



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Robert E. Kirkland)	MUR 6277
Kirkland for Congress and Ronald H. Kirkland,)	
In his official capacity as treasurer)	
Ronald H. Kirkland)	

STATEMENT OF REASONS
Vice Chair CAROLINE C. HUNTER and
Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN

This matter arises from a complaint alleging coordination between Robert E. Kirkland and the campaign of his brother, congressional candidate Ronald H. Kirkland. On the basis of the complaint, the Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that Robert Kirkland violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by making excessive in-kind contributions to his brother’s campaign—Kirkland for Congress (“the Committee”)—in the form of coordinated expenditures, and that the Committee violated the Act by knowingly accepting and failing to disclose the excessive in-kind contributions. After reviewing the complaint and responses, we concluded that the facts in this case do not justify a finding of reason to believe that the respondents violated the Commission’s coordination regulations. Therefore, for the reasons set forth below, we voted against OGC’s recommendation in this matter.

I. BACKGROUND

Ronald Kirkland was a candidate in the August 5, 2010, Republican primary for Congress in Tennessee’s Eighth District. He filed a statement of candidacy with the Commission on January 13, 2010. Between mid-December 2009 and February 7, 2010, Robert Kirkland, the brother of Ronald Kirkland, appears to have served as a Committee volunteer, advising it on various matters and helping it raise funds. Between December 14, 2009, and January 31, 2010, Brad Greer also appears to have served as a Committee volunteer, assisting in scheduling, advising the candidate, and making recommendations on the hiring of campaign staff.

The available information indicates that, on January 21, 2010, Robert Kirkland signed Greer to a contract to serve as a consultant to an independent expenditure effort Robert

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Kirkland would finance. In addition to hiring Greer, Robert Kirkland retained legal counsel to advise him on the effort. Greer's involvement with the Committee appears to have ended on January 31, 2010; Robert Kirkland's, on February 7, 2010. Robert Kirkland's April Quarterly Report of Independent Expenditures (FEC Form 5) shows an initial \$10,000 payment on February 1, 2010, to the law firm of his current counsel, followed by a payment to Greer for "Political Strategy Consulting" on February 5, 2010.

On February 26, 2010, the Committee first used the phrase "proven, trusted, conservative" in a fundraising letter.¹ Then on or about March 26, 2010, Robert Kirkland disseminated communications via a website, www.ivoteconservative.com, whose home page contained the following header: "Ron Kirkland(.) Conservative for Congress(.) Join a Proven-Trusted-Conservative fighting for Tennessee values." Robert Kirkland's first public communication² in support of Ronald appears to have been a March 26, 2010 radio advertisement that contained, in part, the following text: "That's why Ronald Kirkland is running for Congress. Proven. Tested. Conservative."³ The advertisement ends with the following disclaimer: "Robert Kirkland is responsible for the content of this advertisement. Paid for by Robert Kirkland and not authorized by any candidate or candidate committee. Go to www.ivoteconservative.com."⁴

Subsequent to making these communications, Robert Kirkland appears to have paid for a campaign mailer and television ads in support of his brother's candidacy in April 2010, as well as Ron Kirkland yard signs in mid-May 2010, and newspaper ads starting in late May 2010. The mailer included the words "proven, trusted, conservative." Although the Commission does not have copies of the yard signs or the newspaper ads, we have scripts or copies of what appear to be three television ads, none of which use the phrase in question.⁵ As of August 5, 2010 (the date of the primary election), Robert Kirkland had reported making independent expenditures in support of the Committee totaling \$1,017,136.29, which

¹ McElhannon Aff. ¶ 15.

² The term "public communication" is defined at 11 C.F.R. § 100.26.

³ Complaint at 2. The six-page complaint did not include numbered pages; accordingly, we have inserted our own numbers. Also, although the complaint suggests that the ad may have been broadcast as early as March 22, 2010, the FEC filings clarify that March 26 was the first date on which the ads ran. See Robert Kirkland Miscellaneous Report dated April 5, 2010.

