rental invoices generated by "Area Advisors," a local rental agency which previously had managed the rental of Mr. Scherer's unit 703. See, e.g., Special Counsel Ex. 408 at 15-17.

In the fall of 1983, however, the parties abandoned their plans to exchange condominiums because of tax considerations entirely unrelated to Senate reimbursements. As a result, the documentation required to effect a change in title was never filed with the county Registrar of Titles.<sup>64</sup> Accordingly, Senator Durenberger held legal title to the condominium throughout 1983.<sup>65</sup> Thus, because the transaction never was completed and legal title to the property never was surrendered by Senator Durenberger, during this period Senator Durenberger essentially was claiming and accepting Senate monies for the cost of "renting" what was legally his own unit.

<sup>61</sup> Special Counsel submits that Senator Durenberger should have known that a change in his voting residence to a city in which he rarely stayed, in order to justify the receipt of *per diem* reimbursements, was improper.

<sup>62</sup> It also appears that in September and November 1983 the Senator paid the condominium association fee for unit 703. See Special Counsel Ex. 304. However, as is noted in Section VI, A. 3 below, the Senator continued to make mortgage and association fee payments on unit 603 as well.

<sup>63</sup> As is discussed more fully in Section VI, A. 4 below, this rental rate apparently reflected the parties' understanding of the applicable government *per diem* reimbursement rates.

<sup>64</sup> In fact, it does not appear that the documentation required under Minnesota law to effect a change in legal title to the property was ever executed by Mr. Scherer.

<sup>65</sup> As is discussed in Section VI, A. 3 below, Senator Durenberger held legal title to the property until May 16, 1984.

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## 2. THE PARTNERSHIP TRANSACTION

Special Counsel finds that Senator Durenberger participated with others in the execution of a series of backdated and misleading documents in connection with the creation of the partnership, which he then cited in support of his past claims for Senate reimbursements.

As was noted above, in the fall of 1983, the Senator's advisors recognized that the proposed exchange of properties with Mr. Scherer would not qualify as a tax-free transaction under the Internal Revenue Code, and therefore would trigger taxable capital gain to the Senator. Richard Langlais, the Senator's tax counsel, then suggested that a partnership entity be used to accomplish the previously identified goals, and that the Senator and Mr. Scherer contribute their respective condominiums as partnership assets.<sup>66</sup> See Durenberger Ex. 21, ¶ 6. According to Mr. Langlais, in October 1983 he directed Donald Lattimore, an attorney working in his firm, to draft a written agreement. Durenberger Ex. 12, ¶ 4.<sup>67</sup>

Several months later, in December 1983, Mr. Lattimore prepared a draft partnership agreement. *Id.*, ¶ 5. This draft agreement recites that the parties had "entered into an oral agreement on or about the 28th day of July, 1983, regarding the sharing of profits of [condominium unit] 603 and [condominium unit] 703," and further agreed "to share and specially allocate profits beginning July 28, 1983." A revised version of this agreement, forwarded to the Senator by letter dated December 30, 1983, deleted this language and inserted in its place a recitation to the effect that the parties had "entered into an oral agreement on or about the 28th day of July, 1983, regarding the leasing of 603 and 703" and that "a partnership was formed and began business on July 28, 1983." See Special Counsel Ex. 311.<sup>68</sup>

The parties also contemplated that the Senator would lease unit 603 from the partnership, and would claim Senate reimbursement for his condominium lodging costs. Again, the parties discussed with Randall Johnson the effect of the transaction on the Senator's

<sup>66</sup> An undated handwritten note produced to the Committee by the Senator, possibly in Lori Krage's handwriting, states:

Per Randy Johnson the exchange of property is not the best plan for the Senator. Mr. Langlais thinks that a limited partnership would be a much better idea. Therefore the partnership will own both condos but allocation will be such that Roger is allocated #603, and the Senator #703.

Special Counsel Ex. 305.

Mr. Langlais stated in his recently executed affidavit that he was informed in July 1983 that the Senator and Mr. Scherer had agreed to form a partnership. Durenberger Ex. 12, ¶ 4. It is striking to Special Counsel that not even Mr. Scherer, a principal to the transaction, made this specific factual assertion in his affidavit in this matter.

<sup>67</sup> Mr. Langlais' recollection is squarely contradicted by the documents produced to the Committee by the Senator. Those documents reflect that in September 1983, Senator Durenberger registered with the Minneapolis Comptroller as the new owner of unit 703. Mr. Scherer's former unit, and submitted the condominium exchange contract to the building Board of Trustees for approval. These documents, although not previously marked as Special Counsel Exhibits, were provided to the Committee by Senator Durenberger and are therefore presumably well known to him and his counsel. Obviously, as of the dates of those documents, the Senator and Mr. Scherer were planning simply to exchange properties, and had no intent whatsoever to form a partnership entity.

Intent to form a partnership is an essential element in establishing the existence of a partnership. See *Nelson v. Seaborad Surety Co.*, 269 F.2d 882 (8th Cir. 1969) (applying Minnesota law). "It is the intent to do the things that constitute a partnership which determines whether the partnership relation exists." *Id.* at 887.

<sup>68</sup> As produced to the Committee, this document was missing page 5.

right to claim Senate reimbursement. Mr. Johnson advised that the Senator could continue to claim reimbursement if a partnership was created, but cautioned about the need to reduce the parties' agreement to writing as quickly as possible.

Thus, in a letter to the Senator dated December 29, 1983, Mr. Johnson stated:

It is important that you conclude the condominium transaction in order to justify the per diem reimbursement you received during the August recess. As I mentioned to you before, I believe the straight exchange with Roger bears some risk of being disallowed by the Internal Revenue Service. I am more concerned about the partnership transaction and the allocations proposed by Dick Langlais, but he is your income tax specialist. In any event, from the standpoint of Senate Rules and IRS Regulations, I believe you can claim the per diem reimbursement—but the paperwork on this should be completed immediately if you have not done so already. Everything should be dated before August 1st, reflecting the oral agreement between you and Roger.

Special Counsel Ex. 310

In December 1983, Senator Durenberger retained Michael Mahoney, his Minnesota counsel, to oversee and close the transaction.<sup>69</sup> See Special Counsel Ex. 443 at 116-117; Durenberger Ex. 14, ¶ 2. Sometime after January 1, 1984 David Steingart, a third year law student working as a law clerk in Mr. Mahoney's firm, reviewed the agreement previously prepared by Richard Langlais and drafted a revised partnership agreement.<sup>70</sup> See Deposition of M. Mahoney (4/17/90) at 125-127; Durenberger Ex. 14, ¶ 4. This document represented that the parties had "entered into an oral agreement on or about the 28th day of July, 1983, regarding the leasing of 603 and 703," and that pursuant to that agreement a partnership was formed and began business on July 28, 1983. See Special Counsel Ex. 316.

Mr. Mahoney's firm also drafted a number of additional documents necessary to effect the transaction, including quitclaim deeds, by which the Senator and Mr. Scherer were to convey their respective units to the partnership (Special Counsel Exs. 317, 318); Certificates of Real Estate Value, for the Senator's and Mr. Scherer's signatures (Special Counsel Exs. 319, 320); Affidavits of Purchaser of Registered Land, also for the Senator's and Mr. Scherer's signatures as general partners (Special Counsel Exs. 321, 322); and a lease agreement pursuant to which the Senator would

<sup>69</sup> Mr. Mahoney recalled that during their first meeting on this matter, the Senator expressed frustration over the failure of his various advisors to bring the partnership matter to closure. Special Counsel Ex. 433 at 117-119.

<sup>70</sup> In his deposition in this matter Mr. Mahoney testified that the partnership agreement prepared by his firm, as well as the legal documents relating to the transfer of title to the condominium to the partnership, may have been drafted as early as late December. Special Counsel Ex. 443 at 163. Mr. Mahoney's recollection on this issue is simply not credible. As was noted above, on December 30, 1983 Mr. Langlais forwarded to the Senator a revised version of his draft agreement. This certainly suggests that as of that date the Senator was still working with Mr. Langlais to bring the matter to closure—and that Mr. Steingart did not undertake to draft a revised agreement until sometime in early 1984.

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rent unit 603, his former personal residence, from the partnership at a *per diem* rate of \$65 (Special Counsel Ex. 323).<sup>71</sup>

Senator Durenberger executed the partnership agreement, memorializing the parties' intent to form a partnership and defining the parameters of their agreement. The Senator also signed the appropriate quitclaim deed, Certificate of Real Estate Value, and Affidavit of Purchaser of Registered Land, all of which were required to effect a legal transfer of title to the condominium to the partnership.<sup>72</sup> In addition, the Senator's signature is reflected on the referenced lease agreement. Each of these documents is dated, or reflects an effective date of, July 28, 1983.<sup>73</sup>

The witness affidavits introduced by the Senator during the hearing in this matter evidence that these documents were not executed until early 1984. Mr. Mahoney's affidavit reflects his understanding "that the basic partnership documents were executed between December 1983 and February 1984."<sup>74</sup> Durenberger Ex. 14, ¶ 5. Mr. Scherer stated in his affidavit that he executed the "necessary documents" in February 1984—some seven months after the purported effective date of the partnership. Durenberger Ex. 21, ¶ 7.<sup>75</sup>

As these facts demonstrates, an historical and entirely fictitious effective date for the partnership and the transfer of the condominium to that partnership was created. As part of this plan, Senator Durenberger participated in the execution of a series of back dated and misleading documents, which he then cited in support of his past claims for Senate reimbursements.

<sup>71</sup> Documents produced to the Committee in this matter strongly suggest that these materials were created sometime after January 4, 1984. On that date, Donald Lattimore of Mr. Langlais' office forwarded to Mr. Scherer a copy of the partnership agreement and real estate documents which Lattimore has prepared, with the request that Mr. Scherer and the Senator sign these documents. See Special Counsel Ex. 313. This suggests that, as of that date, Mr. Mahoney's firm had not prepared any substitute materials.

<sup>72</sup> In his statement during the hearing on June 12, 1990, Mr. Hamilton, citing *Travelers Ins. Co. v. Horseshoe Lake Farms, Inc.*, 1990 Minn. App. LEXIS 548, stated that, under Minnesota law, the effective date of the transfer of property can be earlier than the date that the deed transferring the property is executed if the parties so intend. The holding of that case rests on narrow statutory grounds that are inapplicable here. *Travelers Ins. Co.* interprets Minn. Stat. § 500.24, subd. 6(a), which requires that a corporation that acquires agricultural land through foreclosure give a right of first refusal to the preceding owner before selling the property. This statutory right is applicable for five years from the date that the corporation acquires the land. The court in *Travelers Ins. Co.* held that the fact finder may consider the parties' intent in determining the date of which a corporation acquired land, and that the term "acquire" in the statute should be defined broadly to support the legislative goals of the Act. 1990 Minn. App. LEXIS 548 at 10-11.

<sup>73</sup> The partnership agreement itself recites that it is "made effective the 28th day of July, 1983." See Special Counsel Ex. 316. The signatures on the agreement are not dated, nor apparently were they witnessed.

<sup>74</sup> These recollections are corroborated by certain independent documentation. For example, it appears that Mr. Steingart provided some or all of these documents to Randall Johnson, presumably in draft form, for his review and that Mr. Johnson returned them to Mr. Steingart with suggested additions by letter dated February 27, 1984. See Special Counsel Ex. 314. Assuming that Mr. Steingart would not have had the parties sign the documents in an incomplete form, these materials support Mr. Scherer's recollection.

<sup>75</sup> The deeds and the purchaser's Affidavits, however, reflect Randall Johnson's notarization of July 28, 1983, purporting to evidence that the parties signed the documents on that date. See Special Counsel Exs. 317, 318, 321, 322. Mr. Johnson informed Special Counsel that he received the documents from Mr. Mahoney's office in February 1984. He further acknowledged that he did not witness the signatures of the parties reflected on the deeds or the referenced Affidavits, and that he notarized the documents when they were sent to him in February 1984. Durenberger Ex. 9, ¶ 7. However, Mr. Johnson stated that neither Senator Durenberger nor Mr. Scherer was present when he notarized the documents, and according to Mr. Johnson he did not discuss the notarization date with Senator Durenberger. Durenberger Ex. 9, ¶ 7; 21, ¶ 7.

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### 3. SENATOR DURENBERGER'S CONTINUED OWNERSHIP INTEREST IN THE CONDOMINIUM

Special Counsel finds that, even after the formation of the partnership, Senator Durenberger retained a significant ownership interest in the condominium property. The deeds and purchaser's Affidavits reflecting an "effective" July 1983 transfer of the condominiums to the partnership were not filed with the Hennepin County Registrar of Titles until May 15, 1984. See Special Counsel Exs. 317, 318. A new Certificate of Title documenting the partnership's ownership of the property was issued by the Registrar on May 16, 1984.<sup>76</sup> See Special Counsel Ex. 328. As a matter of Minnesota law, therefore, legal title to the condominium continued to be in Senator Durenberger's name until the latter date.<sup>77</sup>

Moreover, it is obvious that even after the formation of the partnership Senator Durenberger continued in effect to own the condominium property. The parties' own partnership agreement expressly acknowledged this fact. In setting forth the parties' understanding concerning the allocation of taxable income or loss, the agreement states: "Taxable Income or Loss shall be allocated equally between the Partners (on the basis that each Partner owns an undivided one-half interest in all Partnership Property)." See Special Counsel Ex. 316 at 8.<sup>78</sup>

It also appears from the documents that there was an effort, with Senator Durenberger's knowledge, to disguise the Senator's ownership interest in the partnership entity. Each of the partnership agreements and real estate documents described above identifies the business entity as the "Durenberger/Scherer Partnership." In late March 1984, however, the name of the partnership formally was changed to the "703/603 Association," denominating the unit numbers of the condominiums contributed to the entity by Mr. Scherer and the Senator.

The reasons for this change are set forth in a memorandum to the Senator from Lori Krage (now Edstrom) of his staff:

"In Minnesota, land such as the Senator's condominium which is registered under the Torrens system can be conveyed only upon the issuance of a Certificate of Title by the county Registrar of Titles. See Minn. Stat. Ann. § 508.47. Special Counsel was informed that a Certificate of Title issues after the following documents are filed with the Registrar: 1) a deed of conveyance; 2) the Grantor's Certificate of Title; 3) an Affidavit of the Purchaser of Registered Land; and 4) if the grantor is a trust, a copy of the trust document.

"In June 1985, the Senator established a qualified blind trust pursuant to the Ethics in Government Act, and in his capacity as General Partner deeded the condominium property to Mr. Mahoney as trustee of that trust. This deed, however, was not filed with the county Registrar of Titles until the fall of 1988 and a new Certificate of Title did not issue until October 1988. See Special Counsel Ex. 385. The partnership therefore was the legal owner of the condominium until October 1988.

"As a result of the parties' failure to establish a partnership account, the Senator apparently paid all the operating costs of the condominium at least through March 1984. Thus, in a letter to Eugene Holderness dated March 7, 1984, Senator Durenberger represented that since approximately July 1983 he had paid "mortgage, real estate tax, insurance, condo fee, utility and repair expenses" for unit 603. Special Counsel Ex. 315.

The materials produced to this Committee by the Senator do not include copies of checks or similar payment documents evidencing regular mortgage and condominium fee payments. They do, however, reflect the Senator's payment of the November 1983 mortgage payment, the 1983 real estate taxes due on October 31, 1983, and a number of miscellaneous repair and utility bills. See Special Counsel Exs. 306, 307, 308. Moreover, typed notes apparently prepared by the Senator's staff suggest that the Senator paid the condominium mortgage between August and December 1983. See Special Counsel Ex. 312.

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The name of the partnership will be "703/603 Partnership" and that name will be reflected on the invoices. (I didn't think it looked good to have Durenberger/Scherer [sic] Partnership on the invoices that were being submitted to the Senate—Tom agreed. Roger S. suggested this name for the partnership, and unless you object Dave Steingart will process the legal paperwork.)

Special Counsel Ex. 324. The Senator instructed Mr. Steingart to effect this name change, and an amendment to the partnership agreement effective March 1, 1984 was thereafter signed by the parties.<sup>79</sup> See Special Counsel Exs. 452 at 158-159; 326.<sup>80</sup>

While the witnesses have denied that this change represented a conscious effort to mislead the Senate, the obvious effect of the change was to conceal the Senator's interest in the partnership from the Senate Disbursing Office. Moreover, it is clear from the very language of the quoted document that the Senator's staff understood the appearance of impropriety surrounding the transaction, and communicated that understanding directly to the Senator.

#### 4. THE LEASING OF THE CONDOMINIUM FROM THE PARTNERSHIP AND THE SENATOR'S CLAIMS FOR SENATOR REIMBURSEMENTS

Special Counsel further finds that, whatever its effective date, the partnership was not a *bona fide* investment transaction and was instead motivated solely by the Senator's interest in obtaining Senator lodging reimbursement. In fact, absent the receipt of these reimbursement monies, it appears that the partnership would have been of no financial advantage whatsoever to the Senator.

As was noted above, from the outset the parties contemplated that the Senator would lease back from the partnership his former condominium residence (#603), and that the obligations of this lease would be satisfied in large part through Senate reimbursements. The parties ultimately also understood that these payments would finance the continued operating costs of the condominium.

Thus, as part of both the contemplated condominium exchange and the ultimate partnership transaction, the Senator entered into a lease agreement from the rental of unit 603.<sup>81</sup> The partnership lease provided for the rental of the property on the following terms:

Lessee shall pay rent at the rate of \$65 for each day he occupies the Apartment, with a quarterly minimum rent of \$1575. Lessee shall pay rent monthly within 15 days of receipt of a bill from Lessor.

<sup>79</sup>The word processing "tag" line in the lower left corner of this document indicates that the amendment was created on March 28, 1984.

<sup>80</sup>Senator Durenberger's counsel contends that this memorandum must be read in conjunction with Ms. Krage's March 13, 1984 memorandum reflecting her contacts with the Rules and Ethics Committee's staffs. This reading, he contends, demonstrates that Ms. Krage was always completely forthcoming with the appropriate "watchdog" committees. Special Counsel submits, however, that were Ms. Krage's disclosures to the Committee staffs in early March completely forthcoming, there would have been no need two weeks later to change the title of the partnership so that Senator Durenberger's name would not appear on invoices submitted to the Senate Disbursing Office.

<sup>81</sup>As was noted above, the Senator and Mr. Scherer apparently did not execute this agreement until early 1984.

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See Special Counsel Ex. 323.<sup>42</sup> The parties apparently continued to operate under the terms of the lease until the termination of the partnership in March 1987.

The witnesses interviewed by Special Counsel during the Preliminary Inquiry in this matter generally agreed that the *per diem* rental rate reflected in the lease agreement was established by reference to the parties' understanding of the Senate reimbursement regulations.<sup>43</sup> Mr. Holderness informed Special Counsel that the \$65 rental rate was the amount of reimbursement permitted by the Senate for lodging expenses.<sup>44</sup> Thomas Horner similarly recalled that at his request Lori Krage, the Senator's bookkeeper, contacted the Senate Rules Committee to determine the appropriate rate for lodging reimbursement. Mr. Horner further recalled that it was this rate which was used in the lease agreement.

Special Counsel was further informed by Mr. Holderness that the parties anticipated that the mortgage and other expenses for unit 603 would be serviced by this Senate reimbursement income. Thus, although Senator Durenberger would be obligated personally to pay the quarterly minimum rent specified in the lease agreement, these rental costs would be offset by funds received from the Senate as reimbursement for *per diem* lodging costs.

Accordingly, in a May 29, 1984 letter to Mr. Scherer, Ms. Krage noted:

Dave S. suggested you may want to reevaluate the number of nights required in the association documents. He does not know how this number was determined (and neither does the Senator) and feels it may put too much risk on the Senator.

Special Counsel Ex. 330. Indeed, Mr. Scherer reported that it was his understanding that the sole purpose of the lease was to produce income sufficient to cover the partnership's operating costs.

Mr. Holderness also informed Special Counsel that the \$65 rental rate did not specifically relate to the operating costs of the condominium. The documents clearly reflect, however, that the Senator, his staff and advisors were keenly aware that at that daily rate, the Senator needed to stay in the condominium approximately 100 days per year in order to cover its annual operating costs. In the above referenced May 29, 1984 letter to Mr. Scherer, Ms. Krage

<sup>42</sup>These lease terms are identical to those of the draft lease prepared as part of the contemplated condominium exchange discussed above. See Special Counsel Ex. 302. Indeed, Mr. Mahoney suggested that his staff may have been provided with the information from that earlier draft to use in preparing the lease agreement between the partnership and the Senator. Deposition of M. Mahoney (4/17/90) at 139, 141. Accordingly, witness recollections regarding the lease agreement proposed as part of the condominium exchange are included in this discussion.

<sup>43</sup>The rental figures reflected in the lease also may have represented the parties' approximation of the fair market value of the condominium. In this regard, it should be noted that the quarterly rental rate of \$1,675 specified in the lease represents a monthly rate of \$525, the rate used by Mr. Scherer for his previous rentals on unit 703.

<sup>44</sup>However, in a January 11, 1983 memorandum addressed to the Senator, Mr. Holderness advised that "government expense policy allows you \$75 per diem for room and board. Food is about \$25 so you have \$50 left for room." See Special Counsel Ex. 287. The \$75 rate cited by Mr. Holderness apparently comes, not from the Senate *per diem* regulation, but instead from the travel regulations promulgated by the General Services Administration. At that time, those regulations specified an inclusive *per diem* rate of \$75 for travel in Minneapolis. 47 Fed. Reg. 37545, 37546 (1982). This rate was adopted by the Rules Committee as a maximum *per diem* for all Senate travel on October 1, 1980. See "Dear Colleague" letter from The Honorable Clairborne Pell, dated October 1, 1980. This rate subsequently has been increased.

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noted: "The thing we need to watch for is that the number of nights the Senator spends in #603 per quarter equals at least twentyfive." *Id.* Similarly, by memorandum to the Senator, Mr. Scherer and Mr. Steingart dated April 19, 1985, the partnership's bookkeeper noted: "If Dave doesn't stay an average of 8½ days per month in the condo, we will have a cash shortage." Special Counsel Ex. 329.

Approximately three months later, Ms. Krage provided to Senator Durenberger a listing of his condominium Senate reimbursements through June 29, 1985. The Senator apparently returned this listing with the following notation: "How many are req'd to 'break-even' for the year? . . . That's \$552.50 expenses per month . . . ." In response, Ms. Krage informed the Senator that he would "need 102 nights at the condo to 'break even' for '85." Special Counsel Ex. 332. In fact, during the seven year period which is the subject of this investigation, Senator Durenberger stayed in the condominium an average of ninety days per year.<sup>85</sup>

As planned, between August 1983 and March 31, 1987 the Senator claimed and received from the partnership Senate reimbursement for the costs of renting the condominium that he formerly owned in its entirety. In support of the vouchers submitted for the period from August 1983 to approximately March 1984, the Senator supplied invoices generated by "Area Advisors," a local rental agency. See Special Counsel Exs. 408, 409. Thereafter, the Senator submitted invoices generated by the "703/603 Association" in support of these Senate vouchers. See, e.g., Special Counsel Ex. 409. Each of these vouchers was paid in the amounts requested.<sup>86</sup>

A tax and accounting analysis of the transaction suggests that, absent this receipt of *per diem* reimbursements, the partnership simply was of no financial benefit to the Senator. See Special Counsel Ex. 340. This alone indicates that the partnership was simply a mechanism by which the Senator could personally benefit from Senate reimbursements.

Special Counsel submits that if the taxpayer is to bear the cost, the Senator's use of the condominium should be dictated by the needs of Senate business, not the operating costs of the property. In short, Durenberger—not the taxpayer—should pay his own rent.

<sup>85</sup> At one time the parties apparently contemplated fewer stays by the Senator, such that the leasing costs would only be partially defrayed by reimbursement monies. In a September 15, 1983 letter to the Senator, Mr. Holderness stated:

You will pay Roger \$525/mo. less any recovery. Assuming 45 nites at \$65/nite recovery that reduces your rent bill for #603 from \$6300 to \$3375.

Special Counsel Ex. 303. Mr. Holderness informed Special Counsel that the term "recovery" referred to Senate reimbursements.

<sup>86</sup> In fact, it appears that Senator Durenberger may have claimed and received reimbursement for one date when he did not stay in the condominium. Senator Durenberger received Senate reimbursement for use of the condominium on February 15, 1986. However, the Senator's daily appearance schedule for that date reflects that he left Minneapolis for California early that morning. The schedule is corroborated by a copy of an airline ticket produced to the Committee by the American Association of Equipment Lessors ("AAEL") in connection with the Piranha Press inquiry. The ticket shows that the Senator departed Minneapolis at 9:35 a.m. on February 15, 1986 for California. The Senator then met with an AAEL official on February 16th and addressed the organization on the 17th. Piranha Press received \$5,000 from AAEL for this appearance by Senator Durenberger. See Special Counsel Ex. 335.



### B. Sale of the Condominium to the Independent Service Company

Senator Durenberger has represented that ownership of the condominium unit was transferred by the partnership to ISC, a Minnesota business owned by Paul Overgaard, effective April 1, 1987. The evidence demonstrates that this "sale" was designed to allow the Senator the continued financial benefits of Senate *per diem* reimbursement, and was back dated to April 1987 for that very purpose. In fact, in a letter to the Senator dated September 1989, Mr. Overgaard himself described the sale in a manner which supports Special Counsel's view that it was not a good faith transaction. In this very revealing letter, Mr. Overgaard wrote that one could conclude that the transaction was a mechanism to allow the Senator to collect *per diem* reimbursements from the Senate on a residence which the Senator actually owned. See Special Counsel Ex. 394.<sup>87</sup> Specifically, Special Counsel finds as follows:

ISC was not identified as a buyer for the condominium until the summer of 1987—several months after the purported effective date of the sale to ISC.

The transaction was made retroactive to April 1, 1987, the date immediately following the partnership's termination, in order to permit the Senator to claim Senate *per diem* reimbursement for his condominium stays back to that date.

In approximately December 1987, ISC generated invoices for the Senator's stays in the condominium from April to October 1987. Based on these newly created invoices, the Senator sought Senate reimbursement for these rental costs.

But for the Senator's agreement to rent the condominium from ISC, which was to be financed to a significant extent through Senate reimbursements, Mr. Overgaard would not have entered into the sales transaction. Senator Durenberger thus used the promise of Senate funds to secure personal gain.

The parties apparently agreed that Mr. Overgaard would reconvey the condominium to the Senator on demand. It therefore does not appear that Senator Durenberger intended to surrender his rights in the property.

The letter agreement reflecting the purchase, the deed and related real estate documents, and the lease agreement were not delivered to Mr. Overgaard until October 1989, almost three years after the April 1, 1987 "effective" date of the sale.

By virtue of the principals' failure to file the necessary documents with the Registrar of Titles, ISC still does not have legal title to the condominium. Instead, legal title to the property is in the name of the trustee of the Senator's qualified blind trust.

Although the Senator received reimbursement from the Senate on a fairly regular monthly basis between February 1988 and November 1989, he made only nine lump sum rental payments to ISC—thereby effectively having the use of Senate reimbursement funds for substantial periods of time.

<sup>87</sup> In his deposition in this matter, Mr. Overgaard endeavored to distance himself from this correspondence. See Special Counsel Ex. 445 at 12-13. Special Counsel submits, however, that the meaning of the letter is patently clear on its face.

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Special Counsel finds that Senator Durenberger intended to do little more than "park" the condominium with Mr. Overgaard, as a means of enabling him to continue to reap the benefits of Senate *per diem* reimbursements.

#### 1. THE TIMING OF THE PARTIES' AGREEMENT

As has been noted above, the Senator has represented that his condominium was sold to ISC effective April 1, 1987. The documents produced to the Committee in this matter, however, reflect that Mr. Overgaard was not even introduced as a potential purchaser until the summer of 1987, several months after the "effective" date of the sale.

In response to Mr. Scherer's expressed intent to withdraw from the partnership in the fall of 1986, Senator Durenberger and Douglas Kelley asked Mr. Mahoney to address the effect of the partnership termination on the Senator's continued ability to claim Senate reimbursement for condominium expenses. See Durenberger Exs. 11, ¶ 9; 14, ¶ 13. The parties seemed to understand at this juncture that by virtue of that termination the Senator would be deemed to be the sole owner of the condominium unit. See Special Counsel Ex. 338.

Mr. Kelley told Special Counsel that he and the Senator were informed that the Senator could not claim Senate reimbursement for the cost of staying in a property, such as the condominium, that he owned.<sup>88</sup> Mr. Mahoney recommended to Senator Durenberger that, in order to claim such reimbursement in the future, he sell the condominium to a third party and rent the condominium unit from that purchaser. Deposition of M. Mahoney (4/17/90) at 207-208; see also Durenberger Ex. 14, ¶ 14.

The witnesses have stated that Paul Overgaard was identified as a purchaser for the condominium as a result of these discussions, and that the Senator and Mr. Overgaard had an oral agreement regarding the sale of the condominium in late 1986 or early 1987. In his deposition in this matter Mr. Overgaard testified that toward the close of 1986 he had a "loose agreement" with the Senator for the sale of the condominium effective January 1, 1987.<sup>89</sup> Special Counsel Ex. 445 at 29. Mr. Overgaard also testified that the purchase agreement was *not* conceived until after the effective date of the sale. *Id.* at 87. Mr. Mahoney similarly testified that following a series of conversations during the latter part of 1986, Mr. Overgaard and Senator Durenberger reached an oral agreement concerning the sale of the condominium. Durenberger Ex. 106 at 215-216, 230-231.

<sup>88</sup> See also Special Counsel Ex. 343.

Mr. Mahoney tasked Jeffrey Robbins of his firm to research the question posed by Mr. Kelley. As reflected in his file memorandum dated November 12, 1986, Robbins initially concluded that "[n]othing in the Senate Travel Regulations indicates that termination of the partnership will affect Durenberger's ability to receive the per diem lodging reimbursement amount." See Special Counsel Ex. 338. Both Mr. Mahoney and Mr. Kelley informed Special Counsel, however, that the parties largely disregarded this written opinion, apparently on the basis that it was too "narrow." See Deposition of M. Mahoney (4/17/90) at 201-203.

<sup>89</sup> In response to Special Counsel's questions, however, Mr. Overgaard was unable to state as of what date he had an enforceable "handshake deal" with the Senator. Special Counsel Ex. 445 at 30.

The documents, however, reflect that Mr. Overgaard had not been identified as a purchaser as of June 1987. The documents also evidence that Mr. Overgaard was approached and agreed to purchase the property sometime thereafter, and that the parties did not begin to negotiate the terms of the purchase until late July or early August of that year.

On June 17, 1987, Senator Durenberger dictated a note asking his bookkeeper to confirm that claims for condominium reimbursement had been submitted to the Senate for both May and June 1987. Special Counsel Ex. 342. Mr. Kelley, the Senator's Administrative Assistant, responded on the bookkeeper's behalf as follows:

As you know M[ichael] M[ahoney] gave us the legal opinion that we cannot be reimbursed. Consequently, I have held up those vouchers. H[eidi] S[haw] is now re-doing them minus condo. MM is supposed to advise on alternative proposals.

