FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: November 13, 2001

SUBJECT: Statement of Reasons for Pre-MUR 395

Attached is a copy of the Statement of Reasons for Pre-MUR 395 signed by Commissioner Scott E. Thomas.

This was received in the Commission Secretary's Office on Friday, November 9, 2001 at 4:41 p.m.

cc: Vincent J. Convery, Jr.

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Reasons re Pre MUR 395 (College Republican National Committee)

Commissioner Scott E. Thomas

On November 6, 2001, by a vote of 2-3,[1] the Commission failed to approve a motion to keep on the enforcement docket a case raising the possibility of substantial violations of the Federal Election Campaign Act, as amended (2 U.S.C. § 431 et seq.). This vote foreclosed the opportunity to activate and investigate this matter if, in the judgment of the Office of General Counsel, resources became available.

The case at hand, Pre MUR 395, raised the underlying issue of whether the College Republican National Committee has failed to register and report as a "political committee." The statute defines a "political committee" as a group that "receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). The terms "contribution" and "expenditure" are defined according to whether there has been a payment "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A), (9)(A). Relying on the Supreme Court's analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*"Buckley"*), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*"MCFL"*), the Commission has interpreted the term "political committee" to reach only those organizations whose "major purpose is *campaign activity*; that is, making payments or donations *to influence any election to public office*." Advisory Opinion 1996-13, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 6199 (emphasis added).[2]

The materials provided to the Commission by the Commonwealth of Pennsylvania Department of State under cover letter of June 5, 2000, demonstrate the strong likelihood that the major purpose of the College Republican National Committee is campaign activity. First, by its very title, the group plainly is devoted to supporting one particular political party. This is not an amorphous 'good government' group or 'issue' group. Second, the mailings are replete with pitches for support of Republicans in

---

[1] Commissioner McDonald and myself in favor; Commissioners Mason, Smith, and Wold opposed; Commissioner Sandstrom abstaining.

[2] In *Buckley*, 424 U.S. at 79, the Court stated: "To fulfill the purposes of the Act [the term 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." In *MCFL*, 479 U.S. at 252, n. 6, the Court elaborated: "[S]hould [an organization's] independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the [organization] would be classified as a political committee."

the upcoming 1998 elections. For example, the first mailing reads in pertinent part: "I must know if you will stand by me in this crucial battle to save Republican majority control of Congress—this battle to save our hope. . . . [F]or the Republican party to have any chance of maintaining a majority in Congress in the November elections YOU MUST STAND UP AND BE COUNTED NOW! So please rush your generous support to the '98 [National Republican Victory Campaign.]" *Id.*

In addition to the information provided by the Commonwealth of Pennsylvania, the Commission had at its disposal the record in a previous enforcement case involving the College Republican National Committee—MUR 3826. In that case, where a 5-1 majority of the Commission found 'reason to believe' the group failed to register and report as a "political committee," evidence revealed the group may have had an annual budget in 1992 of $387,000. First General Counsel's Report dated 12/16/94, p. 5, n. 3. While the Republican National Committee explained that the College Republican National Committee was "a separate entity," *id.* p. 6, the record showed the former had made several payments to the latter (e.g., about $7,000 in 1993), and the two entities shared the same Washington, D.C. address. *Id.* pp. 7-9. Thus, the bulk of the activity of the College Republican National Committee apparently was not being disclosed, and there was a clear financial connection with an entity that all would agree is a "political committee." The information developed in MUR 3826 was not pursued because the Commission dismissed the case as 'stale' under its Enforcement Priority System.[3] Such evidence nonetheless was relevant when deciding whether to 'keep alive' the more recent information provided by the Commonwealth of Pennsylvania in Pre MUR 395.

On the basis of the available facts, the Commission *at least* should have been willing to leave Pre MUR 395 on the enforcement docket until the next case closure determination. My colleagues were not being asked to affirmatively make a determination of whether there is 'reason to believe' a violation has occurred. *See* 2 U.S.C. § 437g(a)(2). They were only being asked to let the Office of General Counsel have the *opportunity* to activate the matter should resources permit and, if so, make *recommendations* to the Commission as to whether there is 'reason to believe.'

