Pre-MUR 395 (College Republican National Committee)

Statement of Reasons of
Chairman David M. Mason, Commissioner Darryl R. Wold,
and Commissioner Bradley A. Smith

Normally we would not consider it necessary to write a statement explaining our decision to approve the recommendation of the Office of General Counsel, routinely closing a case pursuant to the Commission's Enforcement Priority System ("EPS"). However, in light of Commissioner Thomas's Statement of Reasons of November 9 in this matter, we believe it is worthwhile to put forth for the public record our reasons for approving the General Counsel's recommendation in our own words, rather than through the filter of Commissioner Thomas. Further, we note that this matter arose as an agency referral rather than through an outside complaint, so that the designated respondent, College Republican National Committee ("CRNC"), has had no chance to respond to the alleged violations, and but for Commissioner Thomas's statement, there would be no public release of this matter.[1] Thus, left unanswered we believe that Commissioner Thomas's Statement of Reasons, with its strong language suggesting that CRNC has violated the law, needlessly and unfairly impugns the CRNC.[2]

In his aforementioned Statement of Reasons, Commissioner Thomas first explains why he believes that this case should have been left on the Commission docket despite having grown "stale" under the Enforcement Priority System. He explains his belief that there is a "strong likelihood that the major purpose of the College Republican National Committee is campaign activity," and suggests that despite the staleness problem this case should be exempted from the EPS because the group has a sizeable budget and because a similar complaint against the group (MUR 3826) was also dismissed as stale under the EPS in 1996. He does not suggest that the case be activated, but merely that it be allowed to languish on the docket so that it might later be activated, "should resources

[1] *See* 2 U.S.C. § 437g(a)(12); 11 C.F.R. §§ 111.9, 111.20-21.

[2] For example, Commissioner Thomas writes at different points: "the materials provided [in the referral] … demonstrate the strong likelihood that the major purpose of the group is campaign activity;" "[a] large group that is avoiding disclosure of hundreds of thousands of dollars…;" "a large, well-connected group that should be reporting declines to do so…;" "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 "Commissioners should be looking for opportunities to enforce the law where it matters most." Statement of Reasons, Commissioner Scott E. Thomas, Pre-MUR 395, p. 1, 3, 5, 6 (hereinafter "Thomas SOR").

permit,"[3] though there is no indication that the Office of General Counsel expects that to happen.

The purpose of the Enforcement Priority System is to focus the Commission's resources on those cases that are most important to effectively carrying out our duties. As noted by Commissioner Thomas,[4] the system involves rating each case on a point system. Most cases dismissed under the EPS without investigation are dismissed because they are deemed "low priority," so that pursuing them would not be an effective use of resources. However, a small number of cases which do not fall in the "low priority" category are nonetheless dismissed as "stale," meaning that Commission resources have not permitted the case to be activated after a number of months.[5] The presumptions behind dismissing cases for staleness include that citizens ought not have the threat of an investigation hanging over them for a lengthy time if it is unlikely that the investigation will actually take place, and that the Commission should focus resources on important cases of more recent vintage, with fresher evidence and more importance to current campaigns.[6]

Pre-MUR 395 came to the Commission not through any complaint by the public, but as a referral by the Pennsylvania Bureau of Charitable Organizations, which was investigating whether the CRNC had properly registered to solicit contributions in Pennsylvania pursuant to that Commonwealth's laws on solicitation.[7] The referral was received at the FEC on June 19, 2000, by which time it appears that all of the activity that served as the basis for the referral was already more than two years old.[8] In fact, by the time the Commission prepared to drop this case as "stale," all of the activity referenced in the referral appears to have been at least three years and seven months old, and some of it as much as four years old. Since there was no evidence that the Office of General Counsel anticipated that it could activate the case in the near future (nor did Commissioner Thomas ask it to), it is very doubtful that the case could have been activated until all of the underlying behavior was at least four years old, and much of it even older. Given the five year statute of limitations, the statutory requirement that a