⁴ *Id.*

⁵ The complaint quotes from the script of a television ad that allegedly began airing on April 6, 2010. Complaint at 2. The script twice uses the word "trust" but does not include the phrase "proven, trusted, conservative." Staff of the Office of the General Counsel's office was able to download three 30-second video clips from Robert Kirkland's website, which appears to have ceased operations shortly after the August 5 primary election. One video clip contains the same text as the script included in the complaint; the second video ends with the statement "Dr. Ron Kirkland, a true conservative for Congress," but does not contain the above phrase; the third video clip contains statements such as "[Ron Kirkland is] uniquely qualified to run for Congress" but does not contain the phrase either.

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included payments for research, polling, political and media consulting, mailers, website design, legal fees, and television, radio, and newspaper advertising.⁶

During the campaign, the Committee posted eight videos on the Internet, including a few that used phrases and themes that were the same as or similar to those used in Robert Kirkland's communications. See <http://www.youtube.com/user/DrRonKirkland> (last visited 12/29/10). A two-minute biographical video entitled "Who is Ron Kirkland?" (posted on 4/21/10) ends with the candidate stating, "These ideas are proven, trusted, conservative, and so am I. I'm Ron Kirkland and I appreciate your support." A second 30-second ad entitled "Ron Kirkland Tennessee" (posted 5/17/10) contains short clips of speakers offering praise for Kirkland, accompanied by on-screen words: "PROVEN"; "VETERAN"; "TRUSTWORTHY"; "HONEST"; "FAMILY VALUES"; "PRO-LIFE"; "SUPPORTS GUN OWNERS"; "TRUSTED"; and "CONSERVATIVE." A third ad, also 30 seconds in length, entitled "Kirkland Responds" (posted 6/15/10), ends with the candidate stating "Our Tennessee values are proven, trusted, conservative, and so am I. You can count on me to fight for you in Washington."

The complaint alleges that Robert Kirkland violated the Act by making excessive in-kind contributions to the Committee, and that the Committee also violated the Act by receiving and failing to report the in-kind contributions.⁷ Specifically, the complaint alleges that the website, television ads, and radio ads paid for by Robert Kirkland constituted coordinated communications under 11 C.F.R. § 109.21 based on (1) their use of the Committee's campaign slogan ("proven, trusted, conservative"), (2) statements made by the Committee's campaign manager indicating that Robert Kirkland suggested making expenditures in support of his brother and that the Committee assented to the suggestion, (3) the "close familial tie" between Ronald and Robert Kirkland, and (4) Robert Kirkland's enthusiastic support of his brother's candidacy, as demonstrated by a February 6, 2010, fundraising email he sent.

The Committee's response, supported by affidavits from candidate Ronald Kirkland, his general consultant Joel McElhammon, and his campaign manager Brent Leatherwood, avers that:

- Ronald Kirkland, McElhammon, and Leatherwood did not request or suggest that Robert Kirkland, or anyone acting on his behalf, produce, or distribute communications on behalf of the Committee.

⁶ Amended reports were filed after the election.

⁷ The Committee's FEC reports show that Robert Kirkland made a \$2,400 primary election contribution and a \$2,400 general election contribution, both on January 14, 2010. Accordingly, he had reached his 2010 cycle contribution limit to the Committee before he started making expenditures in support of Ronald Kirkland.

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- Ronald Kirkland, McElhannon, and Leatherwood did not have a conversation with Robert Kirkland in which he, or anyone acting on his behalf, suggested the production or distribution of communications for the Committee.
- Ronald Kirkland, McElhannon, and Leatherwood were not materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, or the timing, frequency, size, or prominence of any communications paid for by, or on behalf of, Robert Kirkland.
- Ronald Kirkland, McElhannon and Leatherwood have not conveyed the Committee's campaign plans, projects, activities, or needs to Robert Kirkland or anyone acting on his behalf for the purpose of producing or distributing communications.
- Robert Kirkland and Greer have never been employees of or independent contractors for the Committee, and the Committee has not shared vendors with Robert Kirkland.
- McElhannon developed the language "proven, trusted, conservative" for use in the Committee's communications and has used that language in previous campaigns.
- The Committee first used the phrase "proven, trusted, conservative" in a February 26, 2010, fundraising letter (one month before Robert Kirkland's first independent expenditure) and then on the Committee's website on April 5, 2010.⁸