My colleagues who did not support my motion were heard to say, in effect, such things as: (1) this might prove to be a difficult case to resolve; (2) the U.S. District Court decision involving GOPAC a few years ago suggests the Commission would be unsuccessful; (3) commissioners cannot properly consider evidence from MUR 3826 when evaluating what to do regarding Pre MUR 395; (4) commissioners should defer to the Office of General Counsel's recommendation in such situations; and (5) (my personal favorite) I am partisan for taking the approach outlined herein. What these colleagues were not heard expressing was any concern for the failure of the College Republican National Committee to file reports with the Commission.

---

[3] The Commission has developed the practice under its Enforcement Priority System of periodically reviewing cases that have been determined to be 'low priority' or 'stale.' The former are cases that, pursuant to an objective rating system, have been scored as less significant compared to other cases on the enforcement docket. The 'stale' cases are those that have been on the inactive case docket for a certain number of months.

Dealing with the first of my colleagues' concerns, it goes without saying that any case of significance might prove difficult to resolve. Any large group that is avoiding disclosure of hundreds of thousands of dollars in activity might well resist a Commission suggestion that the law requires otherwise. Yet the heart of the Federal Election Campaign Act, as amended, is disclosure. The Commission should never simply 'cave' when a large, well-connected group that should be reporting declines to do so.

Regarding the court decision involving GOPAC,[4] there is simply no way to describe it except as goofy. As explained in my statements at the time,[5] the judge's opinion was so misguided, it would mean none of the national or state political parties would have to register and report with the Federal Election Commission. The judge seemed to require that a group's major purpose be issuing 'express advocacy' communications regarding one or more particular federal candidates. Yet, research has shown that parties use 'express advocacy' less than 'issue ads'.[6] Moreover, many parties probably focus more on *nonfederal* candidates, yet clearly maintain an overall purpose of electing people to public office. The only sensible way to apply the Supreme Court's 'major purpose' test is to examine simply whether the group in question has as its primary purpose the *nomination or election of candidates* (whether federal or nonfederal), or stated slightly differently, *campaign activity*. These are the words used by the Court itself.[7] If the group's major purpose is the nomination or election of candidates or campaign activity, and if it raises or spends more than $1,000 in "contributions" or "expenditures" in any year, it must register and report as a "political committee."[8] My colleagues' embrace of a nonsensical district court ruling, rather than the approach used by the Supreme Court and formally adopted by the FEC in an advisory opinion, *supra*, is not well-reasoned.

Turning to the assertion that commissioners should ignore information from a previous MUR, there is simply no basis for this. While persons submitting complaints under 2 U.S.C. § 437g(a)(1) are held to certain standards, *see* 11 C.F.R. § 111.4(b)-(d), there is no limitation on the Commission's ability to rely on "information ascertained in the normal course of carrying out its supervisory responsibilities" to initiate an enforcement proceeding. 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.8(a). The referral from the Pennsylvania Department of State regarding the College Republican National

---

[4] *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996).

[5] *See* Statements dated Mar. 21 and April 10, 1996 re *FEC v. GOPAC*, at fec.gov/members/thomas.

[6] *See* "Issue Advertising in the 1999-2000 Election Cycle," Annenberg Public Policy Center, Univ. of Pa. (2001), p. 4, available at www.appcpenn.org/issueads; FEC Press Release dated May 15, 2001. Whereas the parties spent at least $162 million for 'issue ads,' they spent only about $4 million for independent expenditures (those general public communications that clearly contain 'express advocacy').

[7] This also is the general approach used in the Internal Revenue Code when characterizing those "political organizations" that are exempt from taxation, yet distinguishable from charitable or social welfare groups. *Compare* 26 U.S.C. § 527(e)(1), (2) *with* 26 U.S.C. § 501(c)(3), (4).

[8] Party committees and PACs are allowed to separate their nonfederal activity and disclose only their federal share of activity under the Commission's regulations. *See* 11 C.F.R. §§ 102.5(a)(1), 104.10, 106.5, 106.6. Thus, treating a group as a "political committee" under the statute is not an overbearing violation of federalism principles. Indeed, GOPAC began filing reports of its federal activity after the 1990 election cycle, and the College Democrats have been filing reports of their federal activity all along.