*Id.*

It appears that immediately thereafter, the Senator, Mr. Kelley and Mr. Mahoney reviewed the history of the condominium transactions as well as various disposition options. Among the documents produced by the Senator is a series of the Senator's handwritten notes titled "MAHONEY" and apparently dated June 18, 1987. These notes read as follows:

orig target=get DD per diem reimb by renting from jt venture

Randy Johnson's proposal.

Mahoney rejected & created partnership.

Scherer left the partnership.

Q = Does this change DD's ability to get reimbursed?

A = No.

DK Q = Can DD be reimbursed for expenses of owned unit?

MM A = No.

DK = I don't like conclusion.

MM = contacted Rules. (Dougherty)

? MM = buy it.—no

? John Deal [buy it]—no

? D2 [buy it]—no

MM A = Separate DD from the unit by transferring ownership and taking *lease-back* with right to buy for \$1.

Would be backed up by letter from Rules.

DD sells unit to D2 Comm.

DD agrees to lease for X days per mo and pay an amt = to costs (mtg, tax, fee)

D2 picks up any shortfall.

Special Counsel Ex. 343. It is particularly significant that neither Mr. Overgaard nor ISC is mentioned in these notes. In fact, the document suggests that an entirely different pool of potential buyers was being discussed at this time.<sup>90</sup> It thus is clear that as of

<sup>90</sup> Mr. Mahoney testified that, once Mr. Overgaard was identified as a purchaser for the condominium, no consideration was given to other possible purchasers. Special Counsel Ex. 443 at Continued

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June 1987 the Senator was not considering ISC as a purchaser for the condominium.

By letter dated June 18, 1987, the Senator then sought the advice of Eugene Holderness and The Honorable Paul Magnuson on this matter. That letter indicates that as of that date the Senator did not have an agreement, oral or otherwise, with Mr. Overgaard. In fact, the letter reflects that the Senator may have learned only shortly before that the partnership actually already had terminated. The letter further reflects the Senator's understanding that he was, or would soon be, the sole owner of the condominium unit.<sup>91</sup>

Senator Durenberger wrote:

For the last five years I have had the benefit of renting my former condominium at 1225 LaSalle from a partnership with Roger Scherer. I now discover that my legal advice was either shaky or misleading; that Roger Scherer very much wants to dispose of his partnership interest or has already disposed of it; and that since March of 1987 my monthly expenses have therefore increased by approximately \$550.00 or an annual, non-deductible, living expense increase of \$6,600.00.

Special Counsel Ex. 344. Again, neither Mr. Overgaard nor ISC is identified in this letter as a potential buyer for the condominium. It seems clear, therefore, as of June 1987 the Senator did not believe that he had a sales agreement of any sort with Mr. Overgaard.<sup>92</sup>

It would appear that as a result of these events, the Senator and his advisors focused on the need to structure a new ownership arrangement for the condominium. The documents produced to the Committee by the Senator suggests that the Senator and Mr. Overgaard did discuss a possible purchase agreement in late July. A note in the Senator's handwriting, dated simply "7/31," reflects the following notation:

Edina Realty says hi-dollar sale price = \$65,000; few sales; more likely 60-63,000.

Overgaard d'n want to pay hi \$; suggested somewhere between it and purchase price with 5-10,000 down (higher if CORP. buys) + balance at 1 pt over my interest. Agreed to reconvey.

Special Counsel Ex. 346. The Senator apparently forwarded this note to Mr. Kelley, with the request that he "put this together."<sup>93</sup> A complete set of sales documents ultimately was generated in late

<sup>91</sup> This too suggests that Mr. Overgaard had not been identified as a buyer as of the June 1987 date of these handwritten notes.

<sup>92</sup> In fact, documents produced to the Committee by the Senator reflect that Senator Durenberger personally paid the condominium mortgage for the months of January, February, March and April 1987. See Special Counsel Ex. 341. It should be noted, however, that other documents suggest that these payments were made from the partnership account, rather than Senator Durenberger's account. See Special Counsel Ex. 339.

<sup>93</sup> When shown this document during his deposition, Mr. Overgaard agreed with this conclusion. Special Counsel Ex. 445 at 87.

<sup>94</sup> Mr. Kelley responded with the following notation:

Sen. I talked w MM Friday & he said it was progressing. I'll send him your note.

Special Counsel Ex. 346



August 1987<sup>94</sup> and was forwarded by Mr. Mahoney to Mr. Overgaard for his review and signature. See Special Counsel Exs. 350, 351.

These facts evidence that Mr. Overgaard was not identified as a possible purchaser until the summer of 1987, that the Senator did not have a purchase agreement of any character with him prior to April 1, 1987, and that the sale of the condominium to ISC subsequently was back dated to that date.

## 2. KEY TERMS OF THE PARTIES' ORIGINAL AGREEMENT

From the documents produced to the Committee in this matter, it appears that the parties agreed at the outset that Mr. Overgaard would reconvey the condominium to Senator Durenberger on demand at his own purchase price. In an undated handwritten note to the Senator, Mr. Overgaard wrote:

I hope these items will clear up any questions you may have. *My intent is that you get it back when you want it at the same price.* I only want to help you stay clear w/ the ethics questions.

Special Counsel Ex. 405 (emphasis added). While denying that he had any such agreement with the Senator, in his deposition in this matter Mr. Overgaard acknowledged that the note accurately reflected his intent at the time it was written. Special Counsel Ex. 445 at 95.

In fact, the Senator's own handwritten note of his "7/31" conversation with Mr. Overgaard is consistent with that understanding. The final line of that note, quoted in full above, reads: "Agreed to reconvey." See Special Counsel Ex. 346. While Senator Durenberger and Mr. Overgaard have disputed this conclusion, Special Counsel believes that it is fair to conclude the Senator did not intend to surrender all right to his condominium, and instead simply planned to "park" the property in Mr. Overgaard's custody for some finite period of time.

It is also clear that Mr. Overgaard would not have purchased the condominium were it not for the Senator's agreement to lease back the property. During his deposition in this matter, Mr. Overgaard testified that he understood from the outset that the Senator would stay in the condominium during his visits to Minneapolis, and that he would receive payment from the Senator for those stays. Special Counsel Ex. 445 at 22. Indeed, among the documents generated and forwarded to Mr. Overgaard in August 1987 is a draft residential lease between ISC and the Senator. See Special Counsel Ex. 351.<sup>95</sup>

<sup>94</sup> This first documentary evidence of a formal purchase agreement is a one page draft letter agreement dated August 13, 1987, prepared by Mr. Mahoney. See Special Counsel Ex. 349. This letter reflects a purchase price of \$55,000, to be paid through the assumption of an existing first mortgage in the amount of \$34,507; a cash payment in the amount of \$7,442; and a five-year promissory note in the amount of \$10,250. Each of these figures has been written into the document in Paul Overgaard's handwriting (Special Counsel Ex. 445 at 32), suggesting that as of August 13th the agreement was still very much in draft form.

<sup>95</sup> Mr. Overgaard testified that he was interested in purchasing the Senator's condominium in part so that he could use it during his weekday business trips to Minneapolis. Durenberger Ex. 15, ¶ 3. Mr. Overgaard also testified, however, that he does not personally use the condominium without first checking with Senator Durenberger's office to see that the Senator will not be using it. Special Counsel Ex. 445 at 52-59. A review of the ISC rental invoices reflects that

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Mr. Overgaard also testified that he was aware at the time that the Senator would in turn be reimbursed for those costs. Special Counsel Ex. 445 at 24-25.

Absent an understanding that the Senator would rent the condominium on a regular basis, Mr. Overgaard testified that he would not have agreed to purchase the condominium. *Id.* at 9, 22. Thus, Senator Durenberger used the promise of a rental agreement, financed by Senate reimbursement funds, as an inducement to Mr. Overgaard to purchase the property.

### 3. NEGOTIATION OF THE TERMS OF THE TRANSACTION AND EXECUTION OF THE REQUIRED DOCUMENTATION

Special Counsel finds that the parties were negotiating the material terms of the agreement as late as February 1988, long after the supposed effective date of April 1, 1987, and that the documentation necessary to transfer title to the condominium to ISC was not delivered to Mr. Overgaard until October 1989. Finally, because the appropriate legal documents never were filed with the Registrar of Titles, ISC still does not hold legal title to the property.

As was noted above, in August 1987 Mr. Mahoney forwarded to Mr. Overgaard certain documentation regarding the sale. The terms of the sale varied considerably over the next several months. The parties' agreement initially contemplated a sale effective as of January 1, 1987. The agreement signed by Mr. Overgaard in August 1987 therefore stated that the condominium would be sold effective January 1, 1987 at a price of \$52,500, paid as follows: assumption of the existing first mortgage in the amount of \$35,134; cash payment of \$7,350; and a five year promissory note payable to Senator Durenberger in the amount of \$9,995.<sup>98</sup> As of August 1987, the parties also apparently contemplated a lease agreement between Mr. Overgaard and the Senator's official election committee. See Special Counsel Ex. 351.

In October 1987, however, ISC was informed that the partnership had paid operating costs on the condominium through March 31, 1987 and had received rental payments from the Senator for that same time period. See Special Counsel Ex. 356. Realizing that the sales agreement therefore could not be dated January 1, 1987, Mr. Overgaard wrote Douglas Kelley in early November 1987:

Things are really going from bad to worse with regard to the Condo. Much remains to be done regarding the sale; no accounting of per diem due has been forthcoming; associa-

almost one-third of the days in which the Senator stayed in the condominium from 1987 to 1989 were weekdays (excluding Fridays). This obviously would have cut significantly into the availability of the unit to Mr. Overgaard.

<sup>98</sup> Mr. Mahoney testified that the agreement was in the nature of a "contract for deed." Special Counsel Ex. 443 at 260-62. See also Durenberger Ex. 14, \* 17. Generally, a contract for deed anticipates that the purchaser will not be entitled to the deed to the property until certain financial contingencies, typically payment of a promissory note, have been satisfied. See R. Larson & B. Harwood, *Minnesota Real Estate* 162 (1984). In this case, a contract for deed presumably would have required that the deed be delivered to Mr. Overgaard at the time of his final 1992 payment on the promissory note executed as part of the transaction. The documents memorializing the sale to ISC do not reference such a contract. In addition, the deed to the property was delivered to Mr. Overgaard in October 1989, well before the promissory note to the Senator had been paid in full.

In any event, if Mr. Mahoney's testimony on this issue is accurate, it arguably would only defeat the Senator's claim that Mr. Overgaard actually owned the property as of April 1987.

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tion dues are three or more months in arrears and we have been advised that the association has first right of refusal on any sales contract.

The sale was to be done effective January 1st and now I find out payments were made to the partnership at least thru March.

Special Counsel Ex. 354.

In early 1988 Mr. Overgaard directed his accountant to review the various payments made by both Mr. Overgaard and Senator Durenberger since the initiation of the transaction, and to arrive at revised purchase figures reflecting these payments. These calculations resulted in an adjustment of the purchase price itself, from \$52,500 to \$52,804, as well as an increase in the amount of the promissory note to be executed as part of the transaction. See Special Counsel Ex. 371.<sup>97</sup>

Mr. Overgaard then forwarded these calculations to Mr. Mahoney, with the request that he

prepare a new note for \$10,299.96 dated April 1, 1987; redo the contract for deed to reflect an April 1st purchase; get condo clearance for the sale and return my note in the amount of \$9,995.66.

*Id.* (emphasis added). Mr. Mahoney provided the requested material, all dated "April 1, 1987" on February 24, 1988.<sup>98</sup> See Special Counsel Ex. 373. Thus, it was not until February of 1988 that the parties agreed to an "effective" sale date of April 1, 1987.

Even as of that date, however, the parties did not have an agreement on the remaining terms of the transaction. After consulting with counsel, Mr. Overgaard revised the lease and the letter agreement to provide that Senator Durenberger would be obligated to pay the total costs of owning and operating the apartment, regardless of the amount of time which he spent in the apartment each month. See Special Counsel Ex. 374. In early March 1988, Mr. Overgaard forwarded these materials to Mr. Mahoney for his review. Special Counsel Ex. 375. Mr. Overgaard also sent a copy of all these materials directly to the Senator, with some explanation of the suggested changes. See Special Counsel Ex. 376. Apparently, neither Mr. Mahoney nor the Senator was willing to agree to these terms at that time, as neither executed the agreements as revised by Mr. Overgaard.

As of early 1989, the sale still had not fully been reduced to writing. On January 11, 1989 Mr. Overgaard sent the following letter to Senator Durenberger:

<sup>97</sup> By the fall of 1987, both the mortgage and condominium association dues on Unit 703 were in arrears. In early December 1987, ISC issued a check to the Eberhardt Management Company in the amount of \$1,285.56 to cover association dues and late penalties for the months of July through December 1987. See Special Counsel Ex. 364. In addition, in August 1987 ISC issued a check to the Commercial State Bank in the amount of \$2,993.12. After some confusion, in November 1987, \$1,844.62 of this amount was applied to the outstanding condominium mortgage payments due through October 1987; the remainder was applied to back due taxes. See Special Counsel Ex. 361.

<sup>98</sup> In fact, it appears that the identity of the parties to the agreement varied over time. The letter agreement forwarded to Mr. Overgaard in January 1987 identified the partnership as the seller. See Special Counsel Ex. 351. In contrast, the letter agreement dated April 1, 1987, forwarded to Mr. Overgaard in February 1988, identified the Senator's blind trust as the seller of the premises. See Special Counsel Ex. 373.

9 3 0 4 0 9 8 2 2 5 8

It is now nearly three years since we entered into an agreement that Independent Service Company would buy your condominium unit. ISC made the agreed-to payments, executed the contracts provided and assumed payments to the bank management company for monthly service and payment of taxes.

*To date, we have received no executed document showing the transaction to be completed.* Tax statements still come in your name. The bank loan is still in your name and nothing seems to be happening.

Special Counsel Ex. 386 (emphasis added).<sup>99</sup>

In response to this letter, the Senator arranged a meeting with Mr. Overgaard to discuss the transaction, and subsequently directed Mr. Mahoney's staff to deliver the requested documents to Mr. Overgaard. See Special Counsel Ex. 387. It was only after this meeting, in April 1989, that the Senator signed the lease agreement dated April 1, 1987 on the basis of which he had been "renting" the property from Mr. Overgaard. See Special Counsel Ex. 391.

Despite these efforts, executed sales documents still were not forthcoming to Mr. Overgaard. Finally, in September 1989, Mr. Overgaard wrote to Senator Durenberger as follows:

Please excuse the handwritten letter but I prefer to keep this totally confidential. The purpose of this letter is to ask that we terminate the condo sale at the earliest possible date. I have just closed my corporate books for the third time since we entered into the purchase agreement and still do not have the necessary documents to prove purchase.

Beginning with our fiscal year end May 31, 1987 I have paid an audit fee in excess of \$3,000.00 annually for a certified audit which would demonstrate fiscal soundness for clients who request such information. Each of those reports has been footnoted because the auditor cannot prove ownership of the condo unit. I don't understand what you and Mahoney are accomplishing by refusing to complete the transaction. Whatever the reason, I want out. *The last thing I need is to get involved in your ethics investigation and be accused of participating in a sham transaction by which you collect per diem from the Senate on a residence you actually own.* That is certainly a conclusion that could be reached as things stand now.

Now it is my turn to feel used. You and Mahoney must have some reason for not giving me the signed sale documents. I can't figure out the reason and obviously the two of you aren't going to let me in on those reasons. You have

<sup>99</sup> It is interesting to note that while Mr. Overgaard was attempting unsuccessfully to obtain evidence of the sale of the condominium to ISC, Mr. Mahoney filed with the Registrar of Titles the documents necessary to transfer title to the condominium from the partnership to himself as trustee of the Senator's blind trust. A Certificate of Title, showing Mr. Mahoney to be the legal owner of the property in his capacity as trustee, was issued on October 26, 1988. Special Counsel Ex. 385.

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the cash flow information I gave you so you must know by now that it's no big profit for ISC. You also must be aware that you have collected more per diem than you have paid to ISC. I presume that's because of your concern that you're being overcharged.

Dave, this thing has dragged along for so long that I'm just weary of the whole thing. I'll gladly settle for the return of my downpayment and call it quits. There are some things just not worth hassling about and this is certainly one of them.

Special Counsel Ex. 394 (emphasis added).<sup>100</sup>

In his recently executed affidavit, Mr. Overgaard has denied that the transaction was a "sham." Durenberger Ex. 15, ¶ 11. Special Counsel submits, however, that Mr. Overgaard's September 1989 letter is far more credible than his more recent affidavit. Unlike that affidavit, which was written for public consumption as part of these proceedings, the quoted letter was a confidential communication between friends, which Mr. Overgaard did not anticipate would be held up for public scrutiny. Instead, the letter was intended to prompt Senator Durenberger into action—a purpose which would not be served by a baseless charge of unethical conduct. Far from being outraged at its contents, however, Senator Durenberger apparently was concerned about the letter's intent and effect.

Indeed, as a result of this letter, Mr. Mahoney, Mr. Kelley and Mr. Overgaard met in early October 1989. See Special Counsel Ex. 396. Mr. Mahoney delivered the requested documentation to Mr. Overgaard at that time, thereby concluding the protracted sales transaction. Yet, as of the initiation of the Committee's Preliminary Inquiry in this matter, those documents still have not been filed with the Hennepin County Registrar of Titles. Thus, ISC still does not have legal title to the condominium property.

#### 4. THE SENATOR'S CLAIMS FOR SENATE REIMBURSEMENT

Special Counsel finds that the sales agreement between Senator Durenberger and Mr. Overgaard was back dated to April 1, 1987 in order to permit the Senator to claim Senate *per diem* lodging reimbursement to that date. Heidi Shaw, the Senator's staff Bookkeeper, routinely prepared Senate reimbursement vouchers for submission to the Disbursing Office. Ms. Shaw initially did not receive rental invoices, either from the partnership or ISC, for the period after March 31, 1987—the partnership termination date. Accordingly, she prepared vouchers for this period using her own handwritten notes of the dates the Senator stayed in the condominium.<sup>101</sup>

Because the Senator had been advised by Mr. Mahoney that he could not receive Senate reimbursement for the expenses of staying in property which he owned, Mr. Kelley instructed Ms. Shaw to

<sup>100</sup> At the time of this letter there was not yet an "ethics investigation" of the condominium matter. Apparently, therefore, Mr. Overgaard was referring to the pending Piranha Press inquiry—and obviously was expressing his concern that that inquiry might be expanded to include the condominium issue.

<sup>101</sup> See, e.g., Special Counsel Ex. 412. Ms. Shaw also reported that she knew that she could not submit vouchers for these expenses unless she had an invoice reflecting the costs to attach to the vouchers.

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delete from Senate reimbursement vouchers any claims for condominium lodging expenses. In response to Mr. Kelley's instructions, Ms. Shaw simply crossed through these amounts on the voucher forms and supporting handwritten notes. See, e.g., Special Counsel Ex. 412. These vouchers then were submitted to the Disbursing Office, and payments were made by that Office in the amounts requested.

In November 1987, Mr. Mahoney's staff informed the ISC staff how to generate invoices for the Senator's stays in the condominium. Thus, by letter dated November 11, 1987, Tamara Hardy of Mr. Mahoney's office wrote to Joan Sorenson of ISC:

Enclosed also find an example of the form of bill previously submitted to Heidi at Senator Durenberger's office in Washington, D.C. *In order that reimbursement can be obtained from the Senate, a similar type of bill is necessary and should be sent to the attention of Heidi Shaw, 154 Russell Senate Office Building, Washington, DC 20505.*

Special Counsel Ex. 359 (emphasis added).<sup>102</sup>

In December 1987, ISC forwarded to Ms. Shaw rental invoices for the entire period from April through October 1987 in the required format. Special Counsel Ex. 445 at 88-89; see Special Counsel Ex. 365. After receiving these invoices, at Mr. Kelley's direction Ms. Shaw then prepared revised Senate vouchers for submission to the Senate Disbursing Office. These "revouchers" included the newly documented condominium rental costs, and were supported by the newly created ISC rental invoices. See, e.g., Special Counsel Ex. 412. Senator Durenberger personally reviewed and signed each of these "revouchers" before they were submitted to the Disbursing Office.

In submitting these materials to the Disbursing Office, Senator Durenberger represented to the Senate that he had rented the condominium from ISC on the dates reflected in the vouchers and supporting invoices.

It is clear from the documentation of the transaction as a whole, however, that there was no *bona fide* agreement to sell the condominium to ISC until at least August 1987, and that ISC effectively had no relationship to the property until that time. It is equally clear that ISC did not hold legal title to the condominium during any of the time periods at issue. Indeed, it is evident that the documentation of the ISC transaction ultimately reflected an April 1, 1987 effective date so that the Senator could claim Senate reimbursement for his condominium stays after that date.

##### 5. DELAYED RENTAL PAYMENTS TO ISC

The evidence in this matter also demonstrates that Senator Durenberger regularly claimed and received Senate reimbursement for the "costs" of renting his former condominium—yet made only nine lump sum rental payments to ISC during the almost two year

<sup>102</sup> The previous month, Ms. Shaw prepared a listing of dates on which the Senator had stayed in the condominium through August 1987. This listing was updated in early November 1987 and was forwarded to Mr. Mahoney with the request that he in turn provide it to Ms. Sorenson. See Special Counsel Ex. 360. Ms. Shaw also informed us that the ISC invoices were provided to her after this information was forwarded to ISC.

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period from January 1988 and November 1989.<sup>103</sup> Senator Durenberger thereby retained the use of Senate reimbursement funds for substantial periods of time.

As part of the sales transaction, Senator Durenberger agreed to lease the condominium from ISC at a daily rate of \$85.<sup>104</sup> As was noted above, in December 1987 ISC sent invoices to the Senator for his stays in the condominium between April and October 1987; in February 1988, ISC invoiced the Senator for his condominium stays through January of that year. See Special Counsel Ex. 372. Thereafter, ISC invoiced the Senator fairly regularly on a monthly basis, based on a listing of dates provided by Heidi Shaw of the Senator's staff.<sup>105</sup> Based on these invoices, the Senator submitted vouchers to the Senate for lodging reimbursement on a fairly regular monthly basis.<sup>106</sup>

A review of the documentation produced to the Committee in this matter reveals that, with a few limited exceptions,<sup>107</sup> Senator Durenberger received reimbursement checks from the Senate on a regular monthly basis for the almost two year period from February 1988 to December 1989. According to Ms. Shaw, these checks were regularly deposited into either the Senator's checking or savings account. Although he regularly was accepting these Senate reimbursement monies, and depositing them into his personal accounts, Senator Durenberger made only nine "rental" payments to ISC during the twenty-two month period from February 1988 to November 1989.<sup>108</sup> See Special Counsel Ex. 407; see also Special Counsel Ex. 395.

Thus, to the extent that he received and held Senate funds for several months between payments to ISC, the Senator was benefiting from the use of Senate monies owed to a third party.<sup>109</sup> This, Special Counsel, submits is simply inappropriate for one charged with the administration of the public trust.

#### *C. Senator Durenberger's Qualified Blind Trust*

In June 1985, Senator Durenberger placed his interest in the partnership into a newly established qualified blind trust pursuant to the Ethics in Government Act. At that time, in his capacity as

<sup>103</sup> In October 1989, the Senator was advised by Mr. Mahoney that these delays were "inappropriate" under numerous statutes. See Special Counsel Ex. 403.

<sup>104</sup> In an April 18, 1988 letter to the Senator, Mr. Overgaard explained that this rate was calculated to cover both the out-of-pocket operating expenses of the unit and "a reasonable return" on Mr. Overgaard's investment in the property. See Special Counsel Ex. 378.

<sup>105</sup> In fact, beginning in June 1989 ISC sent invoices to the Senator on an average of twice each month.

<sup>106</sup> The relevant vouchers do not reflect the dates on which they were submitted to the Disbursing Office. Ms. Shaw, however, informed Special Counsel that she submitted vouchers to the Disbursing Office on a fairly regular basis, and that she typically received payment checks from the Senate within a few weeks of submitting a voucher. Based on a review of the Senate reimbursement checks, it would appear that Ms. Shaw typically submitted vouchers on a monthly basis.

<sup>107</sup> The Senator's condominium stays between July 1988 and early November 1988 were reimbursed by his official election committee. See Special Counsel Ex. 407.

<sup>108</sup> These payments were made in February 1988 (\$5,780), April 1988 (\$2,550), May 1988 (\$680), August 1988 (\$1,190), September 1988 (\$2,975), March 1989 (\$3,000), May 1989 (\$2,124), July 1989 (\$2,500) and November 1989 (\$5,925). See Special Counsel Ex. 407.

<sup>109</sup> Certain documents reflect the Senator's concern that ISC charges were excessive relative to the out-of-pocket operating costs of the premises. See, e.g., Special Counsel Ex. 380. This may account for the delay in the Senator's payments to ISC.

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general partner, Senator Durenberger also deeded the condominium property to Michael Mahoney as the trustee.<sup>110</sup>

The Ethics in Government Act restricts both the activities of the trustee in managing trust assets and communications regarding the trust among the trustee, the Member of Congress, and others.<sup>111</sup> Special Counsel finds that Senator Durenberger violated the statutory requirements governing qualified blind trusts since the Senator's trust became effective on February 24, 1986. Most significantly, the facts evidence Senator Durenberger's constant involvement in the management of one of the trust's principal assets—the Minneapolis condominium unit.

#### 1. FACTUAL BACKGROUND

On June 18, 1985, Senator Durenberger established a qualified blind trust pursuant to the Ethics in Government Act and named Michael Mahoney as trustee. Several months later, copies of the Revocable Trust Agreement and Senator Durenberger's statement regarding the trust assets and qualifications of the trustee were sent to the Ethics Committee. Special Counsel Ex. 333. On February 10, 1986, the Committee was provided with a statement of the assets placed in the trust. Special Counsel Ex. 334. These assets included: 1) all interests in Money Market Portfolio at Piper, Jaffray & Hopwood, Inc.; 2) all interests in Dynamic Enterprises; and 3) all interests in "706-607 Partnership."<sup>112</sup>

After reviewing these documents, the Committee informed the Senator on February 24, 1986 that it found the trust to be a qualified blind trust, pursuant to the Ethics in Government Act. 2 U.S.C. § 702(e).<sup>113</sup> Special Counsel Ex. 336.

#### 2. THE TRUST ASSETS

As was noted above, among the original assets placed in the trust by the Senator was his interest in the condominium partnership. Senator Durenberger then deeded the condominium itself to Mahoney as trustee. The Senator, however, continued to stay in the condominium on a regular basis. Because he received bills from and made payments to both the 703-603 Association and ISC for his use of the condominium, Senator Durenberger was personally aware of the status of the holdings of the qualified blind trust, thereby undermining the very purpose of the trust.

In his opening statement to the Committee on June 13, 1990, Senator Durenberger's counsel acknowledged this fact: "It was . . . nonsensical to put into this trust the interest relating to the condominium where Senator Durenberger stayed when he went back to Minneapolis." *Hearing Transcript* (June 13, 1990) at 4.

<sup>110</sup> This deed was not recorded until 1988.

<sup>111</sup> The purpose of a qualified blind trust is a total lack of knowledge by the Government official with respect to the holdings held in trust. S. Rep. No. 639, 96th Cong., 2d Sess. 13 (1978).

<sup>112</sup> At the time this statement was sent to the Committee, the partnership was known as "703-603 Association."

<sup>113</sup> A qualified blind trust is defined as "any trust in which a reporting individual [Member of Congress, his spouse, or any dependent child] has a beneficial interest in the principal or income" and which meets certain requirements. 2 U.S.C. § 702e(3).

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## 3. IMPROPER COMMUNICATIONS REGARDING THE TRUST

Special Counsel finds that Senator Durenberger not only was aware on a continuing basis of the status of the condominium trust asset, but also was an active participant in the management of this asset. The Ethics in Government Act states that a trustee "in the exercise of his authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party."<sup>114</sup> 2 U.S.C. § 702(e)(3)(C)(i). In addition, communications between the trustee and interested party regarding the trust are restricted severely.<sup>115</sup> 2 U.S.C. § 702(e)(3)(C)(vi).

During the period from February 1986 to the initiation of this inquiry, Senator Durenberger repeatedly consulted with his trustee, Mr. Mahoney, regarding the trust. See, e.g., Special Counsel Exs. 343, 352, 369, 380, 390, 393, 404. Indeed, the Senator's counsel acknowledged in his June 13th opening statement that the laws regarding blind trusts were broken:

The Rules are clear, that the trustee and the beneficiary generally can't communicate about the assets in the trust. Putting the interest relating to the condominium where Senator Durenberger stayed in this trust virtually ensured from the beginning that the rules about communication would be broken. . . . Indeed, the record shows that Mr. Mahoney engaged Senator Durenberger in conversations about [the condominium], sought his advice about it, particularly when they were considering selling this condominium to Mr. Overgaard.

*Hearing Transcript* (June 13, 1990) at 4.

The evidence demonstrates numerous instances of prohibited communications. For example, following the termination of the partnership on March 31, 1987, Senator Durenberger discussed with Mr. Mahoney several alternative dispositions of the condominium property. Special Counsel Ex. 343. He personally negotiated the sales price for the condominium with Mr. Overgaard, see Special Counsel Ex. 369, and retained Mr. Mahoney to draft the necessary legal documents. He subsequently demanded from Mr. Mahoney an explanation of the rental costs for the condominium by Mr. Overgaard. Special Counsel Ex. 380.

In April 1989, the Senator received from Mr. Mahoney's assistant a copy of the April 1, 1987 letter agreement for the sale of the condominium to Paul Overgaard, and was specifically asked to provide his comments on the agreement. The telecopier cover letter transmitting this document included the following notation:

Pursuant to your instructions we are preparing documents to forward to Paul Overgaard. In reviewing the letter of understanding, we noted a paragraph had been

<sup>114</sup> An interested party is defined as a reporting individual (Member of Congress), his spouse and any dependent child with a beneficial interest in the principal or income of a qualified blind trust. 2 U.S.C. § 702(e)(3)(D).

<sup>115</sup> The only communications that are allowed are requests for distributions and written communications regarding the general financial interest of the Member of Congress, notification that law prohibits an asset from being held in the trust, and directions to the trustee to sell any of the trust's original assets because of a conflict of interest. 2 U.S.C. § 702(e)(3)(C)(vi).

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amended. Such paragraph has been marked on the attached page. Please review and call myself or Michael with comments. We are not forwarding this letter until we have your comments.

Special Counsel Ex. 390 (emphasis added).

In August 1989, Senator Durenberger wrote to Mr. Mahoney to direct him to take certain actions regarding the sale to Overgaard:

Please sign the original of the enclosed April 1, 1987 letter agreement as amended by Paul Overgaard and send to him at Independent Service Co., along with the executed original of the quit claim deed (copy enclosed).

Special Counsel Ex. 393.