Robert Kirkland submitted a response as well, which includes an affidavit in which he makes similar averments to those made in the affidavits noted above. In addition, Robert Kirkland attests that "[s]ome aspects of my independent expenditures on behalf of the Kirkland Campaign were developed based upon publicly available information. For example, the phrase 'proven, trusted, conservative' was based on a biography of Ronald Kirkland on the Kirkland Campaign's website."⁹

OGC recommended finding reason to believe Robert Kirkland made, and that the Committee received and failed to report, excessive in-kind contributions in the form of coordinated communications based on (i) the use of similar language in both Robert Kirkland's communications and the Committee's communications; (ii) Greer's alleged status as a common vendor to both Kirkland (as a paid consultant) and the Committee (as a volunteer); and (iii) the alleged role of either Kirkland or Greer, or both, as agents for the Committee. We disagreed with OGC's recommendation and voted to close the file.

⁸ The responses to the complaint in this matter are herein incorporated by reference for the purposes of 2 U.S.C. § 437g(a)(8).

⁹ Robert Kirkland Aff. ¶ 16.

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II. ANALYSIS

Under the Act, no person may make a contribution, including an in-kind contribution, to a candidate and his or her authorized political committee with respect to any election for Federal office which, in the aggregate, exceeds \$2,400.¹⁰ The Act defines in-kind contributions as, *inter alia*, expenditures by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents"¹¹ A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party, (2) satisfaction of one of four "content" standards, and (3) satisfaction of one of six "conduct" standards.¹² However, no limits apply to persons making independent expenditures in support of, or in opposition to, a candidate for Federal office.¹³

The central question in this matter is whether the advertisements paid for by Robert Kirkland in support of candidate Ronald Kirkland were, in fact, independent.¹⁴ The answer to that question entails examining the three central allegations set forth in this matter:

- that the phrase "proven, trusted, conservative" was purportedly a Committee campaign slogan appropriated by Robert Kirkland in the communications at issue;
- that Robert Kirkland and the Committee shared a common vendor; and
- that Robert Kirkland or Greer, or both, were agents of the Committee.

¹⁰ 2 U.S.C. § 441a(a)(1)(A); *see* 2 U.S.C. § 431(8)(a)(i), 11 C.F.R. § 100.52(d)(1).

¹¹ *Id.* § 441a(a)(7)(B)(i).

¹² *See* 11 C.F.R. § 109.21.

¹³ U.S. Const. amend. I; *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

¹⁴ The complaint raised two other bases for alleged coordination, both of which we reject. First, that Robert and Ronald Kirkland are brothers and that Robert previously sent a fundraising email are irrelevant and provide no evidence of coordination under 11 C.F.R. § 109.21(d). The Commission's coordination regulations do not require heightened scrutiny to situations involving familial ties or other personal relationships, and we decline to do so here.

Robert Kirkland's earlier fundraising involvement with the campaign also provides no evidence of coordination under Commission regulations. The Committee's response, including the affidavit of campaign manager Brent Leatherwood, sufficiently rebuts the coordination allegation that is based on press statements reportedly made by Leatherwood. The Committee avers that Leatherwood had no knowledge of the independent expenditure effort before Robert Kirkland started airing radio ads in late March, and Leatherwood states in his affidavit that he had no material involvement in decisions concerning any of Kirkland's ads and did not convey any campaign plans, projects, activities or needs to Kirkland or his agents. Committee Response at 5; Leatherwood Aff. ¶¶ 7, 8. Without more, Robert Kirkland's involvement in prior campaign fundraising provides no basis for a finding of coordination.