Committee provided evidence regarding what the group does with its money (work toward "maintaining a majority in Congress in the November elections"), and the information from the earlier MUR 3826 indicated the group may raise and spend hundreds of thousands of dollars in any given election year. Given how frequently the Commission relies on evidence gleaned from separate proceedings to prove facts in a MUR,[9] the suggestion that here commissioners should shield themselves from such information is peculiar.

The argument of one of my colleagues that commissioners should defer to the recommendation of the Office of General Counsel (OGC) to terminate Pre MUR 395 due to 'staleness' is difficult to disagree with, as a general rule.[10] The Enforcement Priority System (EPS) is designed to periodically weed out cases that are simply 'low-rated' or 'stale.' The Commission wisely adopted this program in 1993 because the agency simply didn't have enough resources to assign all MURs on the docket to staff attorneys. That still is the case. Out of 174 items on the docket recently, 54 were unassigned and inactive.[11] This is explained by the fact that there are only about 27 line staff attorneys available to take assignments.[12]

---

[9] *See*, e.g., FEC reliance on congressional hearings and FEC audit process to generate enforcement proceeding regarding Democratic National Committee deposit practices in MUR 4961.

[10] I note that same commissioner proceeded to vote against the General Counsel's recommendations regarding seven of the twelve matters on the November 6 agenda.

[11] The most recent Enforcement Status Sheets (dated October 17, 2001) (nonpublic) and Public Financing, Ethics and Special Projects (PFESP) Status Report (dated October 11, 2001) (nonpublic) show 152 MURs and 22 audit referrals, Reports Analysis Division referrals or Pre MURs on the docket. (This translates to 135 'cases,' due to internal decisions to 'merge' or 'relate' certain items, but involves 1,528 respondents.) Yet 42 of the 152 Enforcement Division items and 12 of the 22 PFESP items are inactive.

[12] FEC Staffing Report as of Oct. 20, 2001 (nonpublic) (counting the 11 line staff in PFESP as four enforcement staff, since about 1/3 of their work is enforcement-related).

Some of my colleagues assert that the best argument for getting more enforcement attorneys is to show Congress the agency is able to close out fewer cases as 'low-rated' or 'stale' as compared to prior years. These colleagues have chosen to do this by relying on *commissioner offices* to substantively evaluate the cases that otherwise would be summarily dismissed under EPS, and relying on *commissioner offices* to prepare the necessary written legal analysis. While this indirectly proves that more staff resources are needed to resolve these cases, it takes these responsibilities from the professionals most adept at such functions and adds to the already strained resources of individual commissioners (most of whom only have two staff members). In my view, the best argument for more resources is the straight-forward fact that more staff attorneys would allow for assignment and activation of more cases. (It would surely be more efficient, as well, as commissioners would not be evaluating the 'low-rated' and 'stale' matters in a haphazard manner without the benefit of a written legal analysis from OGC.) The Commission should be willing to press upon Congress that more line enforcement attorneys would allow the agency to substantively handle more cases and handle them faster.

One can easily see the effect of having more enforcement attorneys. In FY 1998, when OGC started the year with the equivalent of about 21 line attorneys, the agency was only able to close 68 cases on the merits (i.e., non-EPS closures). In FY 1999, when OGC started the year with the equivalent of 25 line attorneys, the agency closed more cases on the merits (72). In FY 2000 this trend continued, as OGC started the year with the equivalent of about 29 line attorneys, and the number of cases closed on the merits (excluding the five that commissioner offices handled) went up to 110. In FY 2001, OGC started with the equivalent of about 28 line attorneys, and was able to close 117 cases on the merits (not counting the ten that commissioner offices handled). These statistics come from the FEC Staffing Reports of Oct. 9, 1997, Oct. 9, 1998, Dec. 6, 1999, and Oct. 7, 2000 (nonpublic); a statistical chart submitted by OGC for the Nov. 6, 2001 meeting; and applicable case closure recommendation documents and certifications.