The Ethics in Government Act also prohibits an interested party from making efforts to obtain information regarding trust holdings, 2 U.S.C. § 702(e)(3)(C)(viii), and from knowingly or negligently soliciting or receiving any information regarding the trust, which may not be disclosed according to the Act, 2 U.S.C. § 702(e)(6)(B). Despite these prohibitions, Senator Durenberger often received information regarding the condominium, on occasion in response to his specific request. See, e.g., Special Counsel Exs. 339, 343, 370, 379 and 388.

For example, the Senator periodically received financial statements detailing partnership income and expenses. See, e.g., Special Counsel Ex. 339. In addition, in April 1988 Senator Durenberger asked Mr. Overgaard to provide him with a "written explanation of the [condominium sale] transaction and my obligations." Special Counsel Ex. 379. Mr. Overgaard sent a detailed letter explaining the financial transaction and the basis for the lease terms. Special Counsel Ex. 378. Disclosure of such information to the Senator is prohibited by 2 U.S.C. § 702(e)(3)(C)(vi).<sup>116</sup>

#### VII. EVIDENCE REGARDING GIFTS OF LIMOUSINE TRANSPORTATION

Special Counsel finds that Senator Durenberger accepted gifts of limousine transportation in the Boston, Massachusetts area in 1985 and 1986 in violation of Senate Rule 35.<sup>117</sup> In the hearing in this matter, Senator Durenberger's counsel admitted that the Senator's receipt of this limousine transportation violated Senate Rule 35. *Hearing Transcript* (June 13, 1990) at 7.

In 1985, Senator Durenberger began to have regular meetings for personal reasons with Dr. Armand Nicholi in Concord, Massachusetts, approximately twenty miles from Boston. These meetings typically were held on Monday mornings from 8:00 a.m. until 12:00

<sup>116</sup> A trustee also is required to inform a Senator and the Ethics Committee when an asset of the trust is disposed of or when the value of an asset is less than \$1,000. 2 U.S.C. § 702(e)(3)(C)(iii). Although the parties to the purported sale of the condominium claim that ISC owns the condominium, and has done so since April 1987, there has been no formal notification to the Committee of this purported transfer of ownership.

<sup>117</sup> Senate Rule 35 prohibits a Senator from accepting "directly or indirectly, any gift or gifts having an aggregate value exceeding \$100 during a calendar year directly or indirectly from any person, organization, or corporation having a direct interest in legislation before the Congress. Gifts, according to Rule 35, are defined to include reimbursement for "other than necessary expenses." A person or entity that is registered to lobby pursuant to the Federal Regulation of Lobbying Act is deemed to have a direct interest in legislation before the Congress, as is an entity that retains a registered lobbyist. Senate Rule 35 and Interpretive Rule 373 (1983), S. Rep. No. 18, 101st Cong., 1st Sess. 215 (1989).

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noon. Senator Durenberger often made the trips from Boston to Concord and back to Boston by limousine, rented from A and A Limousine Renting, Inc. The limousines usually waited for the Senator during his four hour meetings. The cost of this limousine travel and other unnecessary limousine travel in the Boston area, estimated at \$3,500 was paid by various organizations with a direct interest in legislation, with which Senator Durenberger sometimes met on these trips.

Specifically, on eleven occasions in 1985 and 1986 Senator Durenberger traveled to Boston to meet with a company or business and accepted limousine service to and from Concord. That transportation to and from Concord was necessitated solely by the Senator's personal meetings with Dr. Nicholi. The total value of this limousine travel is estimated at \$2,640.<sup>118</sup> These eleven occasions, and the organizations which paid for the transportation, are as follows:

June 8, 1985; September 16, 1985, and June 9, 1986—New England Mutual Life Insurance Company (Special Counsel Exs. 53, 416, 419, 429).

September 23, 1985—National Machine Tool Builders Association (Special Counsel Exs. 52, 420).

November 4, 1985; February 10, 1986; and March 31, 1986—Pitney Bowes, Inc. (Special Counsel Exs. 78, 423, 425, 427).

January 20, 1986—Mintz, Levin, Cohen, Glovsky & Popeo, P.C. (Special Counsel Exs. 77, 424).

March 17, 1986—American Association of Equipment Lessors (Special Counsel Exs. 30, 426).

July 21, 1986—W.R. Grace & Company (Special Counsel Ex. 431).

September 15, 1986—Massachusetts Mutual Life Insurance Company (Special Counsel Exs. 34, 432).

Each of these organizations is or retains a registered lobbyist pursuant to the Federal Regulation of Lobbying Act, and therefore has a direct interest in legislation within the meaning of Senate Rule 35. See Special Counsel Exs. 283-289.

On five additional dates, Senator Durenberger met with Dr. Nicholi in Concord, but did not meet with representatives of any business or organization. On these five occasions, however, limousine transportation in the Boston area<sup>119</sup> and to and from Concord, valued at \$849, was paid for by the New England Mutual Life Insurance Company ("New England Life")—although the Senator met with neither New England Life officials nor apparently with officials of any other organization on these occasions.<sup>120</sup>

<sup>118</sup> Because most of the invoices reflecting these trips include non-itemized charges for transportation within the Boston area, which appears to have been necessary to the Senator's meetings with organizations, an average value of \$236.81 was assigned for service to and from Concord. This figure is based upon invoices that reflect only travel to and from Concord.

<sup>119</sup> Because Senator Durenberger did not meet with New England Life officials during these five trips, none of the limousine service provided constitutes a necessary expense. Therefore, transportation to and from Concord and within Boston, such as to the airport or the Senator's hotel, is included.

<sup>120</sup> These dates are as follows: May 10, 1985 (Special Counsel Ex. 415); October 9-10, 1985 (Special Counsel Ex. 421); and October 18-19, 1985 (Special Counsel Ex. 422). See also Special Counsel Ex. 53.

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Senator Durenberger also received limousine transportation in the Boston area on four other occasions. These dates, and the organization with which the Senator met if any, are as follows:

July 7-8, 1985 (Special Counsel Ex. 417).

July 15, 1985—Herrick & Smith (Special Counsel Ex. 418).

May 12, 1986—National Machine Tool Builder's Association (Special Counsel Ex. 428).

June 23, 1986—Hale & Dorr (Special Counsel Ex. 430).

The estimated total value of this transportation is \$1,287. Once again, this limousine transportation was necessitated by the Senator's meetings with Dr. Nicholi. While evidence about which organization paid for the limousine service on these dates is unavailable.<sup>121</sup> Senator Durenberger has not put forward any evidence suggesting that he paid for these expenses himself.<sup>122</sup> In light of the circumstances described above, it is not unreasonable to assume that a company or business with a direct interest in legislation paid for this travel, and that the Senator's receipt of this limousine service would also have violated Senate Rule 35.

#### VIII. OTHER MATTERS RELATED TO PIRANHA PRESS

##### A. Failure to Report Reimbursements

Special Counsel finds that Senator Durenberger violated Senate Rule 34<sup>123</sup> by failing to report on his Financial Disclosure Reports for calendar years 1985 and 1986 the acceptance from forty-three organizations of reimbursement for the necessary expenses of travel, in connection with his Piranha Press "promotional appearances" and certain travel to the Boston metropolitan area.<sup>124</sup>

On May 15, 1986, Senator Durenberger filed his Financial Disclosure Report for the 1985 calendar year. At that time, the Senator failed to report his receipt of travel expense reimbursements from twenty-seven organizations before which he made appearances in 1985. See Special Counsel Ex. 266. Similarly, Senator Durenberger's 1986 Financial Disclosure Report, filed on May 15, 1987, did not include his receipt of travel expense reimbursements from sixteen organizations before which he made appearances in 1986. See Special Counsel Ex. 268.

On July 27, 1989, several months after the Committee initiated its Preliminary Inquiry into the Senator's relationship with Piranha Press, Senator Durenberger filed amended Financial Disclosure

<sup>121</sup> Documents obtained from A and A Limousine Renting, Inc. demonstrate that New England Life was to be billed for the transportation on three of these dates. See Special Counsel Exs. 417, 418 and 428. New England Life, however, was unable to find any evidence of payment to A and A Limousine for limousine transportation on those occasions.

<sup>122</sup> It is possible that the cost of the limousine service on these dates was simply absorbed by A and A Limousine Renting, Inc., which does not have a direct interest in legislation within the meaning of Senate Rule 35. However, the Senator's failure to report transportation received on three of these four dates on 1985 and 1986 Financial Disclosure Reports would constitute a violation of Rule 34. See Special Counsel Exs. 266-269.

<sup>123</sup> Senate Rule 34 (adopting the Ethics in Government Act of 1978, as amended) requires that every Senator disclose on May 15th of each year "(t)he identity of the source and a brief description of reimbursements received from any source aggregating \$250 or more in value and received during the preceding calendar year."

<sup>124</sup> Reimbursements from three organizations were made in connection with appearances arranged as Piranha Press events, but payment to Piranha Press was not made. See Special Counsel Exs. 24, 44, 70. Reimbursements from two organizations were made in connection with the Senator's appearances in Boston, Massachusetts. See Special Counsel Exs. 53, 292.

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sure Reports for the 1985 and 1986 calendar years. Special Counsel Exs. 267, 269. These Reports are labeled "Reimbursements Related to Book Promotion Speeches," and include lists of reimbursements for travel expenses that Senator Durenberger received from thirty-nine organizations in 1985 and 1986. Senator Durenberger was required to file this information *not* in 1989, but in 1986 and 1987, the years immediately following those during which he received these travel expenses. His failure to do so violated Senate Rule 34.

In addition, to date Senator Durenberger has failed to disclose reimbursements for travel expenses that he received from four organizations for five trips that he made in 1985. These expenses are as follows:

In connection with his appearance before Blue Cross/Blue Shield of Michigan on May 6, 1985, the Economic Club of Detroit provided the Senator's airfare, lodging and ground transportation (Special Counsel Ex. 136).

New England Mutual Life Insurance Company provided ground transportation, lodging and meals in connection with the Senator's June 7, 1985 meeting with Mr. Mackay and airfare, lodging and ground transportation for his September 16, 1985 meeting with New England Life officials (Special Counsel Exs. 53, 416, 419).

Senator Durenberger received lodging, meals and ground transportation from the Palo Alto Medical Foundation in connection with his "promotional appearance" before that group on April 13, 1985 (Special Counsel Ex. 180).

The State Government Education and Research Foundation paid for Senator Durenberger's airfare, meals, lodging and ground transportation, which were necessary expenses related to his appearance before that organization on November 24, 1985 (Special Counsel Exs. 58, 193).

Special Counsel finds that Senator Durenberger's failure to report receipt of these travel expenses, valued at more than \$3,000, violated Senate Rule 34.

#### *B. Improper Conversion of a Campaign Contribution*

Special Counsel finds that Senator Durenberger violated Senate Rule 38, paragraph 2<sup>125</sup> by converting to his personal use a campaign contribution from the Pathology Practice Association Federal Political Action Committee. In August 1986, the President of the Pathology Practice Association (PPA) invited Senator Durenberger to address the Association's annual meeting on December 5, 1986. Special counsel Ex. 181 at B. Although the Association did not request a book promotion appearance, the Senator's staff forwarded the information about the appearance to Michael Mahoney on October 23, 1986, to be handled as a Piranha Press appearance. Special Counsel Ex. 181 at A.

The Association did not pay Senator Durenberger an honorarium or fee for his speech on December 5, 1986. Instead, several weeks after the Senator's appearance, the Association's Federal Political

<sup>125</sup> Senate Rule 38, paragraph 2 provides: "No contribution ... shall be converted to the personal use of any Member or any former Member."

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Action Committee ("PAC") issued a check in the amount of \$5,000, made payable to "Durenberger for U.S. Senate." Special Counsel Ex. 181 at H-I. This check was sent to the Senator's campaign committee in Minneapolis.<sup>126</sup> Special Counsel Ex. 181 at P.

The Association's registered lobbyist, Paul Johnson, explained in his affidavit that this payment was intended as a campaign contribution:

Senator Durenberger did not request an honorarium, and the PPA PAC made a \$5,000.00 contribution to his reelection campaign. The PPA's check dated December 30, 1986 clearly demonstrates that this was a campaign contribution, as it is made payable to "Durenberger for U.S. Senate" and has the PAC's identifying Federal Election Commission number thereon.

Special Counsel Ex. 41.

This contribution, however, was not reported to the FEC as required by 2 U.S.C. § 434, nor was it deposited with the campaign committee as required by 11 C.F.R. § 103.3. Instead, the check was deposited without endorsement to the Piranha Press account, from which Senator Durenberger was paid for his many "promotional appearances." Special Counsel Ex. 181 at H-K. Special Counsel finds that the Senator's conduct violates Senate Rule 38, paragraph 2.

#### *C. Senator Durenberger's Use of United States Capitol and Senate Facilities*

On six separate occasions in 1985, Senator Durenberger made Piranha Press "promotional appearances" in United States Capitol and Senate rooms. For each of these appearances, Piranha Press was paid a fee ranging from \$250 to \$2,000, in accordance with the Senator's arrangement with that group.<sup>127</sup> These payments ultimately funded, in part, the quarterly payments that Piranha Press made to Senator Durenberger.

It is clear that Senator Durenberger's conduct was contrary to the regulations adopted by the Rules Committee governing the use of these Senate facilities.<sup>128</sup> Initially, in March 1984, the Commit-

<sup>126</sup> In his presentation to the Committee during the hearing, Mr. Hamilton stated that the Association did not send its check to Piranha Press "as it should have done" and that the check was sent "somewhere," apparently not to the campaign committee. *Hearing Transcript* (June 12, 1990) at 134. Although Piranha Press may have considered the \$5,000 payment as a fee for a "promotional appearance," the Association clearly did not. In addition, documents filed with the FEC by the Association's PAC reflect that the check was sent to the Senator's official campaign committee. See special Counsel Ex. 181.

<sup>127</sup> These appearances were as follows: March 3, 1985, Room 385 of the Russell Senate Office Building, National Conference on Catholic Charities (\$250 fee) (Special Counsel Ex. 123); March 25, 1985, Room 385 of the Russell Senate Office Building, The Washington Campus (\$1,000 fee) (Special Counsel Ex. 151); April 11, 1985, Room 385 of the Russell Senate Office Building, The Washington Campus (\$1,000 fee) (Special Counsel Ex. 176); April 24, 1985, Room 211 of the U.S. Capitol, American Protestant Health Association (\$1,000 fee) (Special Counsel Ex. 110); September 9, 1985, Room 207 of the U.S. Capitol, Farmland Industries (\$1,900 fee) (Special Counsel Ex. 139); November 12, 1985, Room 385 of the Russell Senate Office Building, The Washington Campus (\$2,000 fee) (Special Counsel Ex. 152).

<sup>128</sup> The Committee's Resolution authorizing this investigation, also cited 40 U.S.C. § 198d in connection with these activities by Senator Durenberger. That statute provides:

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tee on Rules<sup>129</sup> adopted Rules for the Regulation of the Senate Wing of the United States Capitol. Rule XII of those rules provides as follows:

*Peddling, begging, and the solicitation of books or other subscriptions are strictly forbidden in the Senate Wing of the Capitol, and no portion of said Wing shall be occupied by signs or other devices for advertising any article whatsoever, excepting such signs as may be necessary to designate the entrances to the Senate Restaurant.*

Senate Manual 179-80 (1885) (emphasis added). As here relevant, this Rule remains in force today. S. Doc. No. 1, 100th Cong., 1st Sess. 181 (1988). Moreover, Rule XVI of the current Rules provides that the Rules are applicable as far as practicable to the Senate Office Buildings. *Id.*

The Rules Committee has communicated its regulations on this subject numerous times to Members of the Senate in "Dear Senator" letters. For example, a September 22, 1981 letter from then Rules Committee Chairman Charles McC. Mathias, Jr. advised all Members as follows:

It is the long-settled policy of the Rules Committee that no commercial or profit-making purpose should be served by the use of Senate rooms or facilities.

Special Counsel Ex. 290.

The United States Senate edition of the *Congressional Handbook*, S. Pub. 99-10 (1984), similarly sets forth "procedures" and "rules and regulations" established by the Rules Committee for the use of Senate rooms. The *Handbook* states:

*No products may be sold on the premises or displayed for future sale. No commercial, political, or profit-making purpose whatsoever may be served by the use of the Senate rooms. The sponsoring Senator will be held accountable for the enforcement of this clause.*

S. Pub. 99-10 at I-36 (emphasis in original). This proscription was communicated almost verbatim in a May 22, 1985 "Dear Senator" letter. See Special Counsel Ex. 291. Senator Durenberger's conduct was plainly inconsistent with these proscriptions. Moreover, it is unconscionable that an organization such as Piranha Press can realize profit from activities occurring in Senate buildings.

It is forbidden to offer or expose any article for sale in said United States Capitol Grounds; to display any sign, placard, or other form of advertisement thereon; to solicit fares, alms, subscriptions, or contributions therein.

In response to the arguments of Senator Durenberger's counsel, Special Counsel has reexamined the legislative history of this Act. Special Counsel has concluded that the better reasoned view may be that the cited statute does not reach conduct with the Capitol Buildings.

In 1967, Congress extended the scope of 40 U.S.C. § 193f, prohibiting the possession or discharge of weapons, to include the Capitol Buildings. At the same time, Congress amended Section 193m of the Act to redefine the term "Capitol Buildings," and in so doing eliminated the former language restricting the scope of the entire Act to the Capitol Grounds. Because Section 193f was the only substantive provision of the original Act which as amended referred to the Capitol Buildings, the amendment to Section 193m arguably reaches only that section.

This reading of the Act's legislative history is consistent with the traditional regulation of conduct within the Capitol Buildings by the respective Houses of Congress. As the text above makes clear, the Senate has long prohibited conduct of the type here at issue through its own Rules.

<sup>129</sup> Predecessor to the present Senate Committee on Rules and Administration.

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From Special Counsel's investigation, however, it appears that there is some misunderstanding about these regulations among the Members of the Senate. The cited authorities apparently are not well known among all Members; those Members who are aware of them may be somewhat confused about their scope. For these reasons, Special Counsel recommends that the Committee not find a violation or impose any disciplinary action on the basis of the conduct at issue. Accordingly, Special Counsel's recommendation of a sanction of Senator Durenberger set forth in Section XI below is not based upon the Senator's use of Senate or Capitol facilities in these instances.

Special Counsel further recommends that, in order to eliminate any further confusion on this issue, pursuant to Committee Rules 8(c) the Committee take such appropriate action as is necessary to clearly and unequivocally prohibit such conduct by all Members in the future.

#### IX. SENATOR DURENBERGER'S DEFENSES

Senator Durenberger has raised several general defenses to the charges against him. Specifically, Senator Durenberger has asserted that he acted in good faith and without any intent to violate the law or Senate Rules, and that his responsibility for the misconduct here at issue therefore should be diminished. Senator Durenberger also repeatedly has stressed his reliance on the advice of counsel, the staffs of the Rules and Ethics Committees, and the FEC.

Finally, with respect to his Piranha Press contract, Senator Durenberger argues that even if he gave no actual book promotions, the compensation he received from Piranha Press would still be justified under federal election law pursuant to a contract for certain other "continuing services." These defenses are without merit.

While Senator Durenberger does not contest the facts, he minimizes his own involvement and seeks to blame others. However, the overwhelming weight of the evidence shows that the responsibility for the conduct at issue must be placed on the Senator because it was he who knowingly and intentionally participated in a pattern of conduct which was unethical. Moreover, while Special Counsel does not find that Senator Durenberger acted with venality, it is also true that he did not act in good faith.<sup>130</sup>

##### A. The Senator's Intent

In his statement at the hearing in this matter, Senator Durenberger argued:

First, in all these activities to the degree that it was humanly possible, I acted in good faith, with no intent whatsoever to violate the rules of the Senate.

Hearing Transcript (June 13, 1990) at 20. Senator Durenberger's counsel stressed the same point in his statement to the Committee:

<sup>130</sup> If Special Counsel had concluded that Senator Durenberger acted with venality, the recommendation of sanction would have been more severe.

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[A] basic question that you must focus on is: Do the facts show some type of venal intent, some type of intent to unlawfully circumvent the honorarium rules?

*Id.* (June 12, 1990) at 122. Senator Durenberger apparently does not contest that he sought to circumvent the rules, but only that he did so in an *unlawful* manner. In effect, the Senator contends that he did not act with any specific intent to violate the law or rules.<sup>131</sup>

The Senate, however, need not find that Senator Durenberger actually intended to violate a law or rule in order to impose the disciplinary action recommended by Special Counsel in this matter. Indeed, the Committee's own procedural rules permit the imposition of some disciplinary measures for inadvertent, and therefore presumably unintentional, violations of Senate rules. See Committee Rule 4(f)(2). This reflects the recognition that, as holders of a unique public trust, Members of the United States Senate appropriately can be held to a higher ethical standard of conduct than that which governs the general public.

Indeed, specific intent—that is, proof that an individual knowingly performed an act with the express purpose of violating the law—is required in only a narrow category of criminal cases. Within the criminal context, liability generally may be imposed based on proof that the accused voluntarily committed the acts in question, irrespective of whether he or she knew that those actions violated any law. In fact, in some situations, criminal liability may be imposed based merely on proof that the accused acted in reckless disregard of the facts, or otherwise deliberately avoided learning the facts. See, e.g., *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (*en banc*), cert. denied, 426 U.S. 951 (1976).

The Rules of this Committee, as well as available Committee precedent, are consistent with these general precepts. The Committee has previously recommended the sanction of a Member even absent evidence that the Member had actual knowledge of the wrongdoing at issue. In that matter, the Committee recommended and the Senate voted to denounce Senator Herman Talmadge based on evidence that he knew or should have known of misconduct on the part of his staff. *Report of the Select Committee on Ethics, Herman E. Talmadge Investigation*, S. Rep. No. 337, 96th Cong., 1st Sess. 17 (1979). The Committee further determined that Senator Talmadge should be held responsible for that misconduct by virtue of his own "gross neglect" of his duty to faithfully and carefully administer the affairs of his office. *Id.*

Special Counsel, however, finds that Senator Durenberger's actions and conduct were both knowing and intentional and were not carried out negligently, inadvertently or on the basis of a mistake of law or fact. Senator Durenberger knowingly and intentionally designated certain honorarium invitations as Piranha Press events; gave speeches at these events in which he mentioned neither his

<sup>131</sup> Many of the affidavits submitted by Senator Durenberger contain statements to the effect that, to the best of the affiant's knowledge, Senator Durenberger did not intend unlawfully to circumvent Senate Rules or laws. For example, Gary Diamond stated as follows in his affidavit: "I have no knowledge that Senator Durenberger had any intent unlawfully to avoid statutory honorarium limitations." See also Durenberger Exs. 4, ¶ 5; 5, ¶ 8; 7, ¶ 8; 8, ¶ 9; 11, ¶ 14; 12, ¶ 8; 13, ¶ 6; 15, ¶ 12; 112, ¶ 10. Such a statement is nothing more than an opinion of a participant in the scheme at issue as to the ultimate issue, and has no probative value.

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book nor his publisher; endorsed to Piranha Press checks that had been made payable to him and that were marked clearly with the notation "honorarium"; and signed and submitted reimbursement requests to the Senate Disbursing Office for stays in a condominium which he co-owned. Indeed, the Senator was personally involved in the minutia of the transactions at issue.

In light of the evidence discussed herein, Special Counsel rejects the notion that Senator Durenberger acted in good faith. Throughout these proceedings, Senator Durenberger has urged the Committee to adopt a lesser rather than a higher standard of ethical conduct. Special Counsel submits that Senator Durenberger's conduct was unethical by any standard. As Special Counsel has earlier stated, it is the Senator's moral compass that was broken. As the House Committee on Standards of Official Conduct noted in its report on the Korean Influence Investigation, "Members of Congress are expected to adhere to standards of conduct far more demanding than the bare minimum standards established by our criminal laws." *Manual of Offenses and Procedures, Korean Influence Investigation, House Committee on Standards of Official Conduct*, 95th Cong., 1st Sess. 35 (1977).

In sum, whether Senator Durenberger had the specific intent to violate law or Senate Rules is not at issue here. Such a finding is unnecessary to the imposition of Senate sanctions. Senator Durenberger clearly intended to commit the acts that constitute violations of law and Senate Rules and should be held accountable for his conduct.

#### *B. Reliance on the Advice of Others*

Claims of reliance on the advice and assurances of others have been a major theme in Senator Durenberger's defense of his actions.<sup>132</sup> In his public statement to the Committee, for example, Senator Durenberger asserted:

[A]ll the key decisions were based on the advice of outside, independent counsel, often two or three attorneys, and reaffirmed by contacts with the Ethics Committee, the Rules Committee, or the Federal Elections Commission, whichever had jurisdiction.

*Hearing Transcript* (June 13, 1990) at 20; see also *id.* (June 12, 1990) at 110-11 (statement of counsel).

#### 1. RELIANCE ON COUNSEL

The Senator's reliance on counsel defense is both legally and factually inadequate. The defense is available in only a narrow range of criminal cases—typically those requiring specific intent. In those cases, reliance on counsel may be relevant in showing the absence of a vital element in the prosecution's case: an intent to break the

<sup>132</sup> Senator Durenberger suggested in his statement to the Committee that the good names of his attorneys and friends were unfairly tarnished by Special Counsel's presentation. It is the Senator who throughout these proceedings has blamed his lawyers and friends. It is the Senator who in real time involved them in his schemes to circumvent the rules. Accordingly, his efforts to support them now are disingenuous and are totally inconsistent with the positions he has taken throughout these proceedings.

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law. Confining the reliance on counsel defense to these narrow circumstances is supported by policy concerns of not permitting "those desiring to circumvent the law . . . [to] shop around for bad advice." 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* 595 (1986). Because it is unnecessary in Senator Durenberger's case to show specific criminal intent, the defense of reliance on counsel is not legally relevant.

Perhaps more importantly, Senator Durenberger is himself a lawyer and was, at the very time of some of the conduct at issue here, a member of the Senate Committee on Ethics. He is thus in a very different position from the ordinary layman who must, by necessity, rely upon the advice of lawyers.

In support of his reliance on counsel defense, however, Senator Durenberger has cited two opinion letters provided by Mr. Mahoney. *Hearing Transcript* (June 13, 1990) at 38; *id.* (June 12, 1990) at 115 (statement of counsel). These opinion letters do not fairly reflect the actual agreement between the Senator and Piranha Press, nor do they state the facts of that arrangement as known to the parties as of the dates of the letters. Neither of the opinion letters states that the groups before which the Senator would make "promotional appearances" would pay a fee to the publisher in consideration of the Senator's appearance. See Durenberger Exs. 30, 31. Nor does either of the letters refer to the fact that the "promotional appearances" envisioned under the contract would be the result of traditional honoraria speech invitations extended to the Senator through his U.S. Senate office. *Id.* Given the disparity between the arrangement as it was actually carried out, Senator Durenberger cannot claim to have relied upon the letters in good faith.

Moreover, the facts of the Piranha Press arrangement show that Senator Durenberger did not rely on the advice of disinterested counsel. Where the lawyer upon whom reliance is claimed is himself integrally involved in the transaction at issue, the client may not invoke reliance on counsel as a defense. *United States v. Carr*, 740 F.2d 339, 347 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). Although Senator Durenberger claims that he relied on independent counsel, Mr. Mahoney was centrally involved in carrying out the Piranha Press arrangement. Perhaps the best description of Mr. Mahoney's role was offered by Senator Durenberger's counsel, Mr. Hamilton:

Now Mr. Mahoney of course who is in the middle of the implementation of the Piranha Press contract was acting both as Senator Durenberger's lawyer and as Piranha's agent. . . . Mr. Mahoney was arranging for the appearances. He was communicating and negotiating with groups as to fees. In short, he was the principal organizer of all of this.

*Hearing Transcript* (June 12, 1990) at 123.

Mr. Mahoney profited directly from the Senator's Piranha Press contract by acting simultaneously as counsel for Senator Durenberger and agent for Piranha Press. Indeed, Mr. Mahoney received nearly \$25,000 in fees from Piranha Press for his services as agent. See Special Counsel Ex. 277. Under these circumstances, Mr. Mahoney's legal advice could not be considered truly disinterested.

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and Senator Durenberger was not entitled to place unfettered reliance upon it.

In any event, Senator Durenberger has not presented any evidence to suggest that Mr. Mahoney or anyone else advised him that he could claim book promotion fees for traditional honoraria events. Had such advice been given, it would have been so obviously wrong that the Senator, as a lawyer and former member of this Committee, would have been obliged to ignore it.

Not surprisingly, on several occasions Senator Durenberger did ignore the advice of his counsel and other advisors when it conflicted with his self-interest. For example, Mr. Mahoney testified in this deposition in this matter that he advised Senator Durenberger that Piranha Press "promotional appearances" by the Senator had to include a display of the Senator's books or a mention by the Senator of the books or his publisher. Special Counsel Ex. 442 at 137-38. Notwithstanding this advice, Senator Durenberger treated as promotional appearances numerous speeches in which he mentioned neither this publisher nor his book. Senator Durenberger also was warned in 1985 by Michael Bromberg, a personal friend, that his arrangement with Piranha Press created an appearance of impropriety. Special Counsel Ex. 14, ¶ 9. The Senator also ignored this advice.

Finally, in late 1986, the Senator's chief of staff asked Mr. Mahoney to ascertain whether the Senator's claims for reimbursement for the costs of staying in the condominium would be affected by the termination of the Senator's real estate partnership with Mr. Scherer. Special Counsel Ex. 443 at 189-196, 204-205. Mr. Mahoney advised Senator Durenberger that he could find no basis for the Senator's past claims for lodging reimbursement during the tenure of the partnership, and therefore could not opine that those reimbursements were proper. *Id.* at 205. While this surely should have raised some question in Senator Durenberger's mind, the Senator did not bring the matter to the attention of either the Senate Disbursing Office or the Senate Rules Committee at that time. Instead, he continued to claim such reimbursement through March 31, 1987, the date on which the partnership was terminated.

Special Counsel submits that the impropriety of his conduct should have been readily apparent to Senator Durenberger. A number of people who were neither trained in federal election law nor familiar with the Senate Rules of Conduct recognized that Senator Durenberger's arrangement concerning Piranha Press was, at the very least, irregular. See, e.g., Special Counsel Ex. 435 at 103-104 (attorney Frederick Graefe); 67, ¶ 2 (Jimmie Powell, Senator Durenberger's Legislative Director).

A number of the groups before which Senator Durenberger made "promotional appearances" questioned the legitimacy of the arrangement. See, e.g., Special Counsel Ex. 44, ¶ 6; 54, ¶ ¶ 4-9. It is difficult to see how Senator Durenberger, a lawyer and former Member of this Committee, could not see what was so apparent to others—that his conduct in connection with Piranha Press raised serious ethical and legal questions. Under such circumstances, Senator Durenberger cannot evade responsibility by claiming reliance on counsel.