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All of these allegations implicate the conduct prong of the coordination test. Generally speaking, the conduct prong is met if a third-party communication is created, produced, and distributed after:

- a candidate or a candidate's authorized committee *requests or suggests* that a third party create the communication;
- a candidate or a candidate's authorized committee is *materially involved* in decisions regarding the making and/or distribution of the communication;
- a candidate or a candidate's authorized committee engages in *substantial discussions* with the third party about the candidate's plans, projects, activities, or needs; or
- the third party retains either a *vendor* of the candidate or candidate's authorized committee or a *former employee* of the candidate or a candidate's authorized committee, and that vendor/former employee conveys information about the campaign's plans, projects, activities, or needs to the third party, and such information is material to the creation, production, and distribution of the communication.¹⁵

Except for the "request or suggestion" standard, none of these standards will be satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.¹⁶

As explained in greater detail below, each of the central allegations in this matter is without merit. Thus, because there is an insufficient basis to find that the conduct prong of the coordination test was met, we voted against finding reason to believe that the communications financed by Robert Kirkland were coordinated with the Committee.

A. Robert Kirkland's use of "proven, trusted, conservative" does not provide an adequate basis for finding that the conduct prong was met.

The complaint's primary assertion is that the phrase—"proven, trusted, conservative"—was purportedly a Kirkland Committee campaign slogan, and that Robert Kirkland's use of that phrase in his communications was based on information the Committee shared with him. Respondents deny that they coordinated any of the communications and have submitted affidavits to support their denial. According to McElhannon, the Committee put the phrase into public circulation before Robert Kirkland ran any of his ads, initially using the phrase "in a campaign fundraising letter on February 26,

¹⁵ 11 C.F.R. § 109.21(d).

¹⁶ *Id.*

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2010”¹⁷—over a month before Robert Kirkland distributed his first communication. That communication, which appears to have run on the radio on March 26, 2010, contained the line: “That’s why Ronald Kirkland is running for Congress. Proven. Tested. Conservative.”¹⁸ We note that by using “tested” instead of “trusted,”¹⁹ the communication did not even use the full phrase.

The responses from Robert Kirkland and the Committee state that the words (“proven,” “trusted,” and “conservative”) were generic and commonly used and, moreover, that the phrase was already in the public domain. Furthermore, according to McElhannon, he “developed the language ‘proven, trusted, conservative’ for use in the Committee’s communications and have used variations of the language in previous campaigns I have consulted.”²⁰ The response by the Committee included a mailer from another federal candidate who used the same phrase.²¹

Robert Kirkland’s first use of “proven, trusted, conservative” in a public communication was in a mailer from April 2010.²² However, Robert Kirkland did not use the phrase in question in all of the independent communications he distributed in support of his brother. For example, he ran three television ads in April 2010, none of which included the phrase. In fact, none appear to include all three words at issue. Therefore, it appears that only one public communication financed by Robert Kirkland used the entire phrase, while another used part of the phrase, and yet others used some, but not all, of the words contained in the phrase at issue.

On the basis of the information in the record, including the comprehensive affidavits submitted by the respondents, we cannot conclude that, by itself, Robert Kirkland’s use of the words “proven,” “trusted,” and “conservative,” even in close proximity to each other, provides a sufficiently strong justification to find reason to believe that he coordinated his communications with the Committee. As noted in a prior matter, “immaterial similarities” between communications have no legal consequence “without specific evidence of prior

¹⁷ McElhannon Aff. at ¶¶ 15-16. According to McElhannon, the phrase was first used on the Committee’s campaign website on April 5, 2010. *Id.*

¹⁸ First General Counsel’s Report at 5 (emphasis added).

¹⁹ The Complaint fails to notice the distinction. *Sae, e.g.,* Complaint at 4 (“Additionally, the Radio Ad and Website repeatedly make use of the campaign slogan ‘proven, trusted, conservative,’ which is used by Kirkland and the Committee.”).

²⁰ McElhannon Aff. at ¶ 17.

²¹ Kirkland for Congress Response, Attach. D.

²² On or about March 26, 2010, Robert Kirkland also established a website at www.ivoteconservative.com, which contained the phrase “Proven. Trusted. Conservative.” It is unclear when the phrase was added. Moreover, uncompensated activities that an individual conducts on the internet, including communicating via website, are exempt from the definition of contribution. 11 C.F.R. § 100.94.

