



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20543

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SEP 15 1 04 PM '99

September 15, 1999

**SENSITIVE**

MEMORANDUM

TO: The Commission Secretary

FROM: James A. Pehrkon  
Staff Director

A handwritten signature in black ink, appearing to read "James A. Pehrkon", written over the printed name.

SUBJECT: MUR 4250; Document for Insertion into the Official Record

During discussion of MUR 4250 in Executive Session yesterday, Commissioner Wold requested that the attached memorandum be circulated for informational purposes and that it be made part of the official record.

Thank you.

Attachments

MEMORANDUM

DATE: September 13, 1999  
TO: Lawrence Noble, Esq.  
FROM: Commissioner Darryl R. Wold  
RE: MUR 4250 (RNC)

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Larry, this memorandum follows up on my telephone conversation with you late this morning.

As I told you, I am very concerned about the late timing of the General Counsel's Report recommending that the Commission find probable cause in this matter, circulated to the Commissioners on September 9, 1999, in light of the fact that the Commission's effective deadline for finding probable cause, to allow thirty days for conciliation and still permit suit to be filed prior to the running of the statute of limitations, is apparently September 17, only eight days after we received the Report, and the only meeting scheduled before that deadline at which this matter could be considered is the executive session on September 14, only three business days after we received the Report.

One reason for my concern is the short amount of time this leaves for Commission consideration of very substantial issues. This case appears to be a very complex case, factually and legally; it involves at least some legal issues which are in substantial dispute; it names major players in the political process as respondents (the RNC and a past chairman, Haley Barbour); and it requests very substantial penalties

These factors all make it highly likely that this case will not be resolved by conciliation, but will go to litigation. The OGC's Report that the Commission find probable cause, in light of these aspects of the case and the timing, is therefore tantamount to a recommendation also that the Commission be prepared to authorize filing suit. Before we commit to that course of action, however, we should not only be clear that finding probable cause is justified, but that this is an appropriate case to take to litigation on each of the legal issues raised. Analyzing this case in a day or two of time is a problem that would be particularly acute for me, and possibly for two other Commissioners, because we have no prior familiarity with this case because previous Commission action on it was taken prior to our assuming office.

Despite these grounds for concern, OGC asks that this matter be considered by the Commissioners (1) on an expedited basis that allows only a few days in which to review and digest the hundreds of pages of legal arguments and supporting documents involved in this matter, during a time period when we have substantial other matters on our agenda also, and (2) that we do so at a meeting during a week when one Commissioner, who voted on the RTB finding in this case, is absent due to long-standing plans, which she had previously notified the Commission of over a month ago, and therefore cannot be heard on this matter by the other Commissioners.

Before I am willing to consider this matter on this expedited basis, and in the absence of a Commissioner, I will want a detailed report from OGC in response to my second concern in bringing this matter up now, as outlined below.

My second concern is the apparently late date on which this matter is brought to the Commission, regardless of how much or little time the Commission has in which to consider it. There are two aspects of the lateness that concern me:

(1) The fact that it appears to have been over six months since probable cause briefing was completed by the parties, before a recommendation has been brought to us. OGC's probable cause brief was sent to the respondents on December 23, 1998, and reply briefs by the respondents were received on February 23, 1999 and February 26, 1999. There is no indication that any discovery or other investigation or action has taken place since that time, that would have delayed the preparation of a recommendation to the Commission at an early date after the reply briefs were received. It has nevertheless been over six months since those briefs were received, before the General Counsel's Report has now been given to us.

(2) The fact that the General Counsel's Report has been submitted to us for action only a matter of days before the deadline for us to act before we will be effectively barred from doing so by the statute of limitations. Regardless of whether or not the Commission has sufficient time to consider this matter, the fact that it is brought to us so close to the statutory deadline is a matter of independent concern itself.

I am concerned by the apparent lateness of the Report because of the implications it has for the management of cases in the General Counsel's office. I think the significance of this matter justifies asking for a detailed report from the General Counsel on the progress of this case through his office, and why it did not come to us in a more timely fashion.

That report, in my mind, should include:

- a written description of the calendaring system in place in OGC;
- the reminders or deadlines calendared in this matter;

- a written description of the record maintained by OGC of the progress of matters of this nature;

- a chronology of the progress of this matter through OGC, since the respondents' briefs were received in February, including:

- attorneys assigned and responsible for this matter;
- the preparation of drafts of OGC's Report; and
- reviews of drafts by supervisors; and

- anything else bearing on the timing of the submission of the General Counsel's Report.

It would, of course, be helpful to have as much of this report in writing as possible.

Copies: Commissioners



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**MEMORANDUM**

TO: Commissioner Wold

FROM: Lawrence M. Noble  
General Counsel

A handwritten signature in dark ink, appearing to be "L. Noble", written over the printed name of Lawrence M. Noble.

RE: MUR 4250

DATE: 9/15/99

This is in response to your September 13, 1999, memorandum regarding MUR 4250, in which you voiced concern that the General Counsel's Report recommending probable cause was forwarded to the Commission so close to the running of the five year statute of limitations that it did not give the Commission adequate time to consider the issues before voting on the matter. As a result, you requested a report on the progress of the case through the General Counsel's Office setting forth why the report did not come to the Commission at an earlier point. The request also set forth specific categories of information to be included in the report.