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2. RELIANCE ON THE FEC OPINION

Senator Durenberger also places great emphasis upon the advisory opinion he obtained from the Federal Election Commission ("FEC"), which he says "approved the [Piranha Press] arrangement without any question," (*Hearing Transcript* (June 13, 1990) at 38-39) and which his counsel considers "a central document in this whole proceeding." *Id.* (June 12, 1990) at 119. The Senator's reliance is unfounded.

The request for an advisory opinion submitted to the FEC by Senator Durenberger's counsel omitted several crucial facts about the Senator's proposed arrangement with Piranha Press. It did not state that the groups to which the Senator would speak would pay a fee for his appearance, although this fact was plainly known to all parties at the time. The request also failed to note that certain "promotional appearances" would result from traditional honorarium speech invitations extended to the Senator, although this too was contemplated by the parties at the time. See Special Counsel Ex. 254.

Senator Durenberger has suggested that fault for any omissions in his request for an opinion lies with Mr. Mahoney. When it came to requesting the advisory opinion, Senator Durenberger "left it up to Mr. Mahoney to do this correctly." *Hearing Transcript* (June 12, 1990) at 117. The evidence suggests, however, that Senator Durenberger was very likely personally involved in the submission to the FEC. While the letter seeking that opinion was drafted by the Senator's counsel (see Special Counsel Ex. 254), Thomas Horner—the Senator's Administrative Assistant—was provided with a copy of that request letter in advance of its submission to the Commission. See Special Counsel Ex. 250. Mr. Horner testified that, in accordance with his usual practice, he would have reviewed this material with the Senator. See Special Counsel Ex. 439 at 13, 15. Mr. Mahoney's office also provided to Mr. Horner an advance copy of the final FEC opinion, and Senator Durenberger discussed the opinion with Mr. Mahoney's partner. See Special Counsel Exs. 255, 257. The Senator, therefore, presumably was well aware of the limited factual basis for that opinion.

As a result of these omissions, the arrangement proposed in Mr. Mahoney's letter to the FEC was significantly different from the arrangement actually implemented by the Senator and Piranha Press. The opinion that ultimately was issued by the FEC was premised upon the Senator's appearance at genuine book promotions. The single, overwhelming fact that Senator Durenberger has never adequately responded to is that he did not do what the FEC opinion authorized. One cannot rely on an opinion discussing book promotions when there are no book promotions. The FEC never was advised that the Senator would not mention his books or his publisher, or would mention them only derisively in passing at his Piranha "promotional appearances."

These disparities render the FEC advisory opinion ineffective as a shield for the plan that Senator Durenberger ultimately carried out with Piranha Press. The Federal Election Campaign Act permits reliance upon an FEC advisory opinion only if the transaction at issue is "indistinguishable in all its material aspects from the

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transaction or activity . . . [about] which such advisory opinion [was] rendered." 2 U.S.C. § 437f(c)(1)(B).<sup>133</sup> In this case there is no similarity between the facts addressed in the opinion and the facts as they unfolded. The FEC advisory opinion in this case, therefore, issued in response to a letter that did not accurately describe the "promotional appearances" that took place, is inapplicable.

Senator Durenberger's response to this plain statutory bar to his reliance argument is two-fold. First, his counsel has argued that the omissions in the Senator's request letter are excused because "the request for an advisory opinion specifically referenced the contract [between Senator Durenberger and Piranha Press] which revealed that these groups would be charged a fee." *Hearing Transcript* (June 12, 1990) at 119. Although it is true that the request letter did include a reference to Senator Durenberger's contract with Piranha Press, the contract was *not enclosed* with the letter. The letter's omissions cannot be excused by the fact that some of the material information the letter omitted may have been included in a separate contract which was only referenced, but not included with the request to the FEC. Again, the Senator's contract called for a series of book promotions—yet the 113 appearances made by the Senator in fact were not book promotions.

Second, Senator Durenberger's counsel argued that it was the FEC's responsibility to correct any omissions by asking for follow-up information. *Id.* at 117. However, FEC regulations squarely place the burden of providing all relevant facts on the party requesting the opinion. Section 112.1(c) of those regulations provides:

Advisory opinion requests shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made.

11 C.F.R. § 112.1(c) (emphasis added).

The purpose of the regulation is clear. Because the party submitting the request for an opinion is in the best position to know the material circumstances surrounding the intended transaction, he or she has the burden to provide all relevant facts. It would be unreasonable to expect an agency such as the FEC to speculate about the possible omissions in a request submitted to it by a United States Senator and to demand correction. The FEC in this case was asked to give an opinion on a set of facts and it complied. That Senator Durenberger chose to engage in conduct different from that described in the opinion renders the FEC opinion meaningless.<sup>134</sup>

<sup>133</sup> See also *FEC v. National Conservative Political Action Comm.*, 647 F. Supp. 987, 995 (S.D.N.Y. 1986) (defendant not entitled to rely on advisory opinion obtained from FEC where there exist substantial "distinctions between the facts as they actually unfolded and the facts addressed in the FEC's advisory opinion").

<sup>134</sup> Senator Durenberger's counsel acknowledged as much in his statement before the Committee:

If a Member engages in other or different conduct [from the intended conduct described in the request for an advisory opinion], this doesn't necessarily mean that he has violated the rule. . . . It only means that he can't rely on the advisory opinion for protection.

*Hearing Transcript* (June 12, 1990) at 127.

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3. RELIANCE ON CONTACTS WITH ETHICS AND RULES COMMITTEE STAFFS

Senator Durenberger also has said that he relied upon assurances provided to him and his staff by Ethics Committee staff counsel. The Senator's counsel, Mr. Hamilton, stated to the Committee:

[N]ot only did Senator Durenberger seek the advice of the FEC and his lawyer's advice, he sought advice from the staff of this Committee. The Senator approached a staff member named Clendon Lee about the [Piranha Press] arrangement in 1984, and in early 1986 his Administrative Assistant, Doug Kelley, sought out another staff member whose name is William Canfield.

*Hearing Transcript* (June 12, 1990) at 120. These former Committee staff members are said to have assured Senator Durenberger that his Piranha Press dealings presented no ethics problem, assuming the arrangement had already been approved by the FEC. *See Hearing Transcript* (June 12, 1990) at 121.

The Senator, however, has not indicated specifically what facts, if any, were provided to Mr. Lee at the time, and Mr. Lee has no recollection of the conversation. *See Special Counsel Ex. 48, ¶ 4.* In addition, any assurance by Mr. Lee was founded on the assumption that the FEC had fully reviewed the matter and had approved it. Thus, for the very reasons that the FEC advisory opinion cannot be invoked because of the material omissions upon which it was founded, the purported assurance of Mr. Lee premised upon the FEC's approval of the transaction can have no application to the Piranha Press arrangement as it was actually administered.

The contact between the Senator's Administrative Assistant, Mr. Kelley, and Mr. Canfield similarly does not support the Senator's position. Mr. Kelley did not provide Mr. Canfield with all of the facts needed for a full assessment of the Piranha Press arrangement. In his deposition in this matter, Mr. Kelley testified that he did not discuss with Mr. Canfield the details of the Senator's agreement with Piranha Press. *Special Counsel Ex. 440 at 126-27.* Specifically, he did not disclose that the groups before which the Senator would appear would pay a fee to the publisher, nor did he disclose that traditional honorarium speech invitations would be treated as requests for Piranha Press "promotional appearances."<sup>135</sup> Accepting the very material character of these omitted facts, the Senator cannot fairly rely upon Mr. Canfield's conclusions.

The Senator also has submitted an affidavit of another of his former staff member, Lori Krage Edstrom, who reported that she called the Ethics Committee's chief counsel, Wilson Abney, to ask his advice regarding the condominium matter. *Durenberger Ex. 4, ¶ 4.* Mr. Abney is said to have assured Ms. Krage Edstrom that it

<sup>135</sup> This is consistent with Mr. Canfield's own recollection. In his affidavit, Mr. Canfield indicated:

I do not recall during the conversation being made aware by Doug Kelly [sic] that Senator Durenberger's publisher charged a fee to the groups before whom the Senator appeared to promote his book. Neither do I recall being made aware that the Senator's office referred requests for the Senator's appearance to the book publisher so that a promotional appearance could be arranged.

*Special Counsel Ex. 450, ¶ 5.*

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was permissible for Senator Durenberger to seek Senate reimbursement for his stays at the condominium.<sup>136</sup>

Mr. Abney has categorically denied ever having been informed of the facts of the Senator's condominium arrangement. Special Counsel Ex. 451, ¶ 6. Moreover, he stated in his affidavit that had he been told of the facts, he would have advised that the reimbursement was improper. *Id.*

*C. The Piranha Press Arrangement as a Contract for Continuing Services*

If Senator Durenberger can be said to have promoted his books simply by appearing before a group and speaking well, there is no difference between a "promotional appearance" payment which is exempt from the honoraria limits and a traditional honorarium event.

Perhaps recognizing this, Senator Durenberger's counsel has argued that even if Senator Durenberger's Piranha Press appearances were not book promotions, his compensation could still be justified by treating the Senator's contract with Piranha Press as one for some other type of "continuing services." Mr. Hamilton articulated the argument as follows:

Now the FEC told Senator Durenberger that payments for book promotions would be a stipend for continuing services and not honoraria. If Senator Durenberger's appearances were in fact not book promotions, there is no statutory safe harbor. But the payment is nonetheless a stipend if it was for some type of continuing service.

Hearing Transcript (June 12, 1990) at 128. Mr. Hamilton elaborated:

Now, however you want to characterize Senator Durenberger's conduct, you must conclude that Piranha paid him for continuing services. That is, for making appearances before various groups for which Piranha was paid a fee, and for helping to establish Piranha as a book publishing company . . . .

*Id.*

This, of course, strikes at the very core of the Senator's argument. If Senator Durenberger was not providing continuing promotional services, what type of continuing services was he providing? Special Counsel submits that he was doing no more than making a continuing series of legislative speeches—in short, a continuing series of honoraria speeches, payments for which were channeled through Piranha Press to avoid the honorarium limitations.<sup>137</sup>

Taken to its logical conclusion, the Senator's argument would rob the statutory limitations on honoraria income of any meaning. If the Senator can fairly be said to have entered into a valid "con-

<sup>136</sup> During her earlier interview by Special Counsel, Ms. Krage indicated that she was uncertain about with whom she had spoken.

<sup>137</sup> As the Senator has acknowledged, he frequently mentioned neither his books nor his publisher during these speeches. His only plausible effort therefore to help establish Piranha Press as a legitimate book publishing company was his status as a Piranha Press author. Needless to say, this effort ended with the publication of his book.



tinuing services" arrangement, income from which is a "stipend" rather than an "honorarium," there is truly no distinction between a stipendary speech and an honorarium speech.

**X. FINDINGS OF VIOLATIONS AS NOTICED AND SPECIFIED IN THE COMMITTEE'S RESOLUTIONS**

Special Counsel makes the following specific findings as to the violations noticed and specified in the Committee's resolutions of February 22, 1990 and May 9, 1990 respectively. Special Counsel Exs. 5, 7.

**A. Violations as Noticed in the Committee's Resolution of February 22, 1990**

As to the violations noticed in the Committee's Resolution February 22, 1990, Special Counsel finds that:

1. Senator Durenberger knowingly and intentionally violated the honoraria limitations established by 2 U.S.C. § 31-1 and 2 U.S.C. § 441i through his arrangement with Piranha Press.

2. Senator Durenberger violated Senate Rule 34 (the Ethics in Government Act, as amended) by failing to timely report the receipt of travel expenses reimbursements from forty-three organizations during 1985 and 1986.

3. Senator Durenberger violated Senate Rule 38, paragraph 2 by forwarding to Piranha Press a campaign contribution made by the Pathology Practice Association Federal Political Action Committee, and thereby converting that campaign contribution to his own personal use.

4. Senator Durenberger knowingly and intentionally violated Senate Rule 35 by accepting unnecessary limousine transportation from organizations with a direct interest in legislation before the Congress.

In addition to these findings and those set forth in Section V, VII and VIII above, which are incorporated herein by reference, Special Counsel finds that through this pattern of improper conduct Senator Durenberger has demonstrated an insensitivity to the ethical standards of his office, and has brought discredit upon the United States Senate.

**B. Violations as Noticed in the Committee's Resolution of May 9, 1990**

As to the violations noticed in the Committee's Resolution of May 9, 1990, in addition to the findings set forth in Section VI above, which are incorporated herein by reference, Special Counsel finds that Senator Durenberger participated in the back dating of the partnership transaction with Roger Scherer and the subsequent transfer of his condominium to Independent Service Company; that he conceived of and structured these transactions as a means of claiming Senate *per diem* lodging for staying in what was essentially his Minnesota residence; that he submitted misleading travel reimbursement vouchers to the Senate Disbursing Office; and that at certain times he misrepresented to the Disbursing Office the own-

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(Page 78 of 80)

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ership of the property for which he claimed lodging reimbursements. These actions were knowing and intentional.

Special Counsel finds that through this pattern of clearly improper conduct, Senator Durenberger has abused his United States Senate office and misused United States Senate funds, and in so doing has brought discredit upon the United States Senate.

Special Counsel further finds that Senator Durenberger violated statutory requirements governing his qualified blind trust, as set forth in the Ethics in Government Act, as amended. Special Counsel specifically finds that Senator Durenberger violated Section 702(e)(3)(c) and Section 702(e)(6)(B) of that Act.

#### XI. RECOMMENDATION AS TO SANCTION

Pursuant to Committee Rule 5(f)(1), Special Counsel reports to the Committee as follows:

Special Counsel recommends that this Committee report to the full Senate a Resolution denouncing Senator David F. Durenberger for conduct which is reprehensible, and which has brought the Senate into dishonor and disrepute.

In making this recommendation, Counsel has reviewed prior disciplinary cases since 1793. Special Counsel has considered the results of the lengthy and detailed investigation previously described, and has carefully considered the oral and written submissions of Senator Durenberger and his able counsel, Mr. Hamilton.

The most serious sanction which the Senate may impose is that of expulsion. Expulsions in the Senate historically have concerned cases of perceived disloyalty to the United States Government or a violation of serious criminal statutory law involving the abuse of one's official position. No Senator has been expelled since 1862. In 1981, this Special Counsel recommended that Senator Harrison Williams of New Jersey be expelled from the United States Senate. This Committee carefully reviewed the matter and reported to the full Senate a Resolution of Expulsion. After six days of debate on the Senate floor, Senator Williams, just prior to the Senate vote, resigned from the Senate.

In that case, the recommendation of expulsion was based in part on a detailed factual record which showed that Senator Williams violated several federal criminal statutes including conspiracy to defraud, bribery, conflict of interest and interstate travel in aid of racketeering.

Special Counsel submits to the Committee that while very serious, the conduct of Senator Durenberger is distinguishable from that of Senator Williams. The essential difference is that there is insufficient evidence supporting a finding that Senator Durenberger acted with criminal intent, malice or with specific intent to break the law. Because of the criminal conduct engaged in by Senator Williams, Special Counsel and this Committee thought it appropriate to recommend the removal of a Senator chosen by his constituents. Such a decision to interfere with the choice of the people should only be made in the most aggravated situations. By not recommending the expulsion of Senator Durenberger, Special Counsel is not minimizing the wrongdoing engaged in by Senator Durenberger. Special Counsel is simply saying that the decision to

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ATTACHMENT 3  
(PAGE 79 OF 80)

remove him from the Senate, if such a decision is to be made at all, should only be made by those who elected him to his high office.

While Special Counsel rejects the notion that this is an expulsion case, he equally rejects the view that this is a case only warranting admonishment, disapproval, reprimand or any of the other sanctions that do not require action by the full Senate. Such sanctions would be totally inadequate in this case. Senator Durenberger's conduct was not inadvertent, unintentional or based on mistake of fact, ignorance of the law, negligence or misplaced reliance on others. Instead, Senator Durenberger knowingly and willfully engaged in conduct which violated statutes, rules and Senate standards, and acceptable norms of ethical conduct. His conduct was clearly and unequivocally unethical.

During his presentation to the Committee, Senator Durenberger quoted Professor Dennis F. Thompson of Harvard University:

Public Officials . . . have an ethical obligation to do all they can to make sure that citizens do not have any reasonable basis for believing that they or their colleagues are violating their own ethics rules. There is an ethical obligation to protect the appearances of propriety almost as great as to produce its reality.

*Hearing Transcript* (June 13, 1990) at 45. Senator Durenberger has failed in both regards.

Special Counsel submits that the reprehensible conduct engaged in by Senator Durenberger warrants a sanction of denouncement by the full United States Senate. Special Counsel further submits that what the sanction is called is less important than the language the Committee uses to describe the offending conduct and the Committee's response to it.

Senator Durenberger's conduct must be fully and fairly revealed to the public. This Committee should pronounce its judgment that Senator Durenberger's conduct is reprehensible and that it will not be condoned. Finally, this matter should be put before the full United States Senate for the imposition of its sanction of Senator Durenberger for his repeated pattern of unethical conduct.

For these reasons, Special Counsel recommends that this Committee pass a Resolution calling for the full Senate to denounce Senator Durenberger publicly for knowingly engaging in unethical conduct which has brought dishonor and disrespect to this institution. Further, Special Counsel notes that the Committee may recommend to the Senate that it refer to the Republican party conference a recommendation regarding Senator Durenberger's seniority or positions of responsibility, and may recommend that Senator Durenberger make appropriate financial restitution.

Respectfully Submitted,

ROBERT S. BENNETT,  
*Special Counsel*

(Frances L. Wetzel, Abigail J. Raphael, Skadden, Arps, Slate, Meagher & Flom, 1440 New York Avenue, NW., Washington, DC 20005.)

JULY 2, 1990.

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

September 19, 1990

The Honorable Howell Heflin, Chairman  
The Honorable Warren B. Rudman, Vice Chairman  
Select Committee on Ethics  
United States Senate  
Washington, D.C. 20510-6425

RE: Pre-MUR 234  
Senator David F. Durenberger

Dear Chairman and Vice Chairman:

This is to acknowledge receipt of your letter advising us of the possibility of a violation of the Federal Election Campaign Act of 1971, as amended ("the Act") by Senator David F. Durenberger. We are currently reviewing the matter and will advise you of the Commission's determination.

If you have any questions or additional information, please call Mary Ann Bumgarner, the attorney assigned to this matter, at (202) 376-5690. Our file number for this matter is Pre-MUR 234.

Pursuant to 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), the Commission's review of this matter shall remain confidential until the file has been closed.

Sincerely,

Lawrence M. Noble  
General Counsel

A handwritten signature, likely of Lois G. Lerner, is written over a horizontal line.

BY: Lois G. Lerner  
Associate General Counsel

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HOWELL HEFFLIN, ALABAMA, CHAIRMAN  
WARREN B. RUDMAN, NEW HAMPSHIRE, VICE CHAIRMAN  
BARRY PRYOR, ARKANSAS  
TERRY SANFORD, NORTH CAROLINA  
JESSE HELMS, NORTH CAROLINA  
TRENT LOTT, MISSISSIPPI  
WILSON S. ASHEV, STAFF DIRECTOR/CHIEF COUNSEL  
ANNETTE M. GILLIS, CHIEF CLERK

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RECEIVED  
FEDERAL ELECTION COMMISSION  
MAIL ROOM

# United States Senate

SELECT COMMITTEE ON ETHICS

HART SENATE OFFICE BUILDING, ROOM 220  
SECOND AND CONSTITUTION AVENUE, NE.  
WASHINGTON, DC 20510-6425  
TELEPHONE 224-2981

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*[Handwritten signature]*

January 17, 1991

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RECEIVED  
FEDERAL ELECTION COMMISSION  
OFFICE OF THE CLERK

The Honorable John Warren McGarry  
Chairman  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Dear Mr. Chairman:

United States Senate Select Committee on Ethics Supplemental Procedural Rule 8(a) provides that whenever the Committee determines by majority vote that there is reason to believe that a violation of law may have occurred, it shall report such possible violation to the proper state and federal authorities.

Pursuant to this Rule, the Ethics Committee herewith encloses for your attention a copy of a December 29, 1983 letter from attorney Randall Johnson to Minnesota Senator David F. Durenberger. The Committee received this letter as part of its confidential investigation. A redacted version of the letter appears in the record of the Committee's adjudicatory hearings as Exhibit 310.

With best wishes,

*[Handwritten signature of Howell Hefflin]*  
Howell Hefflin  
Chairman

Cordially,  
*[Handwritten signature of Warren B. Rudman]*  
Warren B. Rudman  
Vice Chairman

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

**SENSITIVE**

**FIRST GENERAL COUNSEL'S REPORT**

Pre-MUR: 234  
STAFF MEMBER: M.A. BUMGARNER

**SOURCE: INTERNALLY GENERATED**

**RESPONDENTS:** Senator David F. Durenberger  
Durenberger '94 Volunteer Committee and  
Delwyn Olson, as treasurer

**RELEVANT STATUTES:** 2 U.S.C. § 434(b)(2)  
2 U.S.C. § 441i  
11 C.F.R. § 103.3(a)

**INTERNAL REPORTS CHECKED:** Disclosure Reports

**FEDERAL AGENCIES CHECKED:** None

**I. GENERATION OF MATTER**

On August 8, 1990, the United States Senate Select Committee on Ethics wrote the Commission concerning possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Senator David F. Durenberger. Attachment 1. Accompanying the letter was the Report of the Select Committee on Ethics (the "Committee Report") and the Report of Special Counsel. Attachments 2 and 3. The Committee also provided copies of the evidence introduced in this matter, transcripts of the adjudicatory hearings and memoranda submitted to the Committee by counsel for Senator Durenberger.<sup>1</sup>

1. This Office also received an additional document from the United States Senate Select Committee on Ethics on January 24, 1991. This document refers to possible violations of the Act as a result of "the way the Volunteer Committee

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According to the Committee Report, on September 27, 1988, the Committee received a complaint against Senator David F. Durenberger from 39 members of the Minnesota Bar. The complaint alleged that the Senator had violated laws and rules within the Committee's jurisdiction, in part through an arrangement he had with a publisher, Piranha Press. Attachment 2 at 1. Based on the factual findings and evidence in this matter, the Committee unanimously concluded that Senator Durenberger had violated federal law and certain Senate Rules.<sup>2</sup>

In regard to violations of the Act, the Committee unanimously concluded that Senator Durenberger violated the honoraria limits established by 2 U.S.C. § 31-1 and 2 U.S.C. § 441i by accepting payments in excess of such limits as consideration for 113 speeches or appearances during calendar years 1985 and 1986. Attachments 2 at 12 and 3 at 104. In addition, the Committee also resolved that there was substantial cause for the Committee to conclude that

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(Footnote 1 continued from previous page)  
reported the \$30,000 Charlie Black-Gene Holderness transaction." The Ethics Committee provided no additional information to explain this reference. This Office has contacted the Ethics Committee in order to obtain further information regarding this additional document and, upon receipt of that information, will report to the Commission.

2. According to an article in the Washington Times on January 10, 1991 (Attachment 4), a lawyers watchdog group asked the Minnesota Supreme Court to indefinitely suspend Senator Durenberger's license to practice law. According to the article, Senator Durenberger agreed to the suspension.

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Senator Durenberger violated 2 U.S.C. § 434(b)(2).

Attachment 2 at 2. Specifically, the Committee found that Senator Durenberger converted a campaign contribution to his personal use by transferring a \$5,000 check made out to "Durenberger for U.S. Senate" to Piranha Press.

Attachment 2 at 2 and 3 at 67. This campaign contribution was not reported pursuant to 2 U.S.C. § 434(b)(2). Id.

Furthermore, the treasurer of the Durenberger for U.S. Senate Volunteer Committee failed to deposit this campaign contribution within 10 days of receipt as required by as required by 11 C.F.R. § 103.3(a).<sup>3</sup>

## II. FACTUAL AND LEGAL ANALYSIS

### A. Exceeding the limit on honorarium

Pursuant to 2 U.S.C. § 441i, no person while an elected or appointed officer of any branch of the federal government shall

3. According to the Report of the Select Committee on Ethics dated July 18, 1990 (Attachment 2 at 11-13), Senator Durenberger also violated the provisions of Senate Rule 34 (the Ethics in Government Act, as amended) by failing to timely report the receipt of travel expenses reimbursements from 43 organizations during 1985 and 1986. The conversion of the \$5,000 campaign contribution was also found to violate Senate Rule 38. In addition, Senator Durenberger accepted gifts of ground transportation in the Boston area in violation of the Senate Rule 35 during 1985 and 1986 in connection with personal travel to Concord, Massachusetts.

Further violations found Senator Durenberger participated in the back dating of a partnership transaction and subsequent transfer of his condominium; that he conceived of and structured these transactions as a means of claiming Senate per diem lodging for staying in what was essentially his Minnesota residence; that he submitted misleading travel reimbursement vouchers to the Senate Disbursing Office; and that at certain times he misrepresented to the Disbursing Office the ownership of the property for which he claimed lodging reimbursements. See Attachments 2 at 13 and 3 at 78.

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accept any honorarium of more than \$2,000 (excluding amounts accepted for actual travel and subsistence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech or article.

Senator Durenberger was first elected to the Senate in 1978 to complete the unexpired term of Senator Hubert H. Humphrey. Senator Durenberger was re-elected in 1982 and 1988, and will be up for re-election in 1994. According to the Committee Report, in the fall of 1984, Piranha Press published Senator Durenberger's first book, a collection of "white papers" on national defense and security issues entitled, Neither Madmen Nor Messiahs. Attachment 2 at 4. In April of 1986, Piranha Press published a second book by the Senator, a collection of speeches on health care topics entitled, Prescription of Change. Id.

Senator Durenberger entered into an agreement with Piranha Press whereby he made 113 appearances before various trade associations and other businesses across the country in 1985 and 1986 in promotion of these books. These sponsoring organizations paid Piranha Press a fee, typically between \$1,000 and \$5,000 plus travel expenses, for the Senator's appearance. Pursuant to its agreement with the Senator, Piranha Press then paid Senator Durenberger a total of \$100,000 in quarterly payments during the two year period at issue. See Attachment 2 at 4-5.

According to the Committee Report, the arrangement between

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Senator Durenberger and Piranha Press was not a good faith book publishing or promotional contract, but was instead a means of converting into "stipendary income" fees which would otherwise have been treated as honoraria subject to 2 U.S.C.

§ 441i. Attachment 2 at 5. The Report concluded that the principal purpose of the agreement was not to promote the sale of Senator Durenberger's books, but was rather to permit the Senator to earn fees for speaking engagements. Id.

Over the two year term of the arrangement, the Senator's "promotional appearances" generated approximately \$248,300 for Piranha Press in speaking fees. In contrast, Piranha Press earned only approximately \$15,500 in book sales during that time period. Id.

The evidence set forth in the Committee Report shows that the Senator's Piranha Press speeches appear uniformly to have been the result of invitations extended to the Senator in his capacity as a United States Senator to deliver what would otherwise have been treated as traditional honoraria speeches. Attachment 2 at 5. None was the result of invitations to the Senator to speak about or promote his books, nor were any initiated by Piranha Press. Id. Further, the evidence shows that, at the Senator's direction, his staff forwarded to the publisher a number of honoraria invitations to be handled instead as Piranha Press appearances. Id. In addition, the evidence shows that Senator Durenberger did not mention either his books or his publisher during a great many of the Piranha Press appearances and if he did make reference to the books,

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these references were often only fleeting and did little more than belittle the books or the publisher. Id. The evidence further demonstrated that that on several occasions, before the Senator was to make a promotional appearance, groups were told that it would not be necessary to display the Senator's books at his appearance. Id.

According to an article entitled, Durenberger Seeks Clemency in Painful Public Hearing, in the June 16, 1990 edition of Congressional Quarterly (See generally Attachment 6), special counsel, Robert S. Bennett, contended that there was never a real intent to promote books. He further stated it was the exception, not the rule, for Senator Durenberger to promote the books at his appearances. See Attachment 6 at 3.

According to the Committee Report, on approximately 23 occasions Senator Durenberger spoke at an event addressed by other Members of Congress. Attachment 2 at 5. While the other Members treated these appearances as honoraria, Senator Durenberger treated these appearances as Piranha Press "promotional appearances." Id. The evidence further reflects that the Senator's Piranha Press speeches were indistinguishable in substance from his traditional honoraria appearances and that on several different occasions, members of the Senator's staff or a representative of Piranha Press insisted that a group before which the Senator was to appear pay a fee in excess of \$2,000 for the Senator's appearance.

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According to the evidence, the fee charged was as high as \$5,000. Id.

According to an article in the Washington Post on December 14, 1989 (Attachment 5), in early 1986, Senator Durenberger was invited to speak at a conference sponsored by the American Podiatric Medical Association. According to John Carson, director of government affairs for the association, instead of dealing with the senator's staff as he was accustomed to, Mr. Carson was referred to Gary L. Diamond, owner of Piranha Press. Id. In a letter, Mr. Diamond told Mr. Carson that the Senator would give the speech for a fee of \$2,000, payable to Piranha Press rather than Senator Durenberger. Id. Senator Durenberger did not count this address to the podiatrists against his limit in speech honoraria in 1986. Id.

The evidence reflects the payment for these "promotional appearances" by the Senator typically was made directly to Piranha Press; however, on 26 occasions sponsoring organizations paid Senator Durenberger directly. Attachment 2 at 6. These checks, totaling \$56,000, were deposited into the Piranha Press bank account. Id. Twenty-one of these checks reflected Senator Durenberger's personal endorsement to Piranha Press. Id.

According to the Report of Special Counsel (Attachment 3 at 74), prior to performing any services under the agreement, Senator Durenberger, requested and received an advisory opinion ("AO") from the Commission stating that income paid to him from

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the publisher would be considered a "stipend" rather than "honoraria." See Attachment 7. This Report states however, that in the request for the advisory opinion, Counsel omitted several crucial facts about the Senator's proposed arrangement with Piranha Press. Id. Specifically, counsel for Senator Durenberger failed to state that the groups before which the Senator would speak would pay a fee to Piranha Press for his appearance, or that the Senator's appearances would be the result of invitations to deliver traditional "honoraria" speeches extended to him in his capacity as a United States Senator. Id.

During the hearing on this matter, both Senator Durenberger and his counsel addressed the Ethics Committee and raised several general defenses to the charges against him. See Attachment 2 at 8-11. At that time, counsel for the Senator admitted mistakes were made and that there had been violations of the rules. See Attachment 2 at 9. Counsel for Senator Durenberger argued however, that the Senator acted in good faith and upon the advice of lawyers and other advisors throughout this matter. Id. Senator Durenberger emphasized that he obtained an advisory opinion from the Commission approving the arrangement and that he relied on counsel to insure that the advisory opinion request included all relevant facts. Id. Also, according to Senator Durenberger's counsel, the Senator believed that he fulfilled his obligations under the contract with Piranha Press, whether or not he explicitly promoted his books or the publisher, so that the income from

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these speeches would be covered by the "stipendary" arrangement. Id. Finally, counsel for Senator Durenberger argues that the Senator was acting in good faith because there was never an attempt to conceal the Senator's income from the Piranha Press arrangement, and he disclosed this income on his 1985 and 1986 Financial Disclosure forms. Id.