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coordination with regard to the specific content, timing and placement of the advertisements.”²³

Furthermore, and perhaps most importantly, each of Robert Kirkland’s communications ran *after* the Committee had already put the phrase into public use. As noted above, Robert Kirkland avers that he based his use of the phrase on publicly available information. In light of this, and since there is no evidence that Robert Kirkland made or ran his communications at the Committee’s request or suggestion, it does not appear that Robert Kirkland’s use of the phrase “proven, trusted, conservative” satisfies any of the conduct standards. This, along with the common and generic nature of the words in question, nullifies the case for determining that the use of similar language in some of the communications run by Robert Kirkland and the Committee provides sufficient evidence of coordination to justify a reason to believe finding.

B. Robert Kirkland and the Committee did not share common vendors; thus, a coordination finding cannot be based on this theory.

Another argument advanced by OGC in support of its recommendation to find reason to believe against Robert Kirkland and the Committee was that Greer, though a Committee volunteer, may have served as a common vendor to both the Committee and Robert Kirkland. However, the common vendor standard cannot be met when there is no common vendor.²⁴ Greer was not paid by the Committee and, thus, does not qualify. To hold that a volunteer is a “vendor” would be to ignore the plain legal definition of the word “vendor” and its inherently commercial connotation. *Black’s Law Dictionary* defines “vendor” to mean, in principal part, “a seller.”

Moreover, the Commission previously considered, but ultimately rejected, an interpretation of the former employee (or independent contractor) standard at section 109.21(d)(5) to cover volunteers, because the use of the word “employee” in section 214(c)(3) of BCRA²⁵ was “a significant indication of Congressional intent that the regulations be limited to individuals who were in some way employed by the candidate’s campaign or political party committee; either directly or as an independent contractor.”²⁶ The same logic applies here: the use of the word “vendor” strongly suggests that the

²³ MUR 5369 (Rhode Island Republican State Committee, *et al.*), Statement of Reasons of Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner at 5. MUR 5369 was concluded before the Commission’s 2002 coordination rulemaking. But a statement from Commissioners Mason, Smith, and Toner, who were on the Commission during the promulgation of the 2002 regulations, informs our analysis in this matter.

²⁴ A majority of the Commission supported deleting the common vendor analysis as a basis for the Commission’s findings. MUR 6277, Commission Certification, Dec. 1, 2010. We agreed. Our statement provides explains why we rejected OGC’s arguments.

²⁵ The reference to section 214(c)(3) of BCRA (Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)) is included in a footnote to 2 U.S.C. § 441a(a)(7)(B)(ii).

²⁶ Explanation & Justification (“E&J”), 68 Fed. Reg. 421, 439 (2003).

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"common vendor" standard was intended to apply only to service providers retained by a campaign for pay.

We also note that the Commission's "common vendor" regulation at 11 C.F.R. § 109.21(d)(4) incorporates the term "commercial vendor" at 11 C.F.R. § 116.1(c). Therefore, for these reasons, we declined the invitation to expand the definition of "common vendor," and hence the scope of the coordination rule, to encompass unpaid volunteers.

C. Pursuing Greer or Robert Kirkland as "agents" of the Committee would require the Commission to adopt a confused theory of agency.

Finally, the allegation that Robert Kirkland or Brad Greer, or both, may have been agents of the Kirkland Committee, and that their contacts with each other while acting as agents about the communications at issue may have satisfied one or more of the conduct standards, is similarly unavailing.²⁷ As noted below, such a strained view of agency runs counter to the Commission's regulatory definition of the term.