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[3] *Id*. at 1-2.
[4] *Id.* at 2, fn. 3.
[5] There were five such cases in fiscal year 2001.
[6] We note that Commissioner Thomas does not have a generic objection to dismissing cases as "stale," though he has sought to have specific cases held or activated beyond the stale dismissal date, *see* MURs 4491; 4519; 4563.
[7] It appears that the Commonwealth was upset that the CRNC had not responded to its requests for information. *See* Letter from Lisa Sandoe, Special Investigator, Commonwealth of Pennsylvania to Lois Lerner, Associate General Counsel for Enforcement, June 5, 2000 (explaining that the Commonwealth had received no response from the CRNC, and so checked to see if the organization was registered with the FEC; and finding it was not, referring the matter to the Office of General Counsel.) From the materials submitted by the Commonwealth, this referral appears to have been made more than two years after the last letter from the Commonwealth to the CRNC.
[8] The CRNC material attached to the referral, which serves as the basis for the referral, is undated. However, most or all of it presumably took place before February 13, 1998 when the Commonwealth's Bureau of Charitable Organizations first wrote to the CRNC. (Letter from Karl Emerson to Adam Brohimer dated Feb. 13, 1998, attached to referral). The referral itself states that the CRNC had solicited a Pennsylvania resident "during the period November 1997 through March 1998." Letter from Lisa Sandoe to Lois Lerner, June 5, 2000. Much of the material refers to current events of January and February, 1998.

respondent be given at least 15 days to respond to any "probable cause" brief by the General Counsel, 2 U.S.C. 437g(a)(3), and the statutory requirement that the Commission engage in conciliation efforts for at least thirty days prior to filing an enforcement action, 2 U.S.C. 437g(a)(4), any investigation would have had to be conducted in a hasty and less than thorough fashion in order to beat the statute of limitations. Even assuming that a full and thorough investigation would support a finding that the Act had been violated, it is doubtful that such a thorough investigation could be completed in time remaining. In short, because of the lengthy time between the activity underlying the referral and the date of the referral itself, this case is unusually "stale," even by EPS standards.

This is important because Commissioner Thomas ridicules us for not supporting his motion because, to use his caricature of our position, "this might prove to be a difficult case to resolve." Noting that "any case of significance might be difficult to resolve," he argues that "the Commission should never simply 'cave'…."[9] But Commissioner Thomas does not dispute that the nature of the allegations in this Pre-MUR would require a substantial investigation to resolve. In a recent law review article, Commissioner Thomas himself discussed the difficulties of completing FEC investigations within short time frames: "a fairly routine matter can easily take one year if the matter proceeds to probable cause … [o]f course, if a matter is factually complex and requires an extensive investigation, the resolution of cases can take much longer…. A factually complex case with extensive discovery and investigation may take three or four years."[10] For these very reasons, we believe that a case which would indisputably require extensive investigation, and where some of the activity is already four or more years old and all or almost all of it would be at least that old before there would be any chance of the case being activated for investigation, is a particularly poor case to withdraw from the EPS system for dismissing stale cases.

Tied to the complexity of the case is that the legal theory on which it appears the Commission would have to rely has already been rejected by the U.S. District Court for the District of Columbia in *FEC v. GOPAC,* 917 F. Supp. 851 (D.D.C. 1996). Again, Commissioner Thomas does not reject our suggestion that *GOPAC* is an applicable precedent, and that it suggests a lower than usual likelihood that the Commission could win this case in court. Rather, he simply dismisses the Court's decision in *GOPAC* as "goofy," "misguided," and "nonsensical."[11]

We do not share Commissioner Thomas's view of *GOPAC.* Commissioner Thomas argues that GOPAC, the defendant in that case, should have been considered a political committee subject to regulation by the Commission because it's "major purpose" was "campaign activity."[12] The idea that a group can be considered a political committee