Based on the evidence presented in this matter, it appears the arrangement between Senator Durenberger and Piranha Press was simply used as a mechanism to evade the statutory limitations on honoraria. Attachment 2 at 11. As already discussed, Senator Durenberger earned more in fees for his "promotional" appearances than Piranha Press earned in book sales. Further, his Piranha Press speeches were not the result of invitations to the Senator to speak about or promote his books, nor were they initiated by Piranha Press. In several of his appearances, the Senator made no reference to the books, and if he did, the reference was often only fleeting. On at least 23 occasions, Senator Durenberger treated these appearances as Piranha Press promotional appearances, whereas other members of Congress also participating treated their appearances as honoraria. Further, Senator Durenberger's Piranha Press speeches were indistinguishable from his traditional honoraria appearances. Therefore, based on the foregoing, it appears that the monies paid for the Senator's Piranha Press appearances were in reality honoraria. See Attachment 2 at 11.

Although counsel for Senator Durenberger requested an

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advisory opinion from the Commission concerning the Senator's arrangement with Piranha Press, Senator Durenberger's purported reliance on the resulting Commission opinion is not a valid defense in this matter. Pursuant to 2 U.S.C. § 437f(c), only those persons involved in the specific transaction or activity with respect to which such advisory opinion is rendered and those persons involved in any specific transaction which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered may rely on such opinions. However, in order to avoid sanctions under the Act for such actions, persons must have acted "in good faith in accordance with the provisions and findings of such advisory opinion." 2 U.S.C. § 437f(c)(2) (emphasis added).

According to the Report of Special Counsel, the Senator engaged in conduct different from that described in the advisory opinion request and discussed in the resulting opinion. Attachment 3 at 75. The Commission regulations specify that "[a]dvisory opinion requests shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 C.F.R. § 112.1(c) (emphasis added). Nevertheless, Senator Durenberger's request for the advisory opinion omitted at least three crucial facts: Senator Durenberger's contract called for the groups he addressed to pay the publisher a fee; the appearances stemmed from requests for speeches, not book promotions; and the promotional events were identical to

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traditional honorarium events. Id. See also Attachment 6 at 2. When, as here, there is a distinction between the facts presented in the advisory opinion request and the facts as they actually unfold, such distinctions preclude any reliance on the advisory opinion. See FEC v. National Conservative Political Action Committee, 647 F.Supp. 987, 995 (S.D.N.Y. 1986). Thus, since the facts set out in the request for the advisory opinion by Senator Durenberger were significantly different from the facts as they actually unfolded, the use of the advisory opinion as a defense for the plan that Senator Durenberger ultimately carried out with Piranha Press is without merit.

The Ethics Committee Special Counsel states that the facts omitted from the advisory opinion request were either already clearly known or contemplated at the time of the request. Attachment 3 at 74. In fact, although Senator Durenberger's request referenced the contract with Piranha Press, which apparently was already in existence, he did not provide a copy of that document to the Commission. Furthermore, Senator Durenberger apparently personally reviewed both the final request prior to submission and the draft opinion released by the Commission prior to its consideration at a Commission meeting. Attachment 3 at 74. Senator Durenberger, therefore, had ample opportunity to provide this additional information. By omitting these facts, the advisory opinion request appeared to be based upon the premise that the Senator's appearances were for the purpose of genuine book promotions when in fact



this was not the case. Attachment 3 at 74.

It is the view of this Office that the foregoing evidence indicates Senator Durenberger knowingly and willfully evaded the honoraria limits through the book promotion deal with Piranha Press. Therefore, this Office recommends that the Commission find there is reason to believe that Senator David F. Durenberger knowingly and willfully violated 2 U.S.C. § 441i by exceeding the limit prohibiting the acceptance of honorarium of more than \$2,000 for an appearance, speech or article.

**B. Reporting and depositing of receipts by treasurer**

Pursuant to 2 U.S.C. § 432(a), every political committee shall have a treasurer. No contribution or expenditure shall be accepted by or made by or on behalf of a political committee when the office of treasurer is vacant. 2 U.S.C. § 432(a). Further, no expenditure may be made without the authorization of the treasurer or his or her designated agent. Id.

The Act places certain responsibilities upon the treasurer. The treasurer, for example, must file periodic reports of receipts and disbursements on behalf of the committee. 2 U.S.C. § 434(b)(2) and (4). Pursuant to 2 U.S.C. § 432(h)(1), all receipts received by a committee shall be deposited into accounts established by that provision. See also 11 C.F.R. § 103.3(a). Commission regulations further provide that such receipts must be deposited within 10 days of receipt by the treasurer. 11 C.F.R. § 103.3.

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During 1985 and 1986, the name of the political committee for Senator Durenberger was the Durenberger for U.S. Senate Volunteer Committee. During all times pertinent to this discussion, the treasurer for the Durenberger for U.S. Senate Volunteer Committee was Sue Dean. Currently, the name of the political committee, as shown on the committee's Statement of Organization filed March 29, 1988, is the Durenberger '94 Volunteer Committee. The current committee treasurer is Delwyn Olson.

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According to the Senate Ethics Committee Report, on December 5, 1986 Senator Durenberger addressed the annual meeting of the Pathology Practice Association. Attachment 2 at 6. Instead of paying the Senator an honorarium or fee for his speech, the Association's federal political action committee sent a check to the Senator's authorized principal campaign committee in the amount of \$5,000 payable to "Durenberger for U.S. Senate." Attachment 8. In an affidavit, Paul Johnson, the Association's registered lobbyist, explained that the payment to the Senator was intended as a campaign contribution. Attachment 9. According to Mr. Johnson, the Association customarily does not pay honorarium without a formal request. Id. In this case, Mr. Johnson states that Senator Durenberger did not request an honorarium and, therefore, the Association made the \$5,000 contribution to Senator Durenberger's re-election campaign. Id.

The Report of the Special Counsel states that the campaign contribution was deposited without endorsement into the Piranha

Press account, from which the Senator was paid by Piranha Press for his "promotional appearances." Attachment 2 at 6. It is unclear how the check ended up in the publisher's hands. This contribution was not reported to the Commission as a campaign contribution.

Counsel for Senator Durenberger argued before the Senate Ethics Committee that the Senator likely never saw or knew of this check. Attachment 2 at 10. Further, Counsel argues that Piranha Press should have made some further inquiry upon receiving the check but did not, and that it would be inappropriate for the Senate to impose a sanction under these facts. Id. The Ethics Committee obviously rejected this latter argument.

While Piranha Press may have considered the \$5,000 payment from the Association to be payment for a "promotional appearance" by the Senator, this apparently was not the intent of the Association. See Attachment 3 at 67 n. 126. The check was payable to "Durenberger for U.S. Senate" and, the payment was reported as a "contribution" on the reports filed by the Association's PAC with the Commission. Attachment 8. Therefore, since this contribution was not deposited by the campaign committee as required by Section 432(h), nor was it reported as required by Section 434, this Office recommends that the Commission find there is reason to believe that the campaign committee of Senator Durenberger, presently known as Durenberger '94 Volunteer Committee, and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2).

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**III. PROPOSED DISCOVERY**

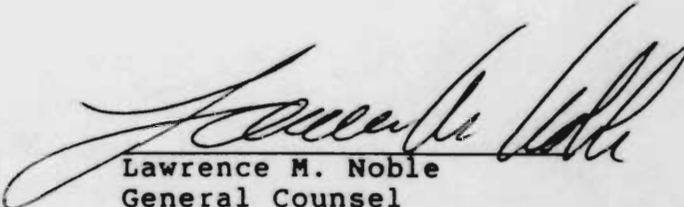
It does not appear, based on the evidence presently available, that any further discovery is necessary at this time.

**IV. RECOMMENDATIONS**

1. Open a MUR.
2. Find reason to believe that Senator David F. Durenberger knowingly and willfully violated 2 U.S.C. § 441i.
3. Find reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2).
4. Approve the appropriate letters and Factual and Legal Analyses.

Date

1/28/91

  
Lawrence M. Noble  
General Counsel

**Attachments**

1. Copy of letter dated August 8, 1990.
2. Report of the Select Committee on Ethics.
3. Report of Special Counsel.
4. Copy of newspaper article dated January 10, 1991.
5. Copy of newspaper article dated December 14, 1989.
6. Copy of article in June 16, 1990 edition of Congressional Quarterly.
7. AOR 1984-56 and AO 1984-56.
8. Copy of check and copy of PAC's 1986 Year-End Report Schedule B.
9. Affidavit of Paul Johnson.
10. Factual and Legal Analyses.

93040982299





FEDERAL ELECTION COMMISSION  
WASHINGTON DC 20461

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS / DELORES HARRIS *PH*  
COMMISSION SECRETARY

DATE: FEBRUARY 1, 1991

SUBJECT: Pre-MUR 234 - FIRST GENERAL COUNSEL'S REPORT  
DATED JANUARY 28, 1991.

The above-captioned document was circulated to the  
Commission on Tuesday, January 29, 1991 at 4:00 p.m..

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

Commissioner Aikens	<u>XXX</u>
Commissioner Elliott	<u>XXX</u>
Commissioner Josefiak	<u>XXX</u>
Commissioner McDonald	<u></u>
Commissioner McGarry	<u></u>
Commissioner Thomas	<u>XXX</u>

This matter will be placed on the meeting agenda  
for TUESDAY, FEBRUARY 5, 1991.

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

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 ) Pre-MUR 234  
Senator David F. Durenberger; )  
Durenberger '94 Volunteer )  
Committee and Delwyn Olson, )  
as treasurer. )

CERTIFICATION

I, Hilda Arnold, recording secretary for the Federal Election Commission executive session on February 5, 1991, do hereby certify that the Commission decided by a vote of 6-0 to continue discussion of Pre-MUR 234 at the next executive session on February 12, 1991.

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

Attest:

Feb. 7 1991  
Date

Hilda Arnold  
Hilda Arnold  
Administrative Assistant

93040982301

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Senator David F. Durenberger; )  
Durenberger '94 Volunteer Committee) )  
and Delwyn Olson, as treasurer. )

Pre-MUR 234

(MUR  
3227)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on February 26, 1991, do hereby certify that the Commission decided by a vote of 4-2 to take the following actions with respect to Pre-MUR 234:

1. Open a MUR.
2. Find reason to believe that Senator David F. Durenberger knowingly and willfully violated 2 U.S.C. § 441i.
3. Find reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. § 432(h)(1) and 434(b)(2).
4. Approve the appropriate letters and Factual and Legal Analyses as recommended in the General Counsel's report dated January 28, 1991.

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

Attest:

2-27-91  
Date

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

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

March 6, 1991

Delwyn Olson, Treasurer  
Durenberger '94 Volunteer Committee  
1103 Plymouth Building  
12 South Sixth Street  
Minneapolis, Minnesota 55402

RE: MUR 3227  
Durenberger '94 Volunteer  
Committee and Delwyn  
Olson, as treasurer

Dear Mr. Olson:

On February 26, 1991, the Federal Election Commission found that there is reason to believe the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2), provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

Under the Act, you have an opportunity to demonstrate that no action should be taken against the Committee and you, as treasurer. You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath.

In the absence of any additional information demonstrating that no further action should be taken against the Committee and you, as treasurer, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

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Mr. Olson  
Page 2

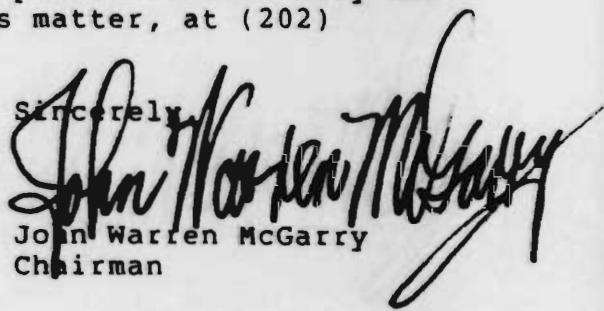
Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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.

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 investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Mary Ann Bumgarner, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

  
John Warren McGarry  
Chairman

Enclosures

Factual and Legal Analysis  
Procedures  
Designation of Counsel Form

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Durenberger '94 Volunteer  
Committee and Delwyn Olson,  
as treasurer

**MUR:** 3227

**I. FACTUAL AND LEGAL ANALYSIS**

**A. Background**

On August 8, 1990, the United States Senate Select Committee on Ethics wrote the Commission concerning possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Senator David F. Durenberger. Accompanying the letter was the Report of the Select Committee on Ethics (the "Committee Report") and the Report of Special Counsel. The Committee also provided copies of the evidence introduced in this matter, transcripts of the adjudicatory hearings and memoranda submitted to the Committee by counsel for Senator Durenberger.

According to the Committee Report, on September 27, 1988, the Committee received a complaint against Senator David F. Durenberger from 39 members of the Minnesota Bar. The complaint alleged that the Senator had violated laws and rules within the Committee's jurisdiction, in part through an arrangement he had with a publisher, Piranha Press. Based on the factual findings and evidence in this matter, the Committee unanimously concluded that Senator Durenberger had violated federal law and certain Senate Rules.

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In regard to violations of the Act, the Committee resolved that there was substantial cause for the Committee to conclude that Senator Durenberger violated 2 U.S.C. § 434(b)(2). Specifically, the Committee found that Senator Durenberger converted a campaign contribution to his personal use by transferring a \$5,000 check made out to "Durenberger for U.S. Senate" to Piranha Press. This campaign contribution was not reported in violation of section 434(b)(2). Furthermore, the Durenberger for U.S. Senate Volunteer Committee failed to deposit this campaign contribution as required by 2 U.S.C. § 432(h)(1).

**B. Reporting and depositing of receipts by treasurer**

Pursuant to 2 U.S.C. § 432(a), every political committee shall have a treasurer. No contribution or expenditure shall be accepted by or made by or on behalf of a political committee when the office of treasurer is vacant. 2 U.S.C. § 432(a). Further, no expenditure may be made without the authorization of the treasurer or his or her designated agent. Id.

The Act places certain responsibilities upon the treasurer. The treasurer, for example, must file periodic reports of receipts and disbursements on behalf of the committee. 2 U.S.C. § 434(b)(2) and (4). Pursuant to 2 U.S.C. § 432(h)(1), all receipts received by a committee shall be deposited into accounts established by that provision. See also 11 C.F.R. § 103.3(a). Commission regulations further provide that such receipts must be deposited within 10 days of

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receipt by the treasurer. 11 C.F.R. § 103.3.

During 1985 and 1986, the name of the political committee for Senator Durenberger was the Durenberger for U.S. Senate Volunteer Committee. During all times pertinent to this discussion, the treasurer for the Durenberger for U.S. Senate Volunteer Committee was Sue Dean. Currently, the name of the political committee, as shown on the committee's Statement of Organization filed March 29, 1988, is the Durenberger '94 Volunteer Committee. The current committee treasurer is Delwyn Olson.

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According to the Senate Ethics Committee Report, on December 5, 1986 Senator Durenberger addressed the annual meeting of the Pathology Practice Association. Instead of paying the Senator an honorarium or fee for his speech, the Association's federal political action committee sent a check to the Senator's authorized principal campaign committee in the amount of \$5,000 payable to "Durenberger for U.S. Senate." In an affidavit, Paul Johnson, the Association's registered lobbyist, explained that the payment to the Senator was intended as a campaign contribution. According to Mr. Johnson, the Association customarily does not pay honorarium without a formal request. In this case, Mr. Johnson states that Senator Durenberger did not request an honorarium and, therefore, the Association made the \$5,000 contribution to Senator Durenberger's re-election campaign.

The Report of the Special Counsel states that the campaign contribution was deposited without endorsement into the Piranha



Press account, from which the Senator was paid by Piranha Press for his "promotional appearances." It is unclear how the check ended up in the publisher's hands. This contribution was not reported to the Commission as a campaign contribution.

Counsel for Senator Durenberger argued before the Senate Ethics Committee that the Senator likely never saw or knew of this check. Further, Counsel argues that Piranha Press should have made some further inquiry upon receiving the check but did not, and that it would be inappropriate for the Senate to impose a sanction under these facts. The Ethics Committee obviously rejected this latter argument.

While Piranha Press may have considered the \$5,000 payment from the Association to be payment for a "promotional appearance" by the Senator, this apparently was not the intent of the Association. The check was payable to "Durenberger for U.S. Senate" and, the payment was reported as a "contribution" on the reports filed by the Association's PAC with the Commission. Therefore, since this contribution was not deposited by the campaign committee as required by Section 432(h), nor was it reported as required by Section 434, there is reason to believe that the campaign committee of Senator Durenberger, presently known as Durenberger '94 Volunteer Committee, and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2).

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 6, 1991

The Honorable David F. Durenberger  
154 Russell Senate Office Building  
Washington, D.C. 20510

RE: MUR 3227  
Senator David F. Durenberger

Dear Senator Durenberger:

On February 26, 1991, the Federal Election Commission found that there is reason to believe you knowing and willfully violated 2 U.S.C. § 441i, a provision of the Federal Election Campaign Act of 1971, as amended (the "Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

Under the Act, you have an opportunity to demonstrate that no action should be taken against you. You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath.

In the absence of any additional information demonstrating that no further action should be taken against you, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

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Senator Durenberger

Page 2

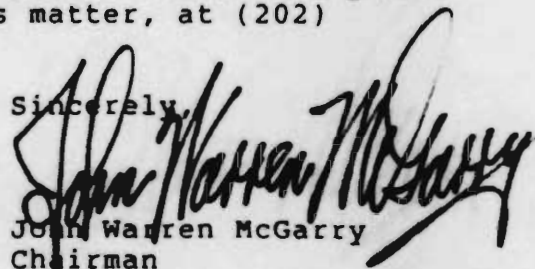
Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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.

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 investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Mary Ann Bumgarner, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

  
John Warren McGarry  
Chairman

Enclosures

Factual and Legal Analysis  
Procedures  
Designation of Counsel Form

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT:** Senator David F. Durenberger    **MUR:** 3227

**I. FACTUAL AND LEGAL ANALYSIS**

**A. Background**

On August 8, 1990, the United States Senate Select Committee on Ethics wrote the Commission concerning possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Senator David F. Durenberger. Accompanying the letter was the Report of the Select Committee on Ethics (the "Committee Report") and the Report of Special Counsel. The Committee also provided copies of the evidence introduced in this matter, transcripts of the adjudicatory hearings and memoranda submitted to the Committee by counsel for Senator Durenberger.

According to the Committee Report, on September 27, 1988, the Committee received a complaint against Senator David F. Durenberger from 39 members of the Minnesota Bar. The complaint alleged that the Senator had violated laws and rules within the Committee's jurisdiction, in part through an arrangement he had with a publisher, Piranha Press. Based on the factual findings and evidence in this matter, the Committee unanimously concluded that Senator Durenberger had violated federal law and certain Senate Rules.

In regard to violations of the Act, the Committee

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unanimously concluded that Senator Durenberger violated the honoraria limits established by 2 U.S.C. § 31-1 and 2 U.S.C. § 441i by accepting payments in excess of such limits as consideration for 113 speeches or appearances during calendar years 1985 and 1986.

B. Exceeding the limit on honorarium

Pursuant to 2 U.S.C. § 441i, no person while an elected or appointed officer of any branch of the federal government shall accept any honorarium of more than \$2,000 (excluding amounts accepted for actual travel and subsistence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech or article.

Senator Durenberger was first elected to the Senate in 1978 to complete the unexpired term of Senator Hubert H. Humphrey. Senator Durenberger was re-elected in 1982 and 1988, and will be up for re-election in 1994. According to the Committee Report, in the fall of 1984, Piranha Press published Senator Durenberger's first book, a collection of "white papers" on national defense and security issues entitled, Neither Madmen Nor Messiahs. In April of 1986, Piranha Press published a second book by the Senator, a collection of speeches on health care topics entitled, Prescription of Change.

Senator Durenberger entered into an agreement with Piranha Press whereby he made 113 appearances before various trade associations and other businesses across the country in

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1985 and 1986 in promotion of these books. These sponsoring organizations paid Piranha Press a fee, typically between \$1,000 and \$5,000 plus travel expenses, for the Senator's appearance. Pursuant to its agreement with the Senator, Piranha Press then paid Senator Durenberger a total of \$100,000 in quarterly payments during the two year period at issue.

According to the Committee Report, the arrangement between Senator Durenberger and Piranha Press was not a good faith book publishing or promotional contract, but was instead a means of converting into "stipendary income" fees which would otherwise have been treated as honoraria subject to 2 U.S.C.

§ 441i. The Report further maintains that the principal purpose of the agreement was not to promote the sale of Senator Durenberger's books, but was rather to permit the Senator to earn fees for speaking engagements. Over the two year term of the arrangement, the Senator's "promotional appearances" generated approximately \$248,300 for Piranha Press in speaking fees. In contrast, Piranha Press earned only approximately \$15,500 in book sales during that time period.

The evidence set forth in the Committee Report shows that the Senator's Piranha Press speeches appear uniformly to have been the result of invitations extended to the Senator in his capacity as a United States Senator to deliver what would otherwise have been treated as traditional honoraria speeches. None was the result of invitations to the Senator to speak about or promote his books, nor were any initiated by Piranha

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Press. Further, the evidence shows that, at the Senator's direction, his staff forwarded to the publisher a number of honoraria invitations to be handled instead as Piranha Press appearances. In addition, the evidence shows that Senator Durenberger did not mention either his books or his publisher during a great many of the Piranha Press appearances and if he did make reference to the books, these references were often only fleeting and did little more than belittle the books or the publisher. The evidence further demonstrated that that on several occasions, before the Senator was to make a promotional appearance, groups were told that it would not be necessary to display the Senator's books at his appearance.

According to an article entitled, Durenberger Seeks Clemency in Painful Public Hearing, in the June 16, 1990 edition of Congressional Quarterly, special counsel, Robert S. Bennett, contended that there was never a real intent to promote books. He further stated it was the exception, not the rule, for Senator Durenberger to promote the books at his appearances.

According to the Committee Report, on approximately 23 occasions Senator Durenberger spoke at an event addressed by other Members of Congress. While the other Members treated these appearances as honoraria, Senator Durenberger treated these appearances as Piranha Press "promotional appearances." The evidence further reflects that the Senator's Piranha Press speeches were indistinguishable in substance from his traditional honoraria appearances and that on several different

occasions, members of the Senator's staff or a representative of Piranha Press insisted that a group before which the Senator was to appear pay a fee in excess of \$2,000 for the Senator's appearance. According to the evidence, the fee charged was as high as \$5,000.

According to an article in the Washington Post on December 14, 1989, in early 1986, Senator Durenberger was invited to speak at a conference sponsored by the American Podiatric Medical Association. According to John Carson, director of government affairs for the association, instead of dealing with the senator's staff as he was accustomed to, Mr. Carson was referred to Gary L. Diamond, owner of Piranha Press. In a letter, Mr. Diamond told Mr. Carson that the Senator would give the speech for a fee of \$2,000, payable to Piranha Press rather than Senator Durenberger. Senator Durenberger did not count this address to the podiatrists against his limit in speech honoraria in 1986.

The evidence reflects the payment for these "promotional appearances" by the Senator typically was made directly to Piranha Press; however, on 26 occasions sponsoring organizations paid Senator Durenberger directly. These checks, totaling \$56,000, were deposited into the Piranha Press bank account. Twenty-one of these checks reflected Senator Durenberger's personal endorsement to Piranha Press.

According to the Report of Special Counsel, prior to performing any services under the agreement, Senator Durenberger, requested and received an advisory opinion ("AO")

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from the Commission stating that income paid to him from the publisher would be considered a "stipend" rather than "honoraria." This Report states however, that in the request for the advisory opinion, Counsel omitted several crucial facts about the Senator's proposed arrangement with Piranha Press. Specifically, counsel for Senator Durenberger failed to state that the groups before which the Senator would speak would pay a fee to Piranha Press for his appearance, or that the Senator's appearances would be the result of invitations to deliver traditional "honoraria" speeches extended to him in his capacity as a United States Senator.

During the hearing on this matter, both Senator Durenberger and his counsel addressed the Ethics Committee and raised several general defenses to the charges against him. At that time, counsel for the Senator admitted mistakes were made and that there had been violations of the rules. Counsel for Senator Durenberger argued however, that the Senator acted in good faith and upon the advice of lawyers and other advisors throughout this matter. Senator Durenberger emphasized that he obtained an advisory opinion from the Commission approving the arrangement and that he relied on counsel to insure that the advisory opinion request included all relevant facts. Also, according to Senator Durenberger's counsel, the Senator believed that he fulfilled his obligations under the contract with Piranha Press, whether or not he explicitly promoted his books or the publisher, so that the income from these speeches would be covered by the "stipendary" arrangement. Finally,

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counsel for Senator Durenberger argues that the Senator was acting in good faith because there was never an attempt to conceal the Senator's income from the Piranha Press arrangement, and he disclosed this income on his 1985 and 1986 Financial Disclosure forms.

Based on the evidence presented in this matter, it appears the arrangement between Senator Durenberger and Piranha Press was simply used as a mechanism to evade the statutory limitations on honoraria. As already discussed, Senator Durenberger earned more in fees for his "promotional" appearances than Piranha Press earned in book sales. Further, his Piranha Press speeches were not the result of invitations to the Senator to speak about or promote his books, nor were they initiated by Piranha Press. In several of his appearances, the Senator made no reference to the books, and if he did, the reference was often only fleeting. On at least 23 occasions, Senator Durenberger treated these appearances as Piranha Press promotional appearances, whereas other members of Congress also participating treated their appearances as honoraria. Further, Senator Durenberger's Piranha Press speeches were indistinguishable from his traditional honoraria appearances. Therefore, based on the foregoing, it appears that the monies paid for the Senator's Piranha Press appearances were in reality honoraria.

Although counsel for Senator Durenberger requested an advisory opinion from the Commission concerning the Senator's arrangement with Piranha Press, Senator Durenberger's purported

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reliance on the resulting Commission opinion is not a valid defense in this matter. Pursuant to 2 U.S.C. § 437f(c), persons involved in the specific transaction or activity with respect to which such advisory opinion is rendered and those persons involved in any specific transaction which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered may rely on such opinions. However, in order to avoid sanctions under the Act for such actions, persons must have acted "in good faith in accordance with the provisions and findings of such advisory opinion." 2 U.S.C. § 437f(c)(2) (emphasis added).

According to the Report of Special Counsel, the Senator engaged in conduct different from that described in the advisory opinion request and discussed in the resulting opinion. The Commission regulations specify that "[a]dvisory opinion requests shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 C.F.R. § 112.1(c) (emphasis added). Nevertheless, Senator Durenberger's request for the advisory opinion omitted at least three crucial facts: Senator Durenberger's contract called for the groups he addressed to pay the publisher a fee; the appearances stemmed from requests for speeches, not book promotions; and the promotional events were identical to traditional honorarium events. When, as here, there is a distinction between the facts presented in the advisory opinion request and the facts

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as they actually unfold, such distinctions preclude any reliance on the advisory opinion. See FEC v. National Conservative Political Action Committee, 647 F.Supp. 987, 995 (S.D.N.Y. 1986). Thus, since the facts set out in the request for the advisory opinion by Senator Durenberger were significantly different from the facts as they actually unfolded, the use of the advisory opinion as a defense for the plan that Senator Durenberger ultimately carried out with Piranha Press is without merit.

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The Ethics Committee Special Counsel states that the facts omitted from the advisory opinion request were either already clearly known or contemplated at the time of the request. In fact, although Senator Durenberger's request referenced the contract with Piranha Press, which apparently was already in existence, he did not provide a copy of that document. Furthermore, Senator Durenberger apparently personally reviewed both the final request prior to submission and the draft opinion released by the Commission prior to its consideration at a Commission meeting. Senator Durenberger, therefore, had ample opportunity to provide this additional information. By omitting these facts, the advisory opinion request appeared to be based upon the premise that the Senator's appearances were for the purpose of genuine book promotions when in fact this was not the case.

It is the view of this Office that the foregoing evidence indicates Senator Durenberger knowingly and willfully evaded the honoraria limits through the book promotion deal with



Piranha Press. Therefore, there is reason to believe that Senator David F. Durenberger knowingly and willfully violated 2 U.S.C. § 441i by exceeding the limit prohibiting the acceptance of honorarium of more than \$2,000 for an appearance, speech or article.

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RECEIVED  
FEDERAL ELECTION COMMISSION  
MAIL ROOM

**STATEMENT OF DESIGNATION OF COUNSEL**

91 MAR 11 PM 4:13

MUR 3227

NAME OF COUNSEL: James Hamilton

ADDRESS: Olwine, Connelly, Chase

1701 Pennsylvania Avenue, NW #1000

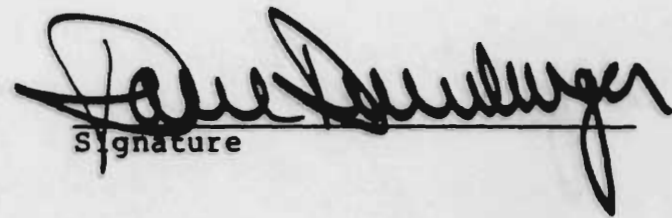
Washington, DC 20006

TELEPHONE: 202/835-0500

RECEIVED  
FEDERAL ELECTION COMMISSION  
91 MAR 12 PM 10:06

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.

March 7, 1991  
Date

  
Signature

RESPONDENT'S NAME: Senator David Durenberger

ADDRESS: 154 Russell Office Building

Washington, DC 20510

HOME PHONE: \_\_\_\_\_

BUSINESS PHONE: 202/224-3244

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OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

SUITE 1000

1701 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006

TELEPHONE: (202) 835-0500

FACSIMILE: (202) 835-1591

750 SEVENTH AVENUE  
NEW YORK, N.Y. 10019  
(212) 261-8000

220 SUNRISE AVENUE  
PALM BEACH, FL. 33480  
(407) 833-6722

CONFIDENTIAL

BY HAND

March 13, 1991

Re: MUR 3227

Senator David F. Durenberger,  
Durenberger '94 Volunteer  
Committee, and Delwyn Olson, as  
Treasurer

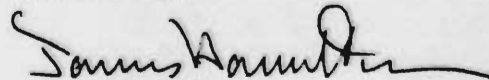
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Dear Ms. Bumgarner:

This letter confirms our agreement that Senator Durenberger, the Durenberger '94 Volunteer Committee and Delwyn Olson, its treasurer, will have until April 17, 1991, to respond to the March 6, 1991 letters to them from the Chairman of the Federal Election Commission. At that time we will present a factual and legal response to those letters and the attached analyses. We also will request in writing that the Commission enter into pre-probable cause conciliation.

Thank you very much for your cooperation in these regards.