An "agent" is defined at 11 C.F.R. § 109.3(b) as any person who has *actual authority*, either express or implied, to engage in certain enumerated activities on behalf of a federal candidate, including, *inter alia*:

- (1) To request or suggest that a communication be created, produced, or distributed.
- (2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR § 109.21(c).
- (3) To request or suggest that any other person create, produce, or distribute any communication.
- (4) To be materially involved in decisions regarding:
 - (i) The content of the communication;
 - (ii) The intended audience for the communication;
 - (iii) The means or mode of the communication;
 - (iv) The specific media outlet used for the communication;
 - (v) The timing or frequency of the communication; or
 - (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

The respondents' affidavits explain what activities Greer and Robert Kirkland engaged in while volunteering with the Committee: advising the candidate (Greer) or the campaign (Robert), raising funds (Robert), scheduling (Greer), and making recommendations on the hiring of campaign staff (Greer). There is no evidence that either Robert Kirkland or Greer had actual authority, either express or implied, to engage in activities involving the Committee's communications, such that either individual was an "agent" of the Committee at the same time he was discussing and signing a contract with the other to create and produce future communications. Therefore, we have no basis to conclude that either was an agent of the Committee.

²⁷ The Commission's regulations state that "any reference [in the coordination provisions] to a candidate, or a candidate's authorized committee, . . . includes an agent thereof." 11 C.F.R. § 109.20(a).

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The arguments advanced by OGC, at best, amount to a theory based on “apparent authority.” Even if Robert Kirkland and/or Greer had “apparent authority” to engage in activities involving the Committee’s communications, that is not enough because such a relationship between a person and a committee is not sufficient to trigger coordination under the Commission’s definition of “agent.” In fact, the Commission considered whether to include “apparent authority” in the definition of “agent,” but declined to do so.²⁸ Thus, even if Robert Kirkland and/or Greer had “apparent authority” to engage in activities involving the Committee’s communications, this does not satisfy the conduct standard.

Moreover, we reject the notion that because Greer was an experienced political consultant, the Commission must investigate the possibility that the Committee gave him actual authority to engage in one or more of the activities enumerated at 11 C.F.R. § 109.3(b) that define an “agent” for purposes of coordination. Nor can we find reason to believe coordination occurred merely because Robert Kirkland is the candidate’s brother. Indeed, the Commission has made clear in related contexts that a mere family relationship is not enough to establish an agency relationship or otherwise support an inference of coordination.²⁹

Finally, some were suspicious of the Respondents’ affidavits because they did not speak with utmost specificity as to the activities in which Robert Kirkland and Greer were engaged while volunteering with the Committee. First, the issue of whether Robert Kirkland and Greer were agents of the Committee was not alleged in the complaint, so it is not surprising the affidavits did not address that issue. Moreover, initiating an investigation on the basis that the affidavits contain general denials as to whether Robert Kirkland or Greer had any involvement with the Committee’s media strategy or the creation of its public communications would be especially inappropriate, since it would essentially shift the burden of proof to respondents.³⁰ In sum, we decline either to adopt a definition of agency counter to its regulatory definition or to impose a heightened evidentiary threshold for respondents confronted with general allegations of coordination.

²⁸ See Definition of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975 (Jan. 31, 2006). See also FEC AO 2003-10 (Reid) at 3 (quoting Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. at 49,082 (“The Commission made clear that under BCRA, the definition of agent ‘does not apply to individuals who do not have any actual authority to act on their [principal’s] behalf, but only ‘apparent authority’ to do so.”))).

²⁹ See FEC AO 2003-10 (Reid) (“the father-son relationship alone is insufficient to create an agency relationship”).

³⁰ See *FEC v. Muchnicists Non-partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (“Plainly, mere ‘official curiosity’ will not suffice as the basis for FEC investigations...” (footnote omitted)).

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III. CONCLUSION

For the foregoing reasons, we rejected the Office of the General Counsel's recommendations to find reason to believe that Robert Kirkland and the Committee violated the Act.³¹



CAROLINE C. HUNTER
Vice Chair

1/28/2011
Date



DONALD F. McGAHN II
Commissioner

1/28/11
Date



MATTHEW S. PETERSEN
Commissioner

1/28/2011
Date

³¹ The Office of the General Counsel recommended to take no action as to the candidate in his personal capacity, pending that office's proposed course of action, which we rejected. For the reasons stated herein, we voted to close the entire file in this matter.

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