Generally, I am quick to defer to the rather automatic OGC case closure recommendations brought about by the EPS.[13] But commissioners must not ignore their responsibility to examine whether specific cases warrant different treatment. This would not have been the first time the Commission voted to hold a matter on the enforcement docket despite its 'stale' status.[14] Where a case presents a fairly significant apparent violation—in this case the failure to disclose hundreds of thousands of dollars spent on hard-edged partisan communications—and where leaving it on the docket will simply allow OGC to activate it if warranted, the better judgment would have been to preserve the agency's options.[15]

Finally, addressing my colleague Commissioner Mason's concern that "the pattern is suspicious" when one lists certain cases I have sought to 'keep alive,' I can't help but smile. While it is true that on prior occasions I have sought to keep other cases involving Republican or conservative-leaning respondents from being dismissed as 'stale,' I have done so because they appeared to involve serious, substantial violations of the law. I have pressed to keep MURs involving Democratic respondents 'alive' as well.[16] At the same time, I have approved dismissing many cases involving Republican or conservative-leaning respondents as 'stale.'[17] Regarding voting patterns, it was not I who voted against 'probable cause' recommendations (*see* 2 U.S.C. § 437g(a)(3), (4)) regarding Republican party respondents in MURs 4250 (Republican National Committee, Haley Barbour, et al.), 4378 (National Republican Senatorial Campaign Committee, Montanans for Rehberg, et al.), and 4382/4401 (Republican National Committee, Dole for President, et al.) (all very significant cases) in the face of overwhelming evidence.[18] On the other hand, I was willing to vote to find 'reason to believe' violations were committed by Democratic respondents in MUR 4994 (Democratic Senatorial Campaign

---

[13] Cases are rated under a very objective point system to determine if they are 'low-rated.' Cases not 'low-rated' that remain on the docket a specified number of months are determined to be 'stale.' Thus, not a lot of subjective thought goes into OGC's EPS case closing calculations.

[14] For example, the Commission has been holding on the docket a MUR involving a foreign national respondent at the request of one of my colleagues even though the apparent violation is well over five years old.

[15] Some of my colleagues were concerned that my proposal to maintain a case on the docket was bereft of 'standards.' First, the case was significant enough under the objective EPS rating process to escape 'low-rated' status. Moreover, my colleagues' proposals at the same meeting to find 'reason to believe' or 'no reason to believe' regarding some 'low-rated' cases were, in my view, subject only to a standard similar to mine: whether, looking at the evidence, there is or is not a violation. In the case I raised, obviously, there is a great deal more at stake.

[16] On Feb. 24, 1998, I moved (unsuccessfully) to keep from 'stale' closure cases involving the Nebraska Democratic Party, the New Hampshire Democratic Party, and Wellstone for Senate. On June 9, 1998, I moved to retain on the docket a 'stale' case involving the Democratic National Committee and Torricelli for Senate.

[17] Indeed, at the November 6 meeting, I approved dismissing as 'stale' the case involving the Republican Leadership Circle (MUR 4948) that I had persuaded my colleagues to keep on the docket at the previous case closing deliberations in July. At that earlier meeting, furthermore, I approved dismissing as 'stale' the case involving the RNC's transfers of over $2 million in 'soft money' to Americans for Tax Reform for what appear to have been targeted communications against Democratic candidates (MUR 4757).

[18] *See* Statements re MURs 4250 and 4378 at fec.gov/members/thomas. A statement of reasons regarding MUR 4382/4401 is soon to be released.

Committee, New York State Democratic Committee, Michigan Democratic State Central Committee, et al.), whereas Commissioner Mason was not willing to do the same regarding Republican respondents in the same case (National Republican Senatorial Committee, Missouri Republican State Committee, et al.). If Commissioner Mason ever wants me to illustrate in tedious detail what a 'suspicious pattern' is, I will gladly oblige.

This is not a game. No one should be declaring victory because the Federal Election Commission is resolving 'substantively' a few more piddly little cases, while at the same time dismissing more significant cases because there aren't enough staff. Commissioners should be looking for opportunities to enforce the law when it matters most. Occasionally, there are cases presenting the possibility of serious violations that warrant more attention than a 'stale' case dismissal. In my humble estimation, this was one.

11/9/01
Date

Scott E. Thomas
Commissioner