[9] Thomas SOR, p. 2-3.
[10] Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 Admin. L. Rev. 575, 589 (2000).
[11] Thomas SOR at 3. We cannot help but note that in another recent MUR Commissioner Thomas urged us to defer to non-binding decisions of Article III courts even when the decisions at issue were reversed by higher courts, albeit on other grounds. *See* MUR 4994, Statement of Reasons of Commissioner Scott E. Thomas, at 9.
[12] *Id.*

solely because its major purpose is campaign activity has no basis in law. The Act defines a "political committee," in pertinent part, as "any committee… which receives contributions aggregating in excess of $1000 during a calendar year or which makes expenditures aggregating in excess of $1000 during a calendar year…." Thus, major purpose alone, however defined, is not enough to subject a group to the Act. The group must also take in contributions or make expenditures in excess of $1000. The Act defines both "expenditure" and "contribution" in terms of activity made "for the purpose of influencing any election for Federal office," 2 U.S.C. 431(8)(A) and (9)(A). In *Buckley v. Valeo*, 424 U.S. 1,79 (1976), the Supreme Court made clear that the phrase "for the purpose of influencing any election for Federal office" suffers from constitutional vagueness problems, and that therefore the definition of "political committee" must be limited only to committees that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* A candidate, under the Act, is an "individual who seeks… Federal office," 2 U.S.C. 431(2), not any candidate for any office whatsoever. Applying *Buckley*, the *GOPAC* Court found that for the years in question the FEC had failed to prove that GOPAC had made any expenditures to support or oppose the nomination or election of a candidate for federal office. GOPAC had made substantial expenditures for state and local Republican candidates, in the hope that doing so would eventually help the Republican Party take control of the U.S. House of Representatives, but the Court noted that these were nonetheless expenditures for state and local candidates, not for federal candidates. 917 F. Supp at 861-62, 864-67. We do not see much that is "nonsensical" or "goofy" here, nor do we see how *GOPAC* fails to follow "the approach used by the Supreme Court," as our colleague puts it.[13]

Part of Commissioner Thomas's difficulty may be that he seems to assume, without saying so, that the CRNC's generic support for candidates of a particular party constitutes "express advocacy" of the election of specific federal candidates, and therefore meets the $1000 expenditure requirement.[14] This position, however, was specifically rejected in GOPAC, 917 F. Supp. at 866-67, and we think GOPAC is correct in holding that general expressions of support for candidates of a party do not, absent direct contributions to federal candidates or the presence of "express advocacy" that would qualify the communication as an "independent expenditure" as defined in 2 U.S.C. §431(17), qualify as "expenditures" under the Act.[15] The types of activities that we are being asked to investigate in this MUR seem to be similar to the types of activities in which GOPAC engaged. Certainly on the face of the complaint there is no sign that

[13] *See* Thomas SOR at 3.
[14] *Id.* at 1-2, 3-4
[15] Thus Commissioner Thomas is clearly wrong in suggesting that under *GOPAC*, "none of the national or state political parties would have to register and report with the Federal Election Commission." *Id.*at 3. The holding in *GOPAC* was based on the fact that "GOPAC did not make any direct contribution to any particular federal candidate." 917 F. Supp. at 858. The national and state committees with which we are familiar would not be in this position. What the Court specifically rejected is the argument that Commissioner Thomas seems to make here, that "an organization need not support the 'nomination or election of a candidate,' but only need engage in 'partisan politics' or 'electoral activity,'" to be subject to the Act. 917 F. Supp. at 859. The Court noted that such terms as "'partisan electoral politics' and 'electioneering' raise virtually the same vagueness concerns as the language 'influencing any election for Federal office,' the raw application of which the Buckley Court determined would impermissibly impinge on First Amendment values." *Id.* at 861.

CRNC made expenditures that would qualify it as a "committee" required to report under the Act. Thus, on the basis of the facts and apparent legal theories of this referral, it does not appear that there is reason to believe that the Act had been violated in any case.[16]

We recognize that we are not bound in all future cases by the decision of a single district court. However, even if we shared Commissioner Thomas's view that *GOPAC* incorrectly interpreted *Buckley*, we would not be inclined to ignore it in carrying out our duties. We cannot expect the courts to give proper deference to our interpretations of the Act, as part of a co-equal branch of government, if we cavalierly dismiss judicial decisions with which we disagree as "goofy." Moreover, we cannot help but note that the *GOPAC* Court is apparently not the only "goofy" court out there. In addition to *GOPAC,* since Commissioner Thomas took his seat on the FEC the Commission has lost several other cases when it has tried to stretch the definition of express advocacy.[17] We believe that a minimum of proper respect for the judicial branch requires that we at least take even non-binding court opinions seriously and consider them in our own interpretations of the law.