Sincerely,



James Hamilton

Mary A. Bumgarner, Esq.  
Federal Election Commission  
999 E Street, N.W.  
Room 657  
Washington, D.C. 20463

JH:vrs

VRG03107:vrs

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 27, 1991

Mr. James Hamilton, Esquire  
Olwine, Connelly, Chase, O'Donnell & Weyher  
Suite 1000  
1701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

RE: MUR 3227  
Senator David F. Durenberger  
Durenberger '94 Volunteer  
Committee and Delwyn Olson,  
as treasurer

Dear Mr. Hamilton:

This is in response to your letter dated March 13, 1991, which we received on March 13, 1991, requesting an extension of 20 days to respond to the Commission's reason to believe findings. 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 April 17, 1991.

If you have any questions, please contact Mary Ann Bumgarner, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble  
General Counsel

A handwritten signature in dark ink, appearing to read "Robert W. Bonham, III", is written over a horizontal line.

BY: Robert W. Bonham, III  
Assistant General Counsel

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DAVE DURENBERGER  
MINNESOTA

United States Senate

WASHINGTON, DC 20510

91 MAR 27 PM 1:09

March 27, 1991

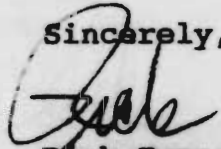
Ms. Mary Ann Bumgarner  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RE: MUR 3227

Dear Mary Ann:

Per your request, enclosed is the  
Statement of Designation of Counsel for  
case MUR 3227.

Sincerely,



Rick Evans  
Administrative  
Assistant

RE/kme  
Enclosure

93040982324

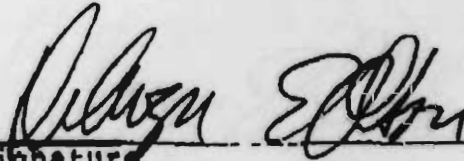
STATEMENT OF DESIGNATION OF COUNSELMUR 3227NAME OF COUNSEL: Jim HamiltonADDRESS: Olwine, Connelly & Chase  
1701 Pennsylvania Avenue, NW  
Suite 1000; Washington, DC 20006TELEPHONE: 202/835-0500

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.

Date

3/16/91

Signature

RESPONDENT'S NAME: Delwyn Olson, TreasurerADDRESS: Durenberger '94 Volunteer Committee  
1112 Plymouth Building  
12 South Sixth Street  
Minneapolis, Minnesota 55402

HOME PHONE: \_\_\_\_\_

BUSINESS PHONE: 612/339-5577

93040982325

06C 0784

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER  
SUITE 1000  
1701 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20006  
TELEPHONE: (202) 835-0500  
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780 SEVENTH AVENUE  
NEW YORK, N.Y. 10019  
(212) 261-8000

220 SUNRISE AVENUE  
PALM BEACH, FL. 33480  
(407) 833-8722

April 17, 1991

CONFIDENTIAL  
BY HAND

Re: MUR 3227, Durenberger '94 Volunteer  
Committee and Delwyn Olson, Treasurer

91 APR 17 PM 12:53

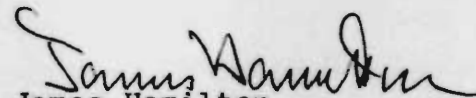
Dear Mr. Noble:

Pursuant to 11 C.F.R. §111.18(f), the Durenberger '94 Volunteer Committee and Delwyn Olson, its Treasurer, request the opportunity to pursue pre-probable cause conciliation in the above-captioned matter.

The attached memorandum sets forth Respondents' views on the merits of this matter.

Please contact me about how we should proceed regarding conciliation.

Sincerely,



James Hamilton  
Counsel for the Durenberger  
'94 Volunteer Committee and  
Delwyn Olson, as Treasurer

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

Attention: Mary Ann Bumgarner, Esq.

93040982326

Before the  
FEDERAL ELECTION COMMISSION  
Washington, D.C.

In the matter of )  
 )  
Senator David F. Durenberger, ) MUR 3227  
Durenberger '94 Volunteer )  
Committee and Delwyn Olson, )  
as Treasurer )

To: The Commission

RESPONSE OF THE DURENBERGER '94  
VOLUNTEER COMMITTEE AND DELWYN OLSON, TREASURER,  
TO COMMISSION'S REASON TO BELIEVE FINDINGS

9 3 0 4 0 9 8 2 3 2 7  
The Durenberger '94 Volunteer Committee and Delwyn Olson, its Treasurer, (hereinafter the Volunteer Committee),<sup>1</sup> hereby respond to the Commission's finding that there is reason to believe that the Volunteer Committee violated 2 U.S.C. §§432(h)(1) and 434(b)(2). As set forth in the accompanying letter to the Commission's General Counsel, the Volunteer Committee wishes to pursue pre-probable cause conciliation. However, the Volunteer Committee submits this response so that the Commission may have the benefit of its views as to the issues under consideration.

---

1 As the Commission has observed, Mr. Olson was not treasurer of the Durenberger campaign committee at the time of the events at issue. (Factual and Legal Analysis at 3).



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This matter was referred to the Commission by the United States Senate Select Committee on Ethics. The Commission's factual analysis is based upon the Report of that Committee and the Report of its Special Counsel. See, Report of the Select Committee on Ethics and the Report of Special Counsel on S. Res. 311, "Investigation of Senator David F. Durenberger," S. Rep. No. 382, 101st Cong. 2d Sess. (1990). The Ethics Committee also provided the Commission copies of the evidence introduced and transcripts of the Committee's adjudicatory hearings. (Factual and Legal Analysis at 1, 3-4).

The Commission's finding that there is reason to believe that the Volunteer Committee violated Sections 432(h)(1) and 434(b)(2) of the Federal Election Campaign Act arises from the Volunteer Committee's failure to report and deposit a \$5000 check dated December 30, 1986 made payable to "Durenberger for U.S. Senate" from the Pathology Practice Association Federal Political Action Committee ("PPA PAC"). The check was not deposited or reported because the Volunteer Committee evidently did not receive it.

By letter of its president dated August 26, 1986, PPA issued an invitation to Senator Durenberger to speak at its annual meeting in San Francisco. Durenberger Ex. 54, Letter of David Yates. The letter offered to pay Senator Durenberger an honorarium. Id. The speech subsequently was

designated as a Piranha Press appearance and on October 23, 1986, the letter of invitation and scheduling information were telecopied to Michael Mahoney, who handled Piranha appearances. Durenberger Ex. 54.

According to the Senator's records, Karen Doyne, an employee of Fleishman-Hillard, Inc., PPA's registered lobbyist, handled the scheduling and other arrangements for the appearance. Durenberger Ex. 54. On October 27, 1986, Piranha Press sent a memorandum regarding the appearance to Ms. Doyne. Id. Moreover, the Senator's records indicate that PPA was to pay Piranha a fee of \$5,000 for the appearance. Id. There is nothing in the Senator's records, or the documentary evidence produced by PPA to the Ethics Committee, that explains why PPA PAC issued a check made payable to the Senator's campaign instead of PPA's paying Piranha the appearance fee.<sup>2/</sup>

- 
- 2 As noted, Senator Durenberger's records indicate that the arrangements for the appearance were handled by Karen Doyne. However, Special Counsel obtained an affidavit (Special Counsel's Ex. 41) from Paul Johnson, another employee of Fleishman-Hillard, stating that he supervised the arrangements for the appearance. Mr. Johnson does not state that he ever discussed the arrangements with anyone in Senator Durenberger's office or at Piranha Press. He further declared that PPA PAC made a campaign contribution because Senator Durenberger did not request an honorarium. Id. However, the PPA invitation letter specifically offered Senator Durenberger an honorarium.

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According to records produced by Charles Bell, former treasurer of PPA PAC, Paul Johnson of Fleishman-Hillard directed that the contribution check be prepared and forwarded to him. Durenberger Ex. 54. No evidence was produced in the Ethics Committee proceeding indicating that Mr. Johnson sent the check to the Volunteer Committee. As the Commission noted, it is unclear how the PPA PAC check ended up in the publisher's hands. (Factual and Legal Analysis at 4) In any event, the check was deposited into Piranha's account on January 12, 1987. Special Counsel Ex. 181. The check was not endorsed over to Piranha Press either by Senator Durenberger or the Volunteer Committee. Durenberger Ex. 54.

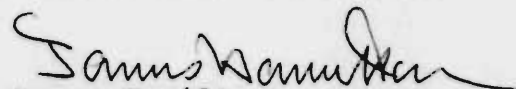
Section 432(h)(1) provides that a campaign committee shall deposit in its designated account "all receipts received by such committee." Section 434(b)(2) requires the treasurer of a campaign committee to report to the FEC all contributions received by the committee. Both of these provisions contemplate receipt of a contribution by a campaign committee as a precondition to the deposit and reporting obligations. Although Piranha Press clearly should not have deposited a check made payable to "Durenberger for U.S. Senate" in its account, the Volunteer Committee cannot be faulted for not depositing or reporting a contribution that it evidently never received.

Conclusion

For the foregoing reasons, we submit that the Commission should reconsider its finding of reason to believe that the Volunteer Committee violated 2 U.S.C. §§432(h)(1) and 434(b)(2) and dismiss this matter.

April 17, 1991

Respectfully submitted,

  
James Hamilton  
Mary C. Albert  
OLWINE, CONNELLY, CHASE,  
O'DONNELL & WEYHER  
1701 Pennsylvania Avenue, N.W.  
Suite 1000  
Washington, D.C. 20006  
(202) 835-0500

Richard L. Evans  
154 Senate Russell Office  
Building  
Washington, D.C. 20510  
(202) 224-3244

Counsel for Senator Durenberger  
'94 Volunteer Committee and  
Delwyn Olson, Treasurer



06-C 0785

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

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(407) 833-8722

April 17, 1991

CONFIDENTIAL  
BY HAND

Re: MUR 3227, Senator David F. Durenberger

91 APR 17 PM 12:54

RECEIVED  
FEDERAL ELECTION COMMISSION  
APR 17 1991

Dear Mr. Noble:

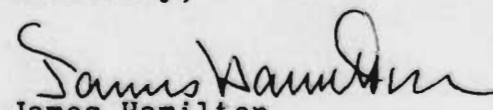
Pursuant to 11 C.F.R. §111.18(f), Senator David F. Durenberger requests the opportunity to pursue pre-probable cause conciliation in the above-captioned matter.

We note in this regard that -- given the history of this matter -- it is certain that Senator Durenberger will not again enter into any arrangement such as that he had with his publisher, Piranha Press. The Commission also should be aware that, pursuant to order of the Senate, Senator Durenberger now is engaged in making "restitution" of basically all funds he received from his publisher, less federal and state taxes already paid on those funds. Specifically, he is paying \$93,730.00, less taxes, to charities with which he has no affiliation over the balance of his current Senate term.

The attached memorandum sets forth Senator Durenberger's views on the merits of this matter.

Please contact me as to how we should proceed regarding conciliation.

Sincerely,



James Hamilton  
Counsel for Senator  
David F. Durenberger

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

Attention: Mary Ann Bumgarner, Esq.

93040982332

Before The  
FEDERAL ELECTION COMMISSION  
Washington, D.C.

In the matter of )  
 )  
Senator David F. Durenberger, ) MUR 3227  
Durenberger '94 Volunteer )  
Committee and Delwyn Olson, )  
as Treasurer )

To: The Commission

RESPONSE OF SENATOR DAVID DURENBERGER  
TO COMMISSION'S REASON TO BELIEVE FINDINGS

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Senator David F. Durenberger hereby responds to the Commission's finding that there is reason to believe that he "knowingly and willfully violated 2 U.S.C. §441i by exceeding the limit prohibiting the acceptance of honorarium of more than \$2000 for an appearance, speech or article." As stated in the accompanying letter to the Commission's General Counsel, Senator Durenberger wishes to pursue pre-probable cause conciliation as to this matter. However, he submits this response so that the Commission may have the benefit of his views as to the issues under consideration.

This matter was referred to the Commission by the United States Senate Select Committee on Ethics. The Commission's factual and legal analysis is based upon the Report of that Committee and the Report of its Special Counsel. See, Report of the Select Committee on Ethics and

the Report of Special Counsel on S. Res. 311, "Investigation of Senator David F. Durenberger," S. Rep. No. 382, 101st Cong. 2d Sess. (1990). The Ethics Committee also provided the Commission with copies of the evidence introduced and transcripts of the adjudicatory hearings before the Committee. (Factual and Legal Analysis at 1).

1. Senator Durenberger Did Not Receive More Than \$2,000 For Any Appearance

Pursuant to the agreement with his publisher, Piranha Press, which published his books Neither Madmen Nor Messiahs and Prescription For Change, Senator Durenberger made 113 speeches before various organizations in 1985 and 1986. As the Commission noted, these organizations paid Piranha a fee, typically between \$1,000 and \$5,000, for the Senator's appearance. The total amount received by Piranha was approximately \$248,300. Piranha then paid Senator Durenberger \$100,000 in quarterly installments over the two year term of the agreement. (Factual and Legal Analysis at 2-3).

Section 441i provides that:

No person while an elected or appointed officer or employee of any branch of the Federal Government shall accept any honorarium of more than \$2,000 (excluding amounts accepted for actual travel and subsistence expenses for such person...and excluding amounts paid or incurred for any agent's fees or commissions) for any appearance, speech or article.

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The statute expressly excludes from the calculation of the amount of an honorarium any fees or commissions paid to third parties. As just observed, Senator Durenberger received a total of \$100,000 for the 113 appearances; the balance of the speaking fees were retained by Piranha. Piranha did not pay the Senator any specific amount for a specific speech. It is therefore difficult to conclude that -- even assuming arguendo that the payments he received should be considered honoraria -- he received more than \$2,000 for any speech. The Commission has identified no specific instance where he did. If the \$100,000 he received is divided equally among the 113 speeches he made, the amount allocated to each would be less than \$1,000.

It would be erroneous to conclude that every payment Piranha received was a payment of an honorarium to the Senator. Piranha collected the money and deducted its share -- which was analogous to the agent's fees or commissions mentioned in the statute. Attributing the entire amount received by Piranha to Senator Durenberger for a given appearance thus appears inconsistent with the language and intent of Section 441i.

2. Senator Durenberger Did Not Knowingly or Willfully Violate Section 441i

Despite the Senate Ethics Committee's conclusions -- which Senator Durenberger, aware of the political nature



of a Senate ethics proceeding, chose not to contest -- it would be wrong for the Commission to find that the \$2,000 limit was knowingly and willfully violated.

Prior to entering into the Piranha Press agreement, Senator Durenberger sought and relied on the advice of counsel as to its propriety. His attorneys, who drafted the publishing agreement in conjunction with counsel for Piranha Press, advised him that the payments contemplated by the agreement "satisfied the test of being payments for services on a fixed and continuing basis and thus constitute a stipend rather than an honorarium." (Durenberger Exs. 30, 31 to Senate Ethics Committee) Moreover, they recommended that he seek an advisory opinion from the Commission before he performed any services under his contract with his publisher, which advice he followed. Id. Senator Durenberger also relied upon his counsel to provide all necessary information to the Commission in the request for the advisory opinion.

On the basis of the facts set forth in the request, the Commission determined that "the arrangement ... whereby the Publisher will pay Senator Durenberger in quarterly installments over a two-year period for promotional appearances, creates a stipendiary relationship" and that "payments made to Senator Durenberger under this agreement would not be viewed as honoraria." Advisory

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Opinion 1984-56, reprinted in Federal Election Campaign Financing Guide (CCH) ¶5798. The Commission now has indicated that Senator Durenberger cannot rely on this advisory opinion as a defense because the request omitted three significant facts: (1) that the publishing contract called for the groups Senator Durenberger addressed to pay the publisher a fee; (2) that the appearances stemmed from requests for speeches, not book promotions; and (3) that the promotional events were identical to traditional honorarium events. (Factual and Legal Analysis at 7-9).

The request for the advisory opinion referenced the contract with Piranha Press, but did not include a copy. (Special Counsel Ex. 254). However, in that request, Senator Durenberger's counsel asked the Commission to advise if additional information was needed. Id. In response, counsel for the Commission stated that the Senator's counsel would be contacted if further information was needed. (Durenberger Ex. 34). Pursuant to 11 C.F.R. §112.1(d), the Commission's General Counsel is authorized to determine whether a request for advisory opinion is incomplete and to notify the requesting person of any deficiencies in the request. The Commission neither requested a copy of the contract nor any other additional information from Senator Durenberger's counsel.

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After obtaining the advisory opinion, Senator Durenberger's Administrative Assistant specifically asked the Senator's counsel whether the request for an advisory opinion fairly reflected that invitations for speaking engagements that came to the Senator's office would be referred to Piranha and that the organizations sponsoring the appearances would pay Piranha a fee. Counsel assured him that the request for the advisory opinion was based upon a fair representation of the arrangement. (Durenberger Ex. 8, ¶¶14-15).

At all times, Senator Durenberger acted in reliance on counsel in the good faith belief that the payments he received from Piranha did not constitute honoraria. This perception was enhanced in 1986 by the published remarks of an FEC spokesperson.

Shortly after the 1985 Piranha payments were reported in the Senator's Financial Disclosure Statement, an article appeared in the St. Paul Pioneer Press Dispatch suggesting that the Piranha arrangement was designed to circumvent the limits on honorarium income. The article reported that the organizations sponsoring the Senator's appearances paid the publisher a fee and that the request for an advisory opinion did not disclose that the book promotions were tantamount to paid speaking engagements. However, an FEC spokesperson was quoted to the effect that

these facts would not change the Commission's conclusion that the payments Senator Durenberger received from Piranha constituted a stipend for continuing services and not honoraria:

Told of the nature of the promotions, FEC assistant press officer Sharon Snyder said, "I don't think that changes the fact that he is getting a stipend (a fixed amount) and not an honorarium.... He is performing services for the company and has a contract with the publisher."

D. Smith, "Speech Fees Routed Through Publisher," St. Paul Pioneer Press Dispatch (May 21, 1986).

In sum, there is no basis for concluding that Senator Durenberger knowingly and willfully violated Section 441i. In addition to the fact that he did not receive more than \$2,000 for any appearance, Senator Durenberger believed, consistent with the advice of counsel, that the payments he received from Piranha were stipendiary in nature. Moreover, while the Commission was on notice in 1986 as to the manner in which the Piranha agreement was being implemented, it did not notify the Senator that he could not rely on the advisory opinion or that anything was amiss. Rather, the only published response by a Commission spokesperson indicated that there was no problem. In these circumstances, it would be most difficult to find a knowing and willful violation.



3. Senator Durenberger Received A Stipend For Continuing Services Under a Continuing Compensatory Relationship

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The Commission's rules exclude a "stipend" from the definition of honorarium. A stipend is "a payment for services on a continuing basis." 11 C.F.R. §110.12(c)(3). Where the circumstances indicate a "continuing compensatory relationship" between the parties, the Commission has characterized payments as stipends, not honoraria. See Advisory Opinion 1975-46, reprinted in, Federal Election Campaign Financing Guide (CCH) ¶5153 (an honorarium is money accepted as payment for a single event or transaction under circumstances that do not imply a continuing compensatory relationship between the parties for similar services); Advisory Opinion 1980-76, reprinted in Federal Election Campaign Financing Guide (CCH) ¶5523 (regular payments for appearances on radio and television shows are stipends because of the continuing compensatory relationship between the parties); Advisory Opinion 1980-140, reprinted in Federal Election Campaign Financing Guide (CCH) ¶5583 (compensation for periodic radio commentaries constitutes a stipend because of the continuing compensatory relationship between the parties); Advisory Opinion 1985-4, reprinted in Federal Election Campaign Financing Guide (CCH) ¶5805 (compensation for conducting seminars constitutes a stipend

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because of the continuing compensatory relationship between the parties).

Pursuant to the publishing agreement, Piranha paid Senator Durenberger \$12,500 per quarter for two years for his appearances. Senator Durenberger was not separately compensated for each appearance. Rather, he had a continuing compensatory relationship with Piranha pursuant to which he was compensated for his continuing services.<sup>\*/</sup> In 1986 Sharon Snyder of the FEC publicly observed that Senator Durenberger was "performing services for the company." Because there was this continuing compensatory relationship and considering the Commission's determinations in other relevant advisory opinions, the payments Senator Durenberger received must be characterized as stipendiary.

That the Senator's continuing services may have been somewhat different than those described in the request for the advisory opinion does not mean that they were not continuing services. Under the Commission's rules and advisory opinions, Senator Durenberger could have performed a variety of services for Piranha for which he could have received payments that rightly would have been characterized

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<sup>\*/</sup> Although the Commission questions whether the contents of Senator Durenberger's speeches were sufficiently promotional in nature (Factual and Legal Analysis at 4), the publisher did not complain about Senator Durenberger's performance under the contract.

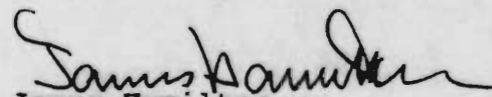
as stipends. If in fact he did not perform promotional services, he is not entitled to a safe harbour for his conduct under the provisions of 2 U.S.C. §437f(c). Nonetheless, if the payments he received were for continuing services of some type, these payments as a matter of law must be characterized as a stipend, not as honoraria. This, at the least, is the situation here.

Conclusion

For the foregoing reasons, we submit that the Commission should reconsider its finding that there is reason to believe that Senator Durenberger knowingly and willfully violated 2 U.S.C. §441i and should dismiss this matter.

April 17, 1991

Respectfully submitted,



James Hamilton  
Mary C. Albert  
OLWINE, CONNELLY, CHASE,  
O'DONNELL & WEYHER  
1701 Pennsylvania Avenue, N.W.  
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Washington, D.C. 20006  
(202) 835-0500

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154 Senate Russell Office  
Building  
Washington, D.C. 20510  
(202) 224-3244

Counsel for Senator  
David F. Durenberger

93040982342



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

June 10, 1991

The Honorable Howell Heflin, Chairman  
The Honorable Warren B. Rudman, Vice Chairman  
Select Committee on Ethics  
United States Senate  
Washington, D.C. 20510-6425

RE: MUR 3227  
Senator David F. Durenberger  
Durenberger '94 Volunteer  
Committee and Delwyn Olson,  
as treasurer

Dear Chairman and Vice Chairman:

On August 8, 1990, this Office received your letter concerning possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act") by Senator David F. Durenberger.

On January 17, 1991, this Office received your second letter enclosing an additional document. In part, this document refers to a potential problem concerning the way that Senator Durenberger's campaign committee reported the "Charlie Black-Gene Holderness transaction" to the Federal Election Commission. I previously contacted your office by telephone to inquire about this document, but did not receive a response. In order to proceed, I would appreciate the opportunity to speak with someone concerning this latest matter. Any additional information the Committee or its staff could provide would be helpful. I can be reached at (202) 376-5690.

Pursuant to 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), the Commission's review of this matter shall remain confidential until the file has been closed.

Sincerely,

Lawrence M. Noble  
General Counsel

By: Lois G. Lerner  
Associate General Counsel

93040982343



RECEIVED  
F.E.C.  
SECRETARIAT

91 AUG 22 AM 10:17

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Senator David F. Durenberger ) MUR 3227  
Durenberger '94 Volunteer )  
Committee and Delwyn Olson, as )  
treasurer )

**SENSITIVE**

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On February 26, 1991, the Federal Election Commission found reason to believe that Senator David F. Durenberger knowingly and willfully violated 2 U.S.C. § 441i by exceeding the limit prohibiting the acceptance of honorarium of more than \$2,000 for an appearance, speech or article. On that same date, the Commission also found reason to believe that the Durenberger '94 Volunteer Committee (the "Committee") and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2) by failing to deposit and report a campaign contribution made payable to "Durenberger for U.S. Senate." On April 17, 1991, both Senator Durenberger and the Committee requested pre-probable cause conciliation.<sup>1</sup>

In the course of this matter, this Office received an additional document from the United States Senate Select Committee on Ethics ("Ethics Committee"). Attachment 1. This document refers to possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), as a result of

1. Senator Durenberger and the Committee are both represented by the same counsel in this matter.

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"the way the Volunteer Committee reported the \$30,000 Charlie Black-Gene Holderness transaction." The Ethics Committee provided no additional information to explain this reference; however, based on the information contained in this additional document, reports filed with the Commission and a telephone conversation with Victor Baird, counsel for the Ethics Committee, this Office is prepared to recommend that the Commission find reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. § 434(b)(5)(A).

## II. ANALYSIS

Pursuant to 2 U.S.C. § 434(a)(1), each treasurer of a political committee shall file reports of receipts and disbursements and shall sign each such report. Section 434(b)(5)(A) further requires each report to disclose the name and address of each person to whom an expenditure in excess of \$200 within the calendar year is made, by the reporting committee, to meet a candidate or committee operating expense. In addition, the date, amount, and purpose of such expenditure is also required to be reported. 2 U.S.C. § 434(a)(1).

As stated above, this Office received an additional document from the Ethics Committee concerning what appears to be a possible reporting violation by Senator Durenberger's campaign committee.

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According to the Durenberger for U.S. Senate Volunteer Committee's 1983 Mid-Year Report's Schedule B of itemized disbursements, three transactions with "Black Manafort & Stone" are reported by the Committee. These three transactions, which took place on 1/7/83, 1/28/83, and 2/9/83, total \$30,000. Therefore, it appears that these are the transactions at issue in this matter. On the Committee's Schedule B, the reported purpose of these disbursements is "Professional Fee."

The Committee's reports also disclose numerous disbursements to, and receipts from, Mr. Holderness. The Committee's 1983 Mid-Year Report's Schedule B shows \$3,000 in disbursements made to Mr. Eugene S. Holderness. The purpose of these disbursements is reported as "Professional Fee." Also on this Schedule B, the Committee reports three \$1,825.78 disbursements to Mr. Eugene S. Holderness for the purpose of "Salary." The Committee also reports on the 1983 Mid-Year Report's Schedule C of loans, a \$1,000 loan from Mr. Holderness. On the Schedule C, Mr. Holderness' employer is listed as "Lungren Brothers" and his occupation is listed as



"Consultant."

Furthermore, on the Committee's 1983 Year End Report's Schedule B, three disbursements of \$1,000 are reported as being made to Mr. Holderness for the purpose of "consulting fees." The address listed for Mr. Holderness is different from the one listed for him on the Committee's 1983 Mid-Year Report; however, it appears that it is the same individual. The Committee also reports on their 1983 Year End Report's Schedule A of itemized receipts, \$250 as being received from Mr. Holderness. On the Schedule A, Mr. Holderness' occupation is listed as "consultant/self-employed."

Activity between the Durenberger committee and Mr. Holderness continued during 1984. On their 1984 Mid-Year Report's Schedule B, the Committee reports making two \$2,000 disbursements to Mr. Holderness. The purpose of these disbursements is reported as "Consulting fee." In addition, on the Committee's 1984 Year End Report's Schedule A of itemized receipts, the Committee reports \$250 as being received from Mr. Holderness. Once again, Mr. Holderness' occupation is listed as "consultant/self-employed."

Based on the evidence available at this time, it appears that the disbursements reported as being made to Black Manafort & Stone may have instead been made to Mr. Gene Holderness.

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While it appears that the subject disbursements made to Black Manafort & Stone, were in fact disbursements made to Gene Holderness, it remains unclear why the Committee reported the subject transactions as they did. The additional document provided by the Ethics Committee does not give any indication as to the reasoning behind the Committee's misreporting of these disbursements. It is not clear whether the Committee misreported the subject transactions to conceal possible

violations of the Act or the misreporting was done for some other purpose. As previously discussed, during the 1984 election cycle, the Durenberger for U.S. Senate Volunteer Committee reported a total of \$13,651.56 in disbursements to Mr. Gene Holderness. Thus, it is possible that the misreporting by the Committee was done simply to reduce the total amount of disbursements reported as being made to Mr. Holderness during the 1984 election cycle. However, since the purpose behind the misreporting remains unclear, additional information is needed from the Committee with regard to this most recent matter.

Based on the evidence presently available, this Office recommends that the Commission find there is reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. § 434(b)(5)(A) by failing to disclose the correct name and address of the person to whom the subject disbursements were made. In addition, a determination to enter into pre-probable cause conciliation at this time would be premature given this additional violation and what appears to be the need for further information. Therefore, this Office also recommends that the Commission decline, at this time, to enter into conciliation with the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, and Senator Durenberger, pending this further investigation.

### III. DISCOVERY

If the Commission accepts this Office's recommendations in this matter, this Office will send interrogatories to

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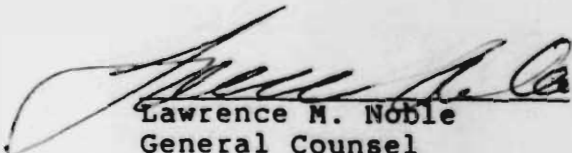
Respondents requesting specific information as to the three transactions reported as taking place between the Committee and Black Manafort & Stone. This discovery will include a request for all writings related to these transactions. In addition, this Office will request any information relating to possible involvement by Senator Durenberger in this most recent matter.

**IV. RECOMMENDATIONS**

1. Find there is reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. § 434(b)(5)(A).
2. Decline, at this time, to enter into conciliation with the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, prior to a finding of probable cause to believe.
3. Approve the attached factual and legal analysis and appropriate letter.

Date

8/22/91

  
Lawrence M. Noble  
General Counsel

**Attachments**

1. Letter and additional document from the Senate Ethics Committee.
2. Factual and legal analysis.

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FEDERAL ELECTION COMMISSION  
WASHINGTON D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

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

DATE: AUGUST 26, 1991

SUBJECT: MUR 3227 - GENERAL COUNSEL'S REPORT  
DATED AUGUST 22, 1991.

The above-captioned document was circulated to the  
Commission on THURSDAY, AUGUST 23, 1991 at 4:00 P.M..

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

Commissioner Aikens	<u>XXX</u>
Commissioner Elliott	<u>          </u>
Commissioner Josefiak	<u>          </u>
Commissioner McDonald	<u>          </u>
Commissioner McGarry	<u>          </u>
Commissioner Thomas	<u>          </u>

This matter will be placed on the meeting agenda  
for TUESDAY, SEPTEMBER 17, 1991.

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

93040982352

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 ) MUR 3227  
Senator David F. Durenberger; )  
Durenberger '94 Volunteer Committee )  
and Delwyn Olson, as treasurer. )

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the  
Federal Election Commission executive session on  
September 17, 1991, do hereby certify that the Commission  
decided by a vote of 5-1 to take the following actions in  
MUR 3227:

1. Find there is reason to believe that the  
Durenberger '94 Volunteer Committee and  
Delwyn Olson, as treasurer, violated  
2 U.S.C. § 434(b)(5)(A).
2. Decline, at this time, to enter into  
conciliation with the Durenberger '94  
Volunteer Committee and Delwyn Olson, as  
treasurer, prior to a finding of probable  
cause to believe.
3. Approve the factual and legal analysis and  
appropriate letters as recommended in the  
General Counsel's report dated August 22, 1991.