Nor, as a practical matter, could we possibly subscribe to Commissioner Thomas's apparent view that in deciding whether or not to devote resources to a case, we should simply ignore the probability of success on the merits, as reflected by the results in prior, similar cases. Dismissing a case as "goofy" or "nonsensical" does not make the precedent go away. Concern for the viability of our legal theory in the courts should be especially important where we would be launching an investigation of a case outside of the normal guidelines of the Enforcement Priority System,[18] and on a timetable that would make a

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[16] It appears that this case could only succeed if the Commission were willing to launch a legal challenge to the limits on the definition of "political committee" laid down by the Supreme Court in *Buckley* and followed in *GOPAC*. We are not interested in challenging the Supreme Court's twenty-five year old *Buckley* decision on this issue. The point has already been once reaffirmed by the Supreme Court in *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986), and in light of our experience on this Commission and elsewhere, we believe *Buckley* was correct on this point. We also note that the Supreme Court has twice in the last two years rejected opportunities to revisit other portions of *Buckley's* core holdings. *See FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 432 (2001); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). Alternatively, we could hope that an investigation, if launched, would yield evidence which is not in the referral in support of legal theories which do not appear in the referral, i.e. that CRNC directly supported for candidates for federal office. But we do not believe that it is proper for this Agency to go forward based on facts and legal theories in referrals or complaints which do not state violations of the Act, even if taken as true. For more on this point, *see* Statement of Reasons of Commissioner Darryl R. Wold in MUR 4994, New York Senate 2000 et al.

[17] *See* Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001); FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997); FEC v. Maine Right to Life Committee, 98 F.3d 1 (1st Cir. 1996), *cert. denied* 522 U.S. 810 (1997); Faucher v. FEC, 928 F.2d 468 (1st Cir.), *cert. denied* 502 U.S. 820 (1991); FEC v. Freedom's Heritage Forum, No. 3:98CV-549-S (W.D. Ky. Sept. 29, 1999); Right to Life of Duchess County, Inc. v. FEC, 6 F.Supp. 2d (S.D.N.Y. 1998); FEC v. Survival Education Fund, 1994 U.S. Dist. Lexis 210 (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); FEC v. Colorado Republican Federal Campaign Committee, 839 F.Supp. 1448 (D. Colo. 1993), *rev'd on other grounds* 59 F.3d 1015 (10th Cir. 1995) and *vacated on other grounds,* 518 U.S. 604 (1996); FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989).

[18] We recognize that Commissioner Thomas's motion would merely have left the case on the docket for the time being, without yet opening an investigation. Presumably, however, the only reason to leave it on the docket would be in the hope of eventually opening an investigation.

thorough, effective investigation prior to bringing suit exceedingly difficult. We note that Commissioner Thomas also uses his Statement of Reasons in this case to argue that the Commission needs more resources from Congress.[19] Perhaps. But we are unpersuaded that the resources we have are well spent pursuing cases under legal theories that run contrary to precedent and which cannot be investigated and evaluated properly due to statute of limitations constraints. *See* 28 U.S.C. § 2462.

Commissioner Thomas also misunderstands our objection to using a long dismissed complaint against the CRNC, MUR 3826, closed as stale over five years ago, as a basis for proceeding on this matter. MUR 3826 does nothing to change the stale nature of the evidence and events in this case, nor does it change the *GOPAC* precedent.[20] This case is not like other MURs Commissioner Thomas mentions, wherein the Commission has looked at evidence from other investigations.[21] In those MURs, the other investigations pertained to the same activity under investigation by the FEC, not to activity many years gone by and not the subject of the matter at hand. All of the events mentioned in this referral took place after MUR 3826 was closed.