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

Attest:

9-18-91  
Date

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

93040982353



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 1, 1991

James Hamilton, Esquire  
Olwine, Connelly, Chase, O'Donnell & Weyher  
Suite 1000  
1701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

RE: MUR 3227  
Senator David F. Durenberger  
Durenberger '94 Volunteer  
Committee and Delwyn Olson, as  
treasurer

Dear Mr. Hamilton:

On March 6, 1991, your clients were notified that the Federal Election Commission had found reason to believe that Senator David F. Durenberger had knowingly and willfully violated 2 U.S.C. § 441i, a provision of the Federal Election Campaign Act of 1971, as amended (the "Act"). In addition, your clients were notified that the Commission had found reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, had violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2). On April 17, 1991, you submitted, on behalf of your clients, a request to enter into conciliation negotiations prior to a finding of probable cause to believe.

In the course of this matter, the Commission became aware of an additional violation of the Act by the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, and on September 17, 1991, found that there is reason to believe that the Committee and its treasurer, violated 2 U.S.C. § 434(b)(5)(A). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

Based on this additional violation and the need for further investigation, the Commission has determined to decline at this time to enter into conciliation prior to a finding of probable cause to believe. The Commission has issued the attached interrogatories and request for production of documents requesting your clients to provide information which will assist the Commission in carrying out its statutory duty

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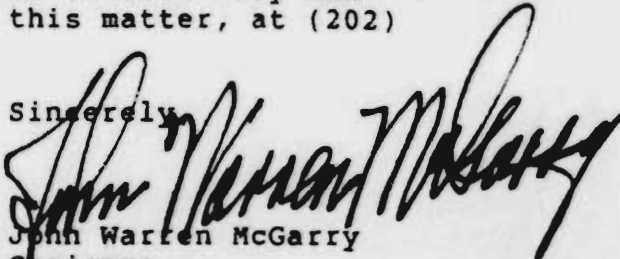
James Hamilton  
Page 2

of supervising compliance with the Act. Such information should be submitted to the Office of the General Counsel within 15 days of receipt of this letter.

At such time when the investigation in this matter has been completed, the Commission will reconsider your request to enter into conciliation prior to a finding of probable cause to believe.

If you have any questions, please contact Mary Ann Bumgarner, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,

  
John Warren McGarry  
Chairman

Enclosures  
Factual and Legal Analysis  
Interrogatories and  
Request for Production of  
Documents

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Durenberger '94 Volunteer Committee and Delwyn Olson,  
as treasurer **MUR: 3227**

On February 26, 1991, the Federal Election Commission found there is reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2) by failing to deposit and report a campaign contribution made payable to "Durenberger for U.S. Senate." In the course of this matter, the United States Senate Select Committee on Ethics ("Ethics Committee") wrote the Commission concerning an additional possible violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), by the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer.

Pursuant to 2 U.S.C. § 434(a)(1), each treasurer of a political committee shall file reports of receipts and disbursements and shall sign each such report. Section 434(b)(5)(A) further requires each report to disclose the name and address of each person to whom an expenditure in excess of \$200 within the calendar year is made, by the reporting committee, to meet a candidate or committee operating expense.

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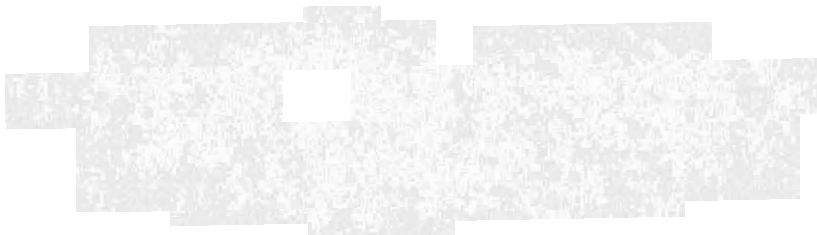
In addition, the date, amount, and purpose of such expenditure is also required to be reported. 2 U.S.C. § 434(a)(1).

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According to the Durenberger for U.S. Senate Volunteer Committee's 1983 Mid-Year Report's Schedule B of itemized disbursements, three transactions with "Black Manafort & Stone" are reported by the Committee. These three transactions, which took place on 1/7/83, 1/28/83, and 2/9/83, total \$30,000. Therefore, it appears that these are the transactions at issue in this matter. On the Committee's Schedule B, the reported purpose of these disbursements is "Professional Fee."

Based on the evidence available at this time, it appears that the disbursements reported as being made to Black Manafort & Stone may have instead been made to Mr. Gene Holderness.

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Based on the foregoing, it appears that the disbursements totaling \$30,000 made to Black Manafort & Stone, were in fact disbursements made to Gene Holderness. Therefore, there is reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. § 434(b)(5)(A) by failing to disclose the correct name and address of the person to whom the subject disbursements were made.

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)  
)  
)  
)

INTERROGATORIES AND REQUEST  
FOR PRODUCTION OF DOCUMENTS

TO: Durenberger '94 Volunteer Committee  
and Delwyn Olson, as treasurer  
c/o James Hamilton  
Olwine, Connelly, Chase, O'Donnell & Weyher  
Suite 1000  
1701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

In furtherance of its investigation in the  
above-captioned matter, the Federal Election Commission  
hereby requests that you submit answers in writing and under  
oath to the questions set forth below within 15 days of your  
receipt of this request. In addition, the Commission hereby  
requests that you produce the documents specified below, in  
their entirety, for inspection and copying at the Office of  
the General Counsel, Federal Election Commission, Room 659,  
999 E Street, N.W., Washington, D.C. 20463, on or before the  
same deadline, and continue to produce those documents each  
day thereafter as may be necessary for counsel for the  
Commission to complete their examination and reproduction of  
those documents. Clear and legible copies or duplicates of  
the documents which, where applicable, show both sides of the  
documents may be submitted in lieu of the production of the  
originals.

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INSTRUCTIONS

In answering these interrogatories and request for production of documents, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each interrogatory propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input, and those who assisted in drafting the interrogatory response.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Should you claim a privilege with respect to any documents, communications, or other items about which information is requested by any of the following interrogatories and requests for production of documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

Unless otherwise indicated, the discovery request shall refer to the time period from January 1, 1983, to the present.

The following interrogatories and requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which and the manner in which such further or different information came to your attention.

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DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named respondents in this action to whom these discovery requests are addressed, including all officers, employees, agents or attorneys thereof.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, the number of pages comprising the document.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and the telephone numbers, the present occupation or position of such person, the nature of the connection or association that person has to any party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and requests for the production of

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documents any documents and materials which may otherwise be construed to be out of their scope.

#### QUESTIONS AND REQUEST FOR DOCUMENTS

1. According to the the Durenberger for U.S. Senate Volunteer Committee's 1983 Mid-Year Report's Schedule B of itemized disbursements, three transactions with "Black Manafort & Stone" are reported by the Committee. These three transactions, totaling \$30,000, were reported as taking place on 1/7/83, 1/28/83, and 2/9/83 and in the separate amounts of \$20,000, \$5,000 and \$5,000 respectively.
  - a. Specify and describe the various purpose(s) of each disbursement made to Black Manafort & Stone: such as consulting fees, photocopy expenses, media production and other similar descriptive language that reflects the actual purpose of each disbursement.
  - b. Produce all documents concerning or in any way relating or pertaining to the three disbursements made by the Committee to Black Manafort & Stone including, but not limited to, copies of any checks, invoices, commercial paper and correspondence.
2.
  - a. Identify "Gene Holderness" and state his connection to or involvement with the Durenberger for U.S. Senate Volunteer Committee.
  - b. Identify any connection to or involvement between "Gene Holderness" and Black Manafort & Stone.
  - c. Produce all documents relating or pertaining to any correspondence or communication between "Gene Holderness" and either the Durenberger for U.S. Senate Volunteer Committee or Black Manafort & Stone.
3. Specify any knowledge of or involvement by Senator David F. Durenberger in regard to the three subject disbursements reported by the Durenberger for U.S. Senate Volunteer Committee as being made to Black Manafort & Stone.

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4. Identify all persons who provided any information used in responding to these Questions and Document Requests.

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FEDERAL ELECTION COMMISSION  
MAIN CLERK ROOM

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

SUITE 1000

1701 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006

TELEPHONE: (202) 835-0500

FACSIMILE: (202) 835-1591

91 OCT -7 AM 10:19

780 SEVENTH AVENUE  
NEW YORK, N.Y. 10019  
(212) 281-8000

220 SUNRISE AVENUE  
PALM BEACH, FL. 33480  
(407) 833-8722

October 4, 1991

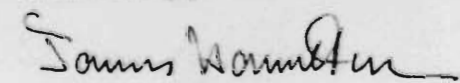
Re: MUR 3227

Dear Ms. Bumgarner:

This letter is to request that the Durenberger '94 Volunteer Committee and Delwin Olsen as treasurer be given until December 1, 1991 to respond to the interrogatories and request for production of documents mailed to me on October 1, 1991. The reason for this request is that -- because of my travel schedule, several upcoming depositions, another extensive document request from the government, the work necessary to respond to the Commission's requests, and the fact that I am changing law firms -- additional time is needed to respond.

I appreciate the Commission's consideration of this request.

Sincerely,



James Hamilton

Mary Ann Bumgarner, Esq.  
Office of General Counsel  
Federal Elections Commission  
999 E St., N.W.  
Washington, D.C. 20463

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FEDERAL ELECTION COMMISSION  
OFFICE OF GENERAL COUNSEL  
91 OCT -7 PM 4:07



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

October 10, 1991

James Hamilton, Esquire  
Olwine, Connelly, Chase, O'Donnell & Weyher  
Suite 1000  
1701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

RE: MUR 3227  
Durenberger '94 Volunteer  
Committee and Delwyn Olson,  
as treasurer

Dear Mr. Hamilton:

This is in response to your letter dated October 4, 1991, which we received on October 7, 1991, requesting an extension of 42 days to respond to the Commission's reason to believe finding and interrogatories and request for documents. After considering the circumstances presented in your letter, I have granted the requested extension. Since your requested due date of December 1, 1991, falls on a Sunday, your response is due by the close of business Monday, December 2, 1991.

If you have any questions, please contact Mary Ann Bumgarner, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,

Lawrence M. Noble  
General Counsel

A handwritten signature in dark ink, appearing to read "Robert W. Bonham, III", is written over the typed name.

BY: Robert W. Bonham, III  
Assistant General Counsel

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66C 3561

SWIDLER & BERLIN

CHARTERED  
3000 K STREET, N.W.  
SUITE 300  
WASHINGTON, D.C. 20007-3851  
(202) 944-4300

JAMES HAMILTON  
ATTORNEY AT LAW

DIRECT DIAL  
(202) 944-4826  
TELEX 701131  
TELECOPIER (202) 944-4296

November 27, 1991

By Hand Delivery

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

Re: MUR 3227, Durenberger '94 Volunteer Committee and  
Delwyn Olson, Treasurer

Dear Mr. Noble:

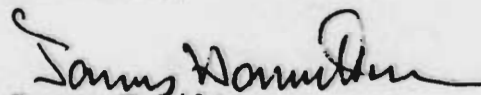
Pursuant to 11 C.F.R. § 111.18(f), the Durenberger '94  
Volunteer Committee and Delwyn Olson, its Treasurer, request the  
opportunity to pursue pre-probable cause conciliation concerning  
the matter raised in your October 1, 1991 letter to me.

The enclosed memorandum sets forth Respondents' views on the  
merits of this matter. The memorandum and its attachment also  
respond to the Commission's "Questions and Request for Documents"  
that accompanied its October 1, 1991 letter.

We believe that conciliation discussions as to the immediate  
matter should proceed in conjunction with conciliation  
discussions concerning the other two matters referred to in your  
October 1, 1991 letter. We already have submitted letters and  
memoranda concerning these matters to the Commission.

Please note my new association and address.

Sincerely,



James Hamilton  
Counsel for the Durenberger '94  
Volunteer Committee and  
Delwyn Olson, as Treasurer

Enclosure

91 NOV 27 PM 4:27

FEDERAL ELECTION COMMISSION  
RECEIVED  
NOV 27 1991

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Before the  
FEDERAL ELECTION COMMISSION  
Washington, D.C.

In the matter of )  
 )  
Senator David F. Durenberger ) MUR 3227  
Durenberger '94 Volunteer )  
Committee and Delwyn Olson, )  
as Treasurer )

To: The Commission

RESPONSE OF THE DURENBERGER '94  
VOLUNTEER COMMITTEE AND DELWYN OLSON,  
TREASURER, TO COMMISSION'S SEPTEMBER 17, 1991  
REASON TO BELIEVE FINDINGS

93040982368  
The Durenberger '94 Volunteer Committee and Delwyn Olson, its Treasurer, (hereinafter the Volunteer Committee),<sup>1/</sup> hereby respond (1) to the Commission's September 17, 1991 finding that there is reason to believe the Volunteer Committee violated 2 U.S.C. § 434(b)(5)(A) and (2) to the Commission's related "Questions and Request for Documents." As stated in the accompanying letter to the Commission's General Counsel, the Volunteer Committee desires to pursue pre-probable cause conciliation about this matter. Nonetheless, the Volunteer Committee submits this response to provide the Commission the Volunteer Committee's views as to the matter involved and the information the Commission has requested.<sup>2/</sup>

---

<sup>1/</sup> Mr. Olson was not Treasurer of Senator Durenberger's campaign committee at the time of the events at issue.

<sup>2/</sup> With the exception of FEC filings (which the Commission already has), only one document called for by Item 1.b of the Commission's "Questions and Request for Documents" has been located and is being produced herewith. However, that document,  
(continued...)

As the Commission has recognized, on January 7, January 28 and February 12, 1983 the Volunteer Committee made three payments totalling \$30,000 to Black, Manafort & Stone. Subsequently, Black, Manafort & Stone transferred \$30,000 to Gene Holderness. The reasons underlying these transactions were legitimate and did not involve any intent to mislead the Commission.

Gene Holderness was Senator Durenberger's campaign manager for the 1982 campaign. Because this was the first campaign Mr. Holderness had managed, Senator Durenberger asked Charles Black of Black, Manafort & Stone, the Senator's chief campaign strategist, to assume a more direct role.<sup>2/</sup> Consequently, Mr. Black was in almost daily contact with Mr. Holderness and others in the campaign and visited Minnesota on a number of occasions. Mr. Black was the campaign's principal decision-maker.

<sup>2/</sup> (...continued)

which mentions a bonus paid to Gene Holderness, incorrectly states the amount of the bonus as \$10,000. See the discussion below.

Ms. Mary Ann Bumgarner of the General Counsel's office has agreed that Request 2.d. need not be responded to at this time. As described in more detail below, Mr. Holderness was the campaign manager and Charles Black of Black, Manafort & Stone was the chief campaign strategist. Production of "all documents relating or pertaining to any correspondence or communication between" Mr. Holderness and either the Volunteer Committee or Black, Manafort & Stone would encompass records totally unrelated to the present inquiry.

<sup>3/</sup> Mr. Holderness previously had never held a paid campaign position, but had participated only as a volunteer.

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Mr. Holderness, who was in the real estate business, took a substantial reduction in compensation to become campaign manager. Moreover, during 1982 his real estate business encountered difficulties so that he no longer received substantial supplementary income from it. This decline in income forced him to consider resigning his campaign post. To induce Mr. Holderness to remain with the campaign, Senator Durenberger agreed that Mr. Holderness would receive a \$30,000 bonus at the end of the campaign if funds were available.

The \$30,000 was paid through Black, Manafort & Stone to avoid upsetting other staff members who would have been unhappy had they known Mr. Holderness received a bonus. Another staff member had directly received a sizeable bonus and some staff members were disturbed about it. Making the payment through Black, Manafort & Stone was a means to preserve good relations among campaign workers; it was not in any way intended to deceive the FEC. A bonus to the campaign manager violated no law and there was no untoward reason not to inform the government about it.

Using Black, Manafort & Stone as the vehicle to pay Mr. Holderness was viewed as appropriate because Mr. Black was the campaign's principal strategist and decision-maker, and because Mr. Holderness, despite his title, received instructions and direction from Mr. Black. In other words, as a practical matter Mr. Holderness worked under Mr. Black, although there was no formal employment relationship.

As remarked, this was the first campaign Mr. Holderness had managed. Mr. Black, on the other hand, was experienced and a recognized expert. Senator Durenberger and he had agreed that, while Mr. Holderness would have the title of campaign manager and be the principal aide in Minnesota, overall direction of the campaign would come from Mr. Black. In this circumstance, it seemed appropriate for Mr. Holderness's bonus payment to come from Mr. Black's firm, particularly because the reason for doing so -- preserving good relations among staff members -- was benign, indeed salutary.

Senator Durenberger was aware contemporaneously that payments to Mr. Holderness were being made through Black, Manafort & Stone. He does not recall being apprised of the personnel reasons for doing this, or the reasons why it appeared appropriate to handle payment in this fashion.



We respectfully submit that the Commission should reconsider its reason to believe finding and dismiss this matter. Several factors support this result:

1. As demonstrated, using Black, Manafort & Stone to pay Mr. Holderness was done for valid reasons -- to reduce staff friction. Paying him a bonus was not improper; indeed, it was the only way to ensure that he remained with the campaign. There was no intent -- and no reason -- to deceive the FEC about this.

2. At the time of the events, it appeared appropriate to pay Mr. Holderness through Black, Manafort & Stone because Mr. Holderness essentially worked for Mr. Black, who had overall control of the campaign.

3.

4. Although a technical violation now appears, no one has been financially harmed. Mr. Holderness received what he was due

-- and paid taxes on it. Mr. Black was not unjustly enriched.  
The United States suffered no financial harm.

5.

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6. Finally, the events involved are very old and essentially involve a technical violation not accompanied by improper intent. No useful purpose would be served by the Commission's committing the considerable resources necessary -- given the factual and legal issues involved -- to litigate this matter to a conclusion.

\* \* \* \*

For the above reasons, we request that the September 17, 1991 reason to believe finding be reconsidered and this matter dismissed.

Respectfully submitted,

James Hamilton / MCA  
James Hamilton  
Mary C. Albert  
SWIDLER & BERLIN  
3000 K Street N.W.  
Washington, D.C. 20007

Richard L. Evans / MCA  
Richard L. Evans  
SR-154 Russell Senate Bldg.  
The United States Senate  
Washington, D.C. 20510

Counsel for  
Senator David F. Durenberger

F:\SECY\VICKIEG\DURERESP.FEC

11/27/91 12:57pm

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92 MAY 15 PM 4:13

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SECRETARIAT

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
Senator David F. Durenberger, ) MUR 3227  
Durenberger '94 Volunteer )  
Committee and Delwyn Olson, as )  
treasurer )

**GENERAL COUNSEL'S REPORT**

**I. BACKGROUND**

On February 26, 1991, the Federal Election Commission ("Commission") found reason to believe that Senator David F. Durenberger knowingly and willfully violated 2 U.S.C. § 441i of the Federal Election Campaign Act of 1971, as amended (the "Act"), by exceeding the limit prohibiting the acceptance of an honorarium of more than \$2,000 for an appearance, speech or article.<sup>1</sup> On that same date, the Commission found reason to believe that the Durenberger '94 Volunteer Committee (the "Committee") and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2) by failing to deposit and report a campaign contribution made payable to "Durenberger for U.S. Senate." On April 17, 1991, both Senator Durenberger and the Committee requested pre-probable cause conciliation.<sup>2</sup>

Attachments 1 and 2.

1. The Commission's jurisdiction over honoraria transactions before August 14, 1991 remains intact. FEC v. Wright, 777 F. Supp. 525 (N.D. Tex. 1991).

2. Senator Durenberger and the Committee are both represented by the same counsel in this matter.

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In the course of this investigation, this Office received a document from the United States Senate Select Committee on Ethics (the "Ethics Committee") that referred to a separate violation of the Act. Attachment 3. Based on information contained in the document, reports filed with the Commission and a telephone conversation with Victor Baird, counsel for the Ethics Committee, the Commission found on September 17, 1991 reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, also violated 2 U.S.C. § 434(b)(5)(A). On that same date, the Commission declined to enter into conciliation with the Committee and Senator Durenberger, citing the additional violation and the apparent need for further investigation. In a letter dated November 27, 1991, the Committee requested pre-probable cause conciliation with regard to the recent reason to believe finding by the Commission. Attachment 4.

## II. FACTUAL AND LEGAL ANALYSIS

### A. Introduction

This report first addresses the violation of 2 U.S.C. § 441i by Senator David F. Durenberger. In Section B, the report discusses the arrangement between Senator Durenberger and Piranha Press, the defenses set forth by Senator Durenberger's counsel in response to the Commission's reason to believe finding, and the evidence that supports the conclusion that this arrangement was a mechanism to evade the statutory limits of section 441i. The defenses asserted by counsel include: the Senator did not receive over \$2,000 for any

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appearance, the Senator did not knowingly and willfully violate section 441i, and the Senator received a stipend for continuing services. The section concludes that each payment to Piranha Press for the Senator's appearances was in reality an honorarium, not a stipend. Additionally, the section concludes that the payments received by Senator Durenberger for at least twenty "Piranha Press" appearances exceeded \$2,000 per appearance and that his violation was knowing and willful. Based on the foregoing, this section recommends that the Commission enter into conciliation with Senator Durenberger prior to a finding of probable cause to believe.

In Section C, the report addresses the failure by the Committee to deposit and report a contribution in violation of 2 U.S.C. §§ 432(h)(1) and 434(b)(2). Further, this section discusses the background to this violation and the response from Committee's counsel to the Commission's findings. In its response, counsel asserts that the contribution check at issue was not deposited or reported by the Committee because it was not received by the Committee. This section concludes that the check was a campaign contribution and was sent to the Senator's campaign committee. Therefore, this section recommends that the Commission enter into conciliation with the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, prior to a finding of probable cause to believe.

Finally, Section C discusses the investigation of the Committee for its failure to report the correct recipient of certain disbursements in violation of section 434(b)(5)(A).

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The report concludes by recommending that the Commission enter into conciliation with the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, prior to a finding of probable cause to believe.

B. Senator David F. Durenberger

1. The Arrangement Between Senator Durenberger and Piranha Press

On August 8, 1990, the Ethics Committee wrote the Commission concerning possible violations of the Act by Senator Durenberger. The letter was accompanied by the Report of the Ethics Committee (the "Committee Report") and the Report of Special Counsel.<sup>3</sup> According to the Committee Report, Piranha Press published two books by Senator Durenberger. It first published Neither Madmen Nor Messiahs, a collection of "white papers" on national defense and security issues, in the fall of 1984. Committee Report at 4. In April of 1986, Piranha Press published a collection of speeches by the Senator on health care topics entitled, Prescription of Change. Id.

The Committee Report further stated that Senator Durenberger entered into an agreement with Piranha Press whereby he made 113 appearances before various trade associations and other businesses across the country in 1985 and 1986 to promote these books. The sponsoring organizations paid Piranha Press a fee, typically between \$1,000 and \$5,000 plus travel expenses, for each appearance by

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3. Both the Committee Report and the Report of Special Counsel were attachments to the First General Counsel's Report in this matter. These reports are referenced in this report.

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the Senator. Pursuant to the agreement, Piranha Press in turn paid Senator Durenberger a total of \$100,000 in quarterly payments during the two year period at issue. See Committee Report at 4-5.

The Committee Report concluded that the arrangement between Senator Durenberger and Piranha Press was not a good faith book publishing or promotional contract. The Report concluded that the arrangement instead was a means of converting into "stipendiary income" fees which otherwise would have been treated as honoraria subject to 2 U.S.C.

§ 441i. Committee Report at 5. The Report further concluded that the principal purpose of the agreement was to permit the Senator to earn fees for speaking engagements, rather than to promote the sale of Senator Durenberger's books. Id.

Over the two year term of the arrangement, the Senator's "promotional appearances" generated approximately \$248,300 in speaking fees for Piranha Press. In contrast, Piranha Press earned only approximately \$15,500 in book sales during that period. Id.

2. Response by Senator Durenberger

a. The Senator Did Not Receive Over \$2,000 For Any Appearance.


In response to the Commission's reason to believe finding (See Attachment 1), counsel for Senator Durenberger at the outset claims that the Senator did not violate section 441i because he never received more than \$2,000 for any appearance. Counsel first argues that it is invalid to attribute the entire

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amount received by Piranha Press for the Senator's appearances to Senator Durenberger. He points out that section 441i expressly excludes from the calculation of the amount of any honorarium any fees or commissions paid to "third parties." Counsel then asserts that Piranha Press collected money for the appearances and deducted its share, thereby creating a payment analogous to the agent's fees or commissions excluded by the statute. Thus, consistent with section 441i, the amount attributed to Senator Durenberger should consist of the portion of the fees remaining after Piranha Press deducted its share.

Counsel next argues that "even assuming arguendo that the payments he received should be considered honoraria," it is difficult to conclude that Senator Durenberger received more than \$2,000 for any appearance made on behalf of Piranha Press. Counsel asserts that Senator Durenberger received a total of \$100,000 in quarterly installments over the two year term of the agreement rather than any specific amount for a specific speech. Therefore, counsel asserts that if the \$100,000 in speaking fees Senator Durenberger received is equally divided among the 113 speeches, the amount allocated to each would be less than \$1,000. Counsel adds that the Commission has not identified any instance where the Senator was paid more than \$2,000 for any speech.



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b. The Senator Did Not Knowingly And  
Willfully Violate 2 U.S.C. § 441i.

Counsel for Senator Durenberger argues that there is no basis for concluding that Senator Durenberger knowingly and willfully violated section 441i. Counsel asserts that Senator Durenberger acted in reliance on counsel in the good faith belief that the payments he received from Piranha Press did not in fact constitute honoraria. Counsel argues that this perception was enhanced in 1986 by the published remarks of an FEC spokesperson.

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Counsel asserts that prior to entering the Piranha Press agreement, Senator Durenberger sought and relied upon the advice of counsel as to its propriety. According to counsel, the Senator's attorneys at the time drafted the publishing agreement in conjunction with counsel for Piranha Press. They also advised him that the payments contemplated by the agreement "satisfied the test of being payments for services on a fixed and continuing basis and thus constitute a stipend rather than an honorarium." Counsel also asserts that prior to performing any services under the contract, the Senator followed a recommendation of his attorneys to seek an advisory opinion from the Commission. Further, the Senator relied upon his counsel to provide all necessary information to the Commission in the advisory opinion request.

Counsel states that the request asked the Commission to advise counsel if any additional information was needed for issuance of an advisory opinion. Counsel adds that the

Commission informed the Senator's counsel that he would be contacted if further information was needed. Counsel cites 11 C.F.R. § 112.1(d) which provides, in part, that the Office of the General Counsel shall specify any deficiencies in the request to the requesting person. Counsel states that the request for the advisory opinion referenced the Senator's contract with Piranha Press, but did not include a copy. According to counsel, the Commission requested neither a copy of the contract nor any other additional information from Senator Durenberger's counsel.

Counsel additionally states that after obtaining the advisory opinion, Senator Durenberger's Administrative Assistant ("A.A.") specifically asked the Senator's then counsel whether the request for an advisory opinion fairly reflected the facts that invitations to the Senator for speaking engagements would be referred to Piranha Press and that the organizations sponsoring the appearances would pay a fee to Piranha. Counsel alleges that Senator Durenberger's counsel assured the A.A. that the advisory opinion request was based upon a fair representation of that arrangement.

Counsel moreover states that an FEC spokesperson reinforced the Senator's perception that his payments from Piranha Press were legally proper. Shortly after the 1985 Piranha Press payments were reported in the Senator's Financial Disclosure Statement, an article appeared in the St. Paul Pioneer Press Dispatch suggesting that the Piranha Press arrangement was designed to circumvent the limits on honorarium

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income. Counsel states that the article reported that the organization sponsoring the Senator's appearances paid the publisher a fee and that the request for an advisory opinion from the Commission had not disclosed that the book promotions were tantamount to paid speaking engagements. However, according to counsel, the article quoted an FEC spokesperson to the effect that these facts would not change the Commission's conclusion that the payments Senator Durenberger received from Piranha constituted a stipend for continuing services and not honoraria. Counsel has not provided a copy of the newspaper article at issue. He asserts that, when told of the nature of the promotions, FEC assistant press officer Sharon Snyder said, "I don't think that changes the fact that he is getting a stipend (a fixed amount) and not an honorarium... He is performing services for the company and has a contract with the publisher."

Therefore, based on the allegations regarding the Senator's reliance on the advice of counsel, the Commission's failure to notify the Senator that his arrangement with Piranha Press was improper, a Commission spokesperson's response that there was "no problem" with the arrangement, counsel argues that no basis exists for concluding that Senator Durenberger knowingly and willfully violated 2 U.S.C. § 441i.

c. The Senator Received A Stipend For Continuing Services.

In the response from Senator Durenberger, counsel argues that the payments to the Senator were the result of a



continuing compensatory relationship and, therefore, should be characterized as stipendiary. Pursuant to the publishing agreement, Piranha Press paid Senator Durenberger \$12,500 per quarter for two years for his appearances and did not separately compensate the Senator for each appearance. According to counsel, Piranha Press compensated the Senator for his continuing service pursuant to the agreement and, therefore, these payments "as a matter of law," must be characterized as a stipend, not as honoraria.

Counsel notes that, although the Commission questions whether the contents of Senator Durenberger's speeches were sufficiently promotional in nature, the publisher did not complain about Senator Durenberger's performance under the contract. Furthermore, counsel argues that while the Senator's continuing services may have somewhat differed from those described in the request for the advisory opinion, that factor does not negate the continuing nature of the services. According to counsel, under the Commission's rules and advisory opinions, Senator Durenberger could have performed a variety of services for Piranha Press for which he could have received payments that would have been characterized as stipends. However, counsel does concede that if in fact Senator Durenberger did not perform promotional services, he is not entitled to a safe harbour for his conduct under the Act.

### 3. Legal Analysis

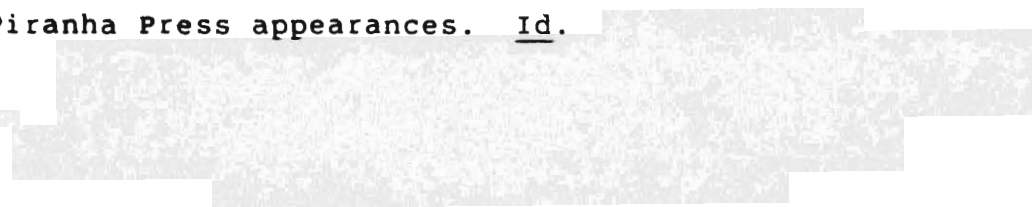
The arrangement between the Senator and Piranha Press apparently was a mechanism to evade the statutory limits of

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section 441i. Therefore, the entire amount generated by the Senator's Piranha Press appearances, \$248,300, constitutes honoraria subject to the limits of section 441i. The applicable law, the evidence supporting this conclusion, and the arguments presented by Senator Durenberger's counsel are addressed in the following analysis.

Pursuant to 2 U.S.C. § 441i, no person while an elected or appointed officer of any branch of the federal government shall accept any honorarium of more than \$2,000 (excluding amounts accepted for actual travel and subsistence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech or article. While this statute has been repealed, the Commission maintains jurisdiction over honoraria transactions before August 14, 1991. See supra p. 1 & note 1.