Commissioner Thomas similarly fails to differentiate between cases when he chides us for deferring to the recommendation of the General Counsel in this case while "vot[ing] against the General Counsel's recommendations regarding seven of the twelve matters on the November 6 agenda," all of which pertained to case closing under the EPS.[22] Those other cases all involved matters in which a violation, or lack thereof, was plain from the face of the complaint, so that the Commission could make substantive determinations without the need for an investigation using up Commission resources. In each case, the Commission rejected the General Counsel's recommendation to close the case solely on grounds that it was "low priority" under the EPS, in order to make a substantive determination on the merits and close the file. Thus the cases were handled substantively without opening an investigation and draining the General Counsel's resources. In each of the seven cases, Commissioner Thomas joined a unanimous Commission vote.[23] Commissioner Thomas argues that the standard used to pull those cases out of EPS was "subject only to a standard similar to mine."[24] But there is a very substantial difference, which Commissioner Thomas does not even note, let alone dispute - each of those cases could be, and was, disposed of within minutes and without

[19] Thomas SOR at 4, n. 12.
[20] *GOPAC* was decided after MUR 3826 was dismissed.
[21] Thomas SOR at 4, n. 9.
[22] *Id.* at 4, and n. 10. He actually refers to just one (unnamed) Commissioner, presumably Commissioner Smith, given that Commissioners Wold and Mason voted against the General Counsel's recommendation in eight of the twelve matters.
[23] Commissioner Thomas also complains that the Commission has held one case open involving a foreign national, although the violations are over five years old. *Id.* at 5, n. 14. In that case the respondent has fled the country to avoid prosecution. Because the Commission believes that the statute of limitations does not run when the respondent purposely flees the country to avoid prosecution, and because the facts have largely been investigated already in connection with other respondents, the Commission has voted to hold the matter open.
[24] *Id*. at 5, n.15.

investigation, whereas this case, were it activated, would require a substantial investigation and resources. [25]

Ultimately, even if we were not of the belief that the referral in this matter did not include either facts or legal theories which, if true, would indicate a violation of the Act, or that the probability of success were so low, we simply would not agree with Commissioner Thomas that this is a case warranting "different treatment" than that provided for by the EPS.[26] It is clear that Commissioner Thomas considers this an extremely important case. He argues that we should ignore the EPS in such a case because, "not a lot of subjective thought goes into OGC's EPS case closing calculations."[27] We believe that this is as it should be. However, the process is not totally rote. Under the System, this case scored just one point above the cut-off used to dismiss cases as low priority. It did so because in at least one important category, OGC scored the maximum possible points, even though the system's scoring guide states that "[one-half the maximum] are generally assessed here." In another category, OGC awarded added points for criteria that did not appear and could not be determined from the face of the referral. This was apparently done by considering the earlier closed MUR 3826 when scoring this referral. In short, this case stayed on the docket as long as it did, and was eligible for activation in the normal course of business at all, only because in scoring the case OGC did account for the old MUR, as Commissioner Thomas wanted, and also rated the case more highly than usual on other criteria as well. Even so, the case received the lowest score possible to avoid automatic dismissal as a low priority case.

The final portion of Commissioner Thomas's Statement of Reasons is devoted to explaining that his desire to keep this case open is not motivated by partisan considerations, accusing others of partisanship, and citing to a number of votes that he has made in the past as evidence of his own lack of partisanship.[28] We take Commissioner Thomas at his word and note that whatever his motivations, they would not alter our votes in this matter.

When we consider that this case would have to be based on a legal theory that runs counter to the law as correctly stated in *GOPAC*; is low rated under the EPS; is extremely dated and difficult to investigate within the statute of limitations; would require the commitment of substantial resources; and appears to have a low probability of success in court even if pursued on the legal theories advanced by Commissioner Thomas, and with which we disagree; we consider it particularly ill-suited to be withdrawn from normal treatment pursuant to the EPS, and believe the dismissal for

[25] In light of our above discussion of *GOPAC* and the referral in this matter, another alternative might have been to move to dismiss this case with a finding of "No RTB" because the referral fails to put forward facts or legal theories that would indicate a violation of the Act. We believe, however, that such a motion would not have been successful at garnering the four votes needed to pass. If true that the Commission could not muster four votes for a finding of either "No RTB" or "RTB," that is further reason to let this case simply be closed on the staleness grounds recommended by the General Counsel, following the EPS.
[26] *Id.* at 5.
[27] *Id.* at 5, n. 13.
[28] *Id.* at 5-6.

staleness, as called for by the EPS and recommended by the General Counsel, was appropriate.

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David M. Mason, Chairman	Date
_____	_____
Bradley A. Smith, Commissioner	Date
_____	_____
Darryl R. Wold, Commissioner	Date