The Senator's speeches uniformly appear to have resulted from invitations to the Senator in his capacity as a United States Senator to deliver what would otherwise have been treated as traditional honoraria speeches. Committee Report at 5. None was the result of invitations to the Senator to speak about or to promote his books. Nor were any initiated by Piranha Press. Id. Indeed, the evidence shows that, at the Senator's direction, his staff forwarded to the publisher a number of honoraria invitations to be handled instead as Piranha Press appearances. Id.



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Senator Durenberger treated 23 such appearances as Piranha Press promotional appearances, whereas other Members of Congress who participated in the same event treated their speaking appearances as honoraria events. In addition, the evidence shows that Senator Durenberger did not mention either his books or his publisher during many of the Piranha Press appearances. Moreover, the few references to the books he made were often fleeting and typically belittled the books or the publisher. Id. The evidence further demonstrates that on several occasions groups were told that it would be unnecessary to display the Senator's books at his appearance. Id.

Senator Durenberger's Piranha Press speeches were indistinguishable from his traditional honoraria appearances. In fact, on 26 occasions, or approximately 30% of the Piranha Press appearances, sponsoring organizations paid Senator Durenberger directly. Committee Report at 6. These checks, totaling \$56,000, were deposited into the Piranha Press bank account. Id. Twenty-one of these checks reflected Senator Durenberger's personal endorsement to Piranha Press. Id.

On several occasions, a member of the Senator's staff, a representative of Piranha Press, or the Senator's then counsel attempted to coax groups that had invited the Senator to speak to increase the payment often to as much as \$5,000. For example, Robert Lively of the National Rural Electric Cooperative Association (the "NRECA") states in an affidavit (Attachment 5) that he was told by a Piranha Press

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representative that Senator Durenberger would not appear before his group unless the Senator received a \$5,000 fee, instead of the \$2,000 honorarium offered by NRECA. He further states that he felt the Piranha Press publisher was pressuring the NRECA. As a result, the NRECA was prepared to withdraw the invitation to the Senator since it had decided not to pay the \$5,000 fee. Significantly, Mr. Lively states that, at the time he extended the invitation, he was unaware that Senator Durenberger had published a book(s) and it was not the purpose or intent of the NRECA to have the Senator promote his books. Further, Mr. Lively asserts that the NRECA was pressured to buy 500 of the Senator's books, although it only expected 40 or 50 attendees. While eventually Piranha Press agreed to the \$2,000 fee for the Senator, Mr. Lively states that none of the Senator's books was displayed or available for sale at the NRECA conference.

Based on the foregoing evidence, it appears each payment made to Piranha Press for the Senator's appearances was in reality an honorarium. Thus, the entire amount generated by the Senator's Piranha Press appearances, \$248,300, is attributable to Senator Durenberger and subject to section 441i. Included in the \$248,300 amount attributable to Senator Durenberger as honoraria are twenty checks, each in excess of \$2,000.<sup>4</sup> Report of Special Counsel at 59. The twenty checks

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4. Illustratively, one such check for \$5,500, was channeled through the publisher and resulted from an appearance by Senator Durenberger before the Public Securities Association. Nonetheless, the invitation extended to the Senator made no

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total \$85,500. Attachment 6. Therefore, Senator Durenberger exceeded the \$2,000 per appearance limitation on honoraria by \$45,500, in violation of 2 U.S.C. § 441i.

Furthermore, the evidence does not support counsel's argument, as noted above, that this arrangement is analogous to agents' fees or commissions. First, the written agreement between the Senator and Piranha Press varied in many key respects from a standard book publishing contract. Report of Special Counsel at 48. According to the Report of Special Counsel, publishers do not customarily pay an author to promote the author's book. Second, the agreement obligated the Senator to make "special appearances to discuss, speak on or otherwise promote the [books] as are mutually agreed upon by the Publisher and Author." Id. Yet, significantly, the Senator seldom mentioned the books during the Piranha Press appearances and when he did so, the reference was fleeting.

Moreover, Piranha Press did not act as though it were an agent of the Senator's. In the Senator's response (see Attachment 1), counsel recognizes the Commission's questions concerning the contents of Senator Durenberger's speeches as being sufficiently promotional in nature. According to counsel, however, "the publisher did not complain about Senator Durenberger's performance under the contract." Indeed, Piranha Press made no effort to promote the books and none of

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(Footnote 4 continued from previous page)  
reference to the Senator's books, requested that the Senator speak before the "Municipal Securities Division," and offered to pay an "honorarium" to the Senator.

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the appearances was initiated by Piranha Press. In addition, the income generated by the Senator's "promotional appearances" over the two year period of the agreement far exceeded the income generated in book sales.

Counsel next argues that the Commission is unable to conclude that the Senator received more than \$2,000 for any appearance made on behalf of Piranha Press. As discussed above, counsel asserts that the amount allocated to each appearance should be less than \$1,000. However, as already shown, payments received for at least twenty Piranha Press appearances by the Senator individually exceeded \$2,000.

Counsel's second line of argument concerns the Commission's finding of a knowing and willful violation by the Senator. Counsel argues it would be wrong for the Commission to find that section 441i was knowingly and willfully violated because the Senator had relied on counsel and the advisory opinion issued by the Commission. Senator Durenberger's purported reliance on the Commission's advisory opinion is not a valid defense. Because the facts as put forth in the advisory opinion request differed significantly from the facts of the actual undertaking and because it appears the Senator reviewed both the request and draft opinion, this Office believes there is sufficient basis to conclude that Senator Durenberger knowingly and willfully violated section 441i through the arrangement with Piranha Press.

Pursuant to 2 U.S.C. § 437f(c), only those persons involved in the specific transaction or activity with respect

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to which such advisory opinion is rendered and those persons involved in any specific transaction which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered may rely on such opinions. To avoid sanctions under the Act for such reliance, persons must have acted "in good faith in accordance with the provisions and findings of such advisory opinion." 2 U.S.C. § 437f(c)(2) (emphasis added).

The Senator engaged in conduct different from that described in his advisory opinion request and discussed in the resulting opinion. Report of Special Counsel at 100. Commission regulations specify that "[a]dvisory opinion requests shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 C.F.R. § 112.1(c) (emphasis added). Nevertheless, Senator Durenberger's request for the advisory opinion omitted at least three crucial facts. One, Senator Durenberger's contract called for the groups he addressed to pay the publisher a fee. Two, the appearances stemmed from requests for speeches, not book promotions. And, three, the promotional events were indistinguishable from traditional honorarium events. Id. Where, as here, a distinction exists between the facts presented in the advisory opinion request and the facts as they occurred, such a distinction precludes any reliance on the advisory opinion. See FEC v. National Conservative Political Action Committee, 647 F. Supp. 987, 995 (S.D.N.Y. 1986). Thus, since the facts

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set out in the advisory opinion request by Senator Durenberger significantly differed from the actual facts of the arrangement, reliance on the advisory opinion as a defense for the arrangement with Piranha Press lacks merit.

Furthermore, the Special Counsel indicated that the facts omitted from the advisory opinion request were either already clearly known or contemplated at the time of the request.

Report of Special Counsel at 100. Although Senator Durenberger's request apparently referenced an existing contract with Piranha Press, he failed to provide a copy of that document to the Commission. In addition, Senator Durenberger apparently personally reviewed both the final request prior to submission to the Commission as well as the draft opinion released by the Commission prior to its consideration at a Commission meeting. Report of Special Counsel at 100. Senator Durenberger, therefore, had ample opportunity to provide this additional information, including a copy of the contract.

Counsel attempts to place on the Commission the burden to request other information, rather than on the Senator, the requesting party, to provide all necessary information. The advisory opinion request rested on the premise that the Senator's appearances were for genuine book promotions. The information provided by the request appeared to be complete and, therefore, it was unnecessary for the Commission to request further information. For the Commission to have requested additional information, it would have needed to

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conclude first that the representations in the request were incomplete or warranted disbelief. Even if the Commission had requested a copy of the contract, for example, the fact that requests for speeches generated the payments would not have been evident. In addition, the fact that the promotional events were identical to traditional honoraria events would not have been evident.

For these reasons, then, the responsibility for incomplete information in the subject advisory opinion lies not with the Commission, but with those who requested it. It is the view of this Office that, based on the Senator's knowledge of and participation in the challenged events, he knowingly and willfully violated the honoraria limits of section 441i through his arrangement with Piranha Press.<sup>5</sup>

Lastly, counsel for Senator Durenberger argues that the Senator had a continuing compensatory relationship with Piranha Press and, therefore, the payments received by Senator Durenberger are stipendiary. Counsel cites to Advisory Opinion 1975-46, in which the Commission determined that where circumstances indicate a "continuing compensatory relationship"

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5. Counsel for the Senator attempts to rely on the statement by Sharon Snyder, presented above, that apparently was made after Ms. Snyder heard that the organizations sponsoring the Senator's appearances paid Piranha Press a fee and that the book promotions were tantamount to paid speaking engagements. Ms. Snyder's recollection, at the time this comment was made, was that the Commission was unaware that the information presented in the advisory opinion request was incomplete. Nonetheless, pursuant to 2 U.S.C. § 437f(b), no opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

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between the parties, such payments are characterized as stipends and not honoraria. Pursuant to 11 C.F.R. § 110.12(c)(3), a stipend is defined as a payment for services on a continuing basis. That regulation expressly provides that the term "honorarium" does not include funds characterized as stipends.

Counsel for Senator Durenberger argues that even though the Senator's services may have been different from those described in his advisory opinion request, this factor does not mean that they were not continuing services. Counsel asserts therefore that payments for continuing services "as a matter of law" must be characterized as a stipend, not as honoraria.

Based on the evidence, it does not appear that Senator Durenberger performed any continuing services on behalf of Piranha Press. As discussed above, Senator Durenberger rarely mentioned either his books or publisher during many of the Piranha Press appearances. In those instances when he referred to the books, his comments were often fleeting and usually only belittled the books. Committee Report at 5. While counsel for the Senator argues that the publisher did not complain about the Senator Durenberger's performance under the contract, that has no bearing on the fact that Senator Durenberger did not in fact promote the books. Since the Senator did not promote the books at the Piranha Press appearances, it is difficult to determine what "continuing services" he performed for Piranha Press. In fact, there is no available evidence indicating Senator Durenberger performed any continuing services in

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connection with Piranha Press. As conceded by his own counsel, where the Senator did not perform continuing services, he is not entitled to a "safe harbour." Thus, the monies paid for the Senator's appearances were not stipendiary income, but instead honoraria.

The Commission has sufficient information to support a conclusion that the Senator committed a knowing and willful violation of 2 U.S.C. § 441i. The Office of the General Counsel therefore recommends that the Commission enter into pre-probable cause conciliation with Senator Durenberger.

C. Durenberger '94 Volunteer Committee and Delwyn Olson, as Treasurer

1. Failure To Deposit And Report Contribution

a. Factual Background

According to the Senate Ethics Committee Report, on December 5, 1986 Senator Durenberger addressed the annual meeting of the Pathology Practice Association (the "Association"). Instead of paying the Senator an honorarium for his speech, the Association's federal political action committee issued to the Senator's authorized principal campaign committee a \$5,000 check payable to "Durenberger for U.S. Senate." Paul Johnson, a registered lobbyist for the Association, explained in an affidavit that this payment was intended as a campaign contribution. Attachment 7. According to Mr. Johnson, the Association customarily does not pay an honorarium without a formal request. Mr. Johnson states that Senator Durenberger did not request an honorarium and,

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therefore, the Association made the \$5,000 contribution to Senator Durenberger's re-election campaign.

The Report of the Special Counsel states that the campaign contribution was deposited without endorsement into the Piranha Press account. The publisher paid the Senator from this account for his "promotional appearances." It is unclear how the check ended in the publisher's hands. The Committee did not report this campaign contribution to the Commission as required by 2 U.S.C. § 434(b).

b. Response by Committee

In response to the Commission's reason to believe finding (see Attachment 2), counsel for the Committee asserts that the check from the Association was not deposited or reported by the Committee because it was not received by the Committee. According to counsel, the Association extended an invitation to the Senator to speak at its annual meeting and offered to pay the Senator an honorarium. Subsequently, the speech was designated as a Piranha Press appearance.

According to the Senator's records, Karen Doyne, an employee of Fleishman-Hillard, Inc. and a registered lobbyist for the Association, handled the scheduling and other arrangements for the appearance.<sup>6</sup> Counsel states that Piranha Press sent a memorandum regarding the appearance to Ms. Doyne, and that the Senator's records indicate that the Association was to pay Piranha Press a fee for the appearance. Counsel

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6. Fleishman-Hillard is the registered lobbyist for the Association.

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asserts that neither the Senator's records nor documents of the Association explain why the Association issued a check to the Senator's campaign instead of Piranha Press. Counsel also notes that while the Johnson affidavit states that Johnson supervised the arrangements for this particular appearance, he does not state in the affidavit whether he actually discussed the arrangements for this appearance with anyone in either the Senator's office or Piranha Press. Counsel further asserts that although the Johnson affidavit states that the Association made a campaign contribution because the Senator did not request an honorarium, the Association's invitation to the Senator specifically offered an honorarium.

Lastly, counsel argues that no evidence was produced indicating that Mr. Johnson sent the Association check to the Committee. Counsel states that the check was not endorsed over to Piranha Press either by the Senator or the Committee. According to counsel, the Committee cannot be faulted for not depositing or reporting a contribution that it evidently never received.

c. Legal Analysis

The Association's contribution was not deposited or reported by the Committee as required by 2 U.S.C. §§ 432(h) and 434(b), respectively. The applicable law, rebuttals to counsel's arguments, and support for this conclusion are addressed in the following analysis.

Pursuant to 2 U.S.C. § 432(a), every political committee shall have a treasurer. No contribution or

expenditure shall be accepted or made by or on behalf of a political committee when the office of treasurer is vacant. 2 U.S.C. § 432(a). Further, no expenditure may be made without the authorization of the treasurer or his or her designated agent. Id.

The Act places certain responsibilities upon the treasurer. The treasurer, for example, must file periodic reports of receipts and disbursements on behalf of the committee. 2 U.S.C. § 434(b)(2) and (4). Pursuant to 2 U.S.C. § 432(h)(1), all receipts received by a committee shall be deposited into accounts established by that provision. See also 11 C.F.R. § 103.3(a). Commission regulations further provide that such receipts must be deposited within 10 days of receipt by the treasurer. 11 C.F.R. § 103.3.

While Piranha Press may have considered the \$5,000 payment from the Association to be payment for a "promotional appearance" by the Senator, this apparently was not the intent of the Association. According to the evidence, the Association did not request a book promotion appearance. Yet, the Senator's staff designated the appearance as one. Furthermore, the check at issue specifically was made payable to "Durenberger for U.S. Senate." According to the Association's Schedule B of itemized disbursements, the \$5,000 at issue was reported as a contribution to Durenberger for U.S. Senate. Attachment 8. Indeed, the address reported by the Association is the Senator's campaign committee address, not that of Piranha Press.

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Further, while counsel for the Committee implies that Mr. Johnson was not actively involved in the arrangements for Senator Durenberger's appearance before the Association, Mr. Johnson specifically states in his affidavit that as Senior Vice-President of Fleishman-Hillard he "supervised the arrangements" for Senator Durenberger to speak at the Association's annual meeting. Therefore, Mr. Johnson should have been aware of the arrangements made by Ms. Doyme in connection with this speaking engagement. Also, according to the Johnson affidavit, the invitation to the Senator "mistakenly" mentions the word honorarium. As a non-profit organization, the Association customarily does not pay honoraria. In the event that an honorarium is required, the Association asks that a formal request be provided. According to Mr. Johnson, Senator Durenberger, in this case, did not request an honorarium and, therefore, the Association made a \$5,000 contribution to the Senator's re-election campaign.

Lastly, counsel argues that the Committee cannot be faulted for failing to deposit or report a contribution that it evidently never received. While it is unclear how the check ended in the publisher's hands, it was intended as a campaign contribution and it was sent to the Senator's campaign committee. See Attachment 8. The fact that this check was deposited into a Piranha Press account is not surprising since the evidence indicates that Senator Durenberger often treated traditional honorarium appearances as Piranha Press promotional appearances.

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In sum, this contribution was not deposited by the campaign committee as required by Section 432(h), nor was it reported as required by Section 434(b). The Commission has adequate information supporting a conclusion that this violation occurred. The Office of the General Counsel therefore recommends that the Commission enter into pre-probable cause conciliation with the Durenberger '94 Volunteer Committee, and Delwyn Olson, as treasurer.

2. Failure To Report Correct Recipient Of Disbursements

a. Factual Background

As discussed above, this Office received a document from the Ethics Committee concerning an apparent reporting violation by Senator Durenberger's campaign committee.

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According to the Durenberger for U.S. Senate Volunteer Committee's 1983 Mid-Year Report's Schedule B of itemized disbursements, three transactions with "Black Manafort & Stone" are reported by the Committee. These three transactions, which took place on January 7, 1983, January 28, 1983 and February 9, 1983, totaled \$30,000. On the Committee's Schedule B, the reported purpose of these disbursements is "Professional Fee."

b. Response by Committee

In response to the Commission's reason to believe finding, interrogatories and request for documents (see Attachment 4), counsel acknowledges the Volunteer Committee made three payments totaling \$30,000 to Black Manafort & Stone. Subsequently, counsel states, Black Manafort & Stone transferred \$30,000 to Gene Holderness. According to counsel, the reasons underlying these transactions were legitimate and did not involve any intent to mislead the Commission.

Gene Holderness was Senator Durenberger's campaign manager for the 1982 campaign. Counsel states that since this was the first campaign Mr. Holderness had managed, Senator Durenberger asked Charles Black of Black Manafort & Stone, the Senator's chief campaign strategist, to assume a more direct role. According to counsel, Mr. Holderness was in the real estate business and took a substantial reduction in compensation to become the Senator's campaign manager. Counsel further states that during 1982, Mr. Holderness' real estate business encountered difficulties so that he no longer received substantial supplementary income from it. Because of this decline in income, counsel asserts that during the campaign it was necessary to encourage Mr. Holderness to reconsider resigning his campaign post. Therefore, Senator Durenberger agreed that Mr. Holderness would receive a \$30,000 bonus at the end of the campaign if funds were available. Counsel asserts that this money was to be paid through Black Manafort & Stone in order to conceal the bonus from other staff members, who

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would have been unhappy had they known Mr. Holderness received a bonus.

Based on the foregoing, counsel states that the payment through Black Manafort & Stone was "not in any way intended to deceive the FEC." Counsel further argues that, as a practical matter, Mr. Holderness worked under Mr. Black although no formal employment relationship existed. Counsel also states that "Senator Durenberger was aware contemporaneously that payments to Mr. Holderness were being made through Black Manafort & Stone. He does not recall being apprised of the personnel reasons for doing this, or the reasons why it appeared appropriate to handle payment in this fashion."

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Lastly, counsel asserts that the events of this matter are very old and essentially involve a technical violation unaccompanied by improper intent. According to counsel, no useful purpose would be served by the "Commission's committing the considerable resources necessary - given the factual and legal issues involved - to litigate this matter to conclusion."

c. Legal Analysis

As revealed by the Committee's response, the disbursements reported by the Committee as made to Black Manafort & Stone were instead disbursements to Gene Holderness. In fact, counsel for the Committee concedes in his response that a "technical violation now appears." The Committee thus failed to report the correct name and address of the person to whom the subject disbursements were made. The applicable law and the arguments presented by counsel are addressed in the following analysis.

Pursuant to 2 U.S.C. § 434(a)(1), each treasurer of a political committee shall file reports of receipts and disbursements and shall sign each such report. Section 434(b)(5)(A) further requires each report to disclose the name and address of each person to whom an expenditure in excess of \$200 within the calendar year is made, by the reporting committee, to meet a candidate or committee operating expense. In addition, the date, amount, and purpose of such expenditure is also required to be reported. 2 U.S.C. § 434(b)(5)(A).  
in violation of 2 U.S.C. § 434(b)(5)(A).

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While counsel for the Committee argues that the payment through Black Manafort & Stone was "not in any way intended to deceive the FEC," that was the result nonetheless. Counsel states that it appeared appropriate to the Committee to pay Mr. Holderness through Black Manafort & Stone since he "essentially worked for Mr. Black." However, counsel also states that, in order to reduce staff friction, it was in the Committee's best interest to conceal the bonus to Mr. Holderness. Therefore, in its attempts to deceive its staff, the Committee succeeded in deceiving the Commission as well.

Based on the foregoing, the Commission has adequate information supporting a conclusion that the Committee violated 2 U.S.C. § 434(b)(5)(A). The Office of the General Counsel therefore recommends that the Commission enter into pre-probable cause conciliation with the Durenberger '94 Volunteer Committee, and Delwyn Olson, as treasurer, as to this violation.

III. DISCUSSION OF CONCILIATION PROVISIONS AND CIVIL PENALTY

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**IV. RECOMMENDATIONS**

1. Enter into conciliation with Senator David F. Durenberger prior to a finding of probable cause to believe.
2. Enter into conciliation with the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, prior to a finding of probable cause to believe.
3. Approve the attached proposed conciliation agreements and appropriate letters.

Date

5/15/92

  
Lawrence M. Noble  
General Counsel

Attachments

1. Response from Senator Durenberger dated April 17, 1991.
2. Response from the Committee dated April 17, 1991.
3. Document from the Senate Ethics Committee dated January 17, 1991.
4. Response from the Committee dated November 27, 1991.
5. Affidavit of Robert Lively.
6. Copies of twenty checks.
7. Affidavit of Paul Johnson.
8. Schedule B filed by the Association.
9. Proposed conciliation agreement with Senator Durenberger.
10. Proposed conciliation agreement with the Committee.

Staff Member: Mary Ann Bumgarner

93040982406



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

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

DATE: MAY 21, 1992

SUBJECT: MUR 3227 - GENERAL COUNSEL'S REPORT  
DATED MAY 15, 1992.

The above-captioned document was circulated to the  
Commission on MONDAY, MAY 18, 1992 11:00 A.M..

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

Commissioner Aikens	_____
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	_____
Commissioner McGarry	_____
Commissioner Potter	<u>XXX</u>
Commissioner Thomas	<u>XXX</u>

This matter will be placed on the meeting agenda  
for TUESDAY, JUNE 2, 1992.

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

93040982407



BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 ) MUR 3227  
Senator David F. Durenberger; )  
Durenberger '94 Volunteer Committee )  
and Delwyn Olson, as treasurer. )

AMENDED CERTIFICATION

I, Marjorie W. Emmons, Recording Secretary for the Federal Election Commission executive session on June 16, 1992, do hereby certify that the Commission decided by a vote of 6-0 to return the May 15, 1992 report on MUR 3227 to the Office of General Counsel for revision of the conciliation agreements as follows:

1. Revise the conciliation agreement with Senator David F. Durenberger

(continued)

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2. Revise the conciliation agreement with the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer

Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision.

Attest:

7-7-92  
Date

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

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 18, 1992

James Hamilton, Esquire  
Swidler & Berlin  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007-3851

RE: MUR 3227  
Senator David F. Durenberger

Dear Mr. Hamilton:

On February 26, 1991, the Federal Election Commission found that there is reason to believe your client, Senator David F. Durenberger, knowingly and willfully violated 2 U.S.C. § 441i. At your request, on July 31, 1992, the Commission determined to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If your client agrees with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

If you have any questions or suggestions for changes in the agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact me at (202) 219-3690.

Sincerely,

*Mary Ann Bumgarner*  
Mary Ann Bumgarner  
Attorney

Enclosure  
Conciliation Agreement

93040982410



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

James Hamilton, Esquire  
Swidler & Berlin  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007-3851

RE: MUR 3227  
Durenberger '94 Volunteer  
Committee and Delwyn Olson, as  
treasurer

Dear Mr. Hamilton:

On February 26, 1991, the Federal Election Commission found reason to believe that your clients, the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2). In addition, on September 17, 1991, the Commission found reason to believe your clients violated 2 U.S.C. § 434(b)(5)(A). At your request, on July 31, 1992, the Commission determined to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If your clients agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

If you have any questions or suggestions for changes in the agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact me at (202) 219-3690.

Sincerely,

*Mary Ann Bumgarner*

Mary Ann Bumgarner  
Attorney

Enclosure  
Conciliation Agreement

93040982411





FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

December 10, 1992

Mr. Rick Evans  
154 Russell Senate Office Building  
Washington, D.C. 20510-2301

RE: MUR 3227  
Senator Dave Durenberger  
Durenberger '94 Volunteer  
Committee and Delwyn Olson,  
as treasurer

Dear Mr. Evans:

As we discussed on September 15, 1992, in order for this Office to proceed in this matter, we will need signed designation of counsel forms which indicate that you will be handling the above-cited matter on behalf of Senator Durenberger and the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer. For your convenience, I have enclosed blank designation of counsel forms. I would appreciate if you would submit the completed forms at your earliest opportunity.

Sincerely,

*Mary Ann Bumgarner*  
Mary Ann Bumgarner  
Attorney

93040982412

**SWIDLER & BERLIN**

CHARTERED

3000 E STREET, N.W.

SUITE 300

WASHINGTON, D.C. 20007-5116

(202) 944-1900

JAMES HAMILTON  
ATTORNEY-AT-LAWDIRECT DIAL  
(202) 944-4036  
TELEX: 701131  
TELECOPIER: (202) 944-4396

January 25, 1993

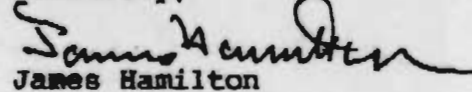
VIA TELECOPYMary Ann Bumgarner, Esq.  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463Re: Senator David F. Durenberger

Dear Ms. Bumgarner:

This is to confirm that the October 6, 1992, letter to you from Rick Evans, Senator Durenberger's Administrative Assistant, sets forth the Senator's position regarding MUR 3227.

Mary Albert and I will continue as the Senator's counsel in this matter.

Sincerely,

  
James Hamilton

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93 JAN 25 PM 4:04

## SWIDLER &amp; BERLIN

CHARTERS

3000 E STREET, N.W.

SUITE 900

WASHINGTON, D.C. 20007-5116

(202) 944-4300

JAMES HAMILTON

ATTORNEY-AT-LAW

DIRECT DIAL

(202) 944-6836

TELEX: 701191

TELECOM. (202) 944-4396

January 26, 1993

VIA TELECOPY

Mary Ann Bumgarner, Esq.  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

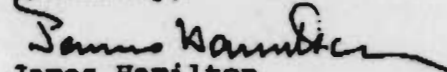
Re: Senator David F. Durenberger

Dear Ms. Bumgarner:

This is to confirm that the October 6, 1992, letter to you from Rick Evans, Senator Durenberger's Administrative Assistant, sets forth the positions of the Senator, the Durenberger '94 Volunteer Committee and its Treasurer, Delwyn Olson, regarding MUR 3227.

Mary Albert and I will continue as counsel for the Senator, the Volunteer Committee and Mr. Olson in this matter.

Sincerely,

  
James Hamilton

93 JAN 26 PM 12:41

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MUR # 3227

ADDITIONAL DOCUMENTS WILL BE ADDED TO THIS FILE AS THEY  
BECOME AVAILABLE. PLEASE CHECK FOR ADDITIONAL MICROFILM  
LOCATIONS.

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR# 3227

Date Filmed 10/27/93 Camera No. --- 2

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FEDERAL ELECTION COMMISSION

WASHINGTON DC 20463



Microfilm

Public Records

Press

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3227.

12/10/93

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**THE READER IS REFERRED TO ADDITIONAL MICROFILM LOCATIONS  
FOR THE FOLLOWING DOCUMENTS PERTINENT TO THIS CASE**

1. Memo, General Counsel to the Commission, dated September 22, 1992, Subject: Priority System Report.  
See Reel 354, pages 1590-94.
2. Memo, General Counsel to the Commission, dated April 14, 1993, Subject: Enforcement Priority System.  
See Reel 354, pages 1595-1620.
3. Certification of Commission vote, dated April 28, 1993.  
See Reel 354, pages 1621-22.
4. General Counsel's Report, In the Matter of Enforcement Priority, dated December 3, 1993.  
See Reel 354, pages 1623-1740.
5. Certification of Commission vote, dated December 9, 1993.  
See Reel 354, pages 1741-1746.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

DEC 10 1991

The Honorable Richard H. Bryan,  
Chairman  
United States Senate Select  
Committee on Ethics  
220 Hart Senate Office Building  
Second and Constitution Avenue, NE  
Washington, DC 20510-6425

RE: MUR 3227

Dear Chairman Bryan:

This is in reference to the matter involving Senator David F. Durenberger, the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, which the Senate Ethics Committee referred to the Federal Election Commission on August 8, 1990 and January 17, 1991. On February 26, 1991, the Commission found reason to believe that Senator David F. Durenberger knowingly and willfully violated 2 U.S.C. § 441i. On that same date, the Commission also found reason to believe that the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2). In addition, on September 17, 1991, the Commission found reason to believe the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. § 434(b)(5)(A).

After considering the circumstances of this matter, the Commission has determined to exercise its prosecutorial discretion and to take no further action against Senator David F. Durenberger, the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer. Accordingly, the Commission closed its file in this matter. This matter will become a part of the public record within 30 days.

We appreciate your cooperation in helping the Commission meet its enforcement responsibilities under the Federal Election Campaign Act of 1971, as amended. If you have any questions,

93043542505

Chairman Bryan  
Page 2

please contact Mary Ann Bumgarner, the attorney assigned to this matter, at (202) 219-3400.

Sincerely,

Lawrence M. Noble  
General Counsel



BY: Lois G. Lerner  
Associate General Counsel

Date the Commission voted to close the file: DEC 09 1993

93043542506





FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

DEC 10 1991

James Hamilton, Esquire  
Swidler & Berlin  
3000 K Street, N.W., Suite 300  
Washington, DC 20007-3851

RE: MUR 3227  
Senator David F. Durenberger  
Durenberger '94 Volunteer  
Committee and Delwyn Olson,  
as treasurer

Dear Mr. Hamilton:

On February 26, 1991, your client, Senator David F. Durenberger, was notified that the Federal Election Commission had found reason to believe he knowingly and willfully violated 2 U.S.C. § 441i. On that same date, the Commission also found reason to believe that your clients, the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. §§ 432(h)(1) and 434(b)(2). In addition, on September 17, 1991, the Commission found reason to believe the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer, violated 2 U.S.C. § 434(b)(5)(A).

After considering the circumstances of this matter, the Commission has determined to exercise its prosecutorial discretion and to take no further action against Senator David F. Durenberger, the Durenberger '94 Volunteer Committee and Delwyn Olson, as treasurer. Accordingly, the Commission closed its file in this matter.

The Commission reminds Senator Durenberger that he should take steps to ensure future compliance with all provisions of the Federal Election Campaign Act of 1971, as amended.

The confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record before receipt of your additional materials, any permissible submissions will be added to the public record when they are received.

93043542507



Mr. Hamilton  
Page 2

If you have any questions, please contact me at (202)  
219-3400.

Sincerely,

*Mary Ann Bumgarner*

Mary Ann Bumgarner

Date the Commission voted to close the file: DEC 09 1993

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