Because of the short interval between receipt of your memorandum and the September 14, 1999, Commission meeting, this office was unable to provide the written report before the meeting. Instead, the General Counsel's Office gave an oral report at that meeting and promised to follow-up with a written report. This memorandum memorializes the information provided during the oral report and provides additional information related to the specifics requested in your memorandum.

**I. Description of OGC Calendaring System**

Over time, OGC has tried various systems to automate case tracking. One example, the Enforcement Tracking (ET) system, was developed by the team leaders, in conjunction with Data Systems, to give them a better overview of the caseload. Unfortunately, the data entry requirements of the system were so intensive that the system collapsed of its own weight. Our present automated tracking system, MTS (MUR Tracking System), was not designed to track all aspects of a case, nor does it allow staff access to the information that is in the system. Consequently, most calendaring must now be done by hand on a team by team basis, and staff attorneys and supervisors must keep

their own calendars of the actions in their cases. The one exception to this relates to First General Counsel's Reports (FGC). In the past, there were concerns that these reports were taking too long. To provide a better sense of where things stand regarding the FGC, CED hand tracks the time elapsed since activation of a case and compiles a report, which is provided to the Associate General Counsel and the Assistant General Counsels at the monthly CED meeting. This enables them to pinpoint where there may be problems at the early stages of the case and to discuss how best to proceed. Because OGC has not experienced the same problems meeting deadlines regarding statute of limitations in our cases as it had with FGCs, we had not previously developed a specialized tool to allow the separate tracking of that item. As a result of what occurred here, however, CED is working on providing a report that will notify management at the monthly CED meetings when a case is within 12 months, and then 6 months of the statute of limitations.

Historically, Enforcement team leaders, in conjunction with their staff, set quarterly goals in all their cases in an effort to better track the progress of their caseload and forwarded those goals to the Associate General Counsel and the General Counsel. The team leaders would meet with the Associate General Counsel regarding these goals and she, in turn, would discuss any issues or concerns with the General Counsel. During the quarter, the Associate General Counsel's secretary notified her and the team leaders when it appeared that anticipated time frames were not being met. This practice was suspended during the hiatus period when much work was put on hold while the newly constituted Commission was familiarizing itself with the caseload.

Once things started moving again, implementation of the new Case Management System was on the horizon and Enforcement decided to wait to reinstitute the program and build on the new system for format. In the meantime, monitoring of the cases was accomplished through one on one meetings, as well as during the monthly CED meetings.

While the new Case Management System is being designed to serve several purposes, OGC has always looked at it as, first and foremost, a method to allow staff and supervisors to keep better track of the progress of ongoing cases. Once the CMS is implemented, we should have a powerful tool to help us avoid future problems involving the tracking of cases.

## **II. Reminders or Deadlines Calendared in This Case**

As noted above, the team leader and staff assigned to the case kept their own records of events in this case.

### **III. Description of the Record Maintained in OGC of the Progress of Matters of this Nature**

Major stage information regarding OGC cases is kept on MTS. This is the system that is used to run the monthly Enforcement Status sheets. As noted above, this system is limited in what it contains and is not available to staff. The other OGC record that tracks progress is the routing cards that are attached to documents as they proceed through the review process. While useful for following the progress of a particular document, these are not very helpful in tracking the overall progress of a case. Again, this office looks forward to the implementation of the Case Management System which will make pertinent case information readily available to all staff, as well as provide for some automated reminder capability.

### **IV. Chronology of the Matter through OGC Since Response Briefs Filed Including:**

#### **a) Attorneys Assigned and Responsible for the Matter**

Jose Rodriguez is the staff attorney and Anne Weissenborn was the Acting Assistant General Counsel supervising the case until July, when the case was transferred to Lisa Klein for supervision. The supervisor, in turn, reports to Lois Lerner, Associate General Counsel for Enforcement, who reports directly to me.

#### **b) Preparation of Drafts of OGC Report , and**

#### **c) Review by Supervisors**

Although the request only seeks a chronology of the case since the response briefs were filed, this Office has prepared a chronology of the entire case for the Commission's information. See Attachment A.

### **V. Other Information Bearing on the Timing of the Submission of the GC Report**

As illustrated on the full case chronology, this case has been actively worked on from the time it was assigned in March of 1996. There are only two periods during the pendency of this matter where the case was delayed. The first occurred between July and December of 1998. During that period, the newly configured Commission was considering the Commission's caseload and had not yet determined whether it wished to continue to pursue all the cases on its docket. As a result, while review of the information gathered in the investigation in MUR 4250 continued, more active progress was delayed and the staff person was assigned a new case to work on during the waiting period. The staff person also was working on a FGC in a major matter which was also being pursued by the Department of Justice.

The other time lag is the crucial 6 month period which elapsed from the time the last response brief was filed in March, 1999, until the Probable Cause Report was circulated in September. After the General Counsel's briefs went out, the staff person had been assigned another matter to work on while awaiting the response briefs. As noted during the oral report to the Commission, the supervisor on this matter was not a permanent supervisor; rather she was in that position on a temporary basis. Although she was aware of the statute of limitations issue, having discussed it with the Associate General Counsel, she and the staff person believed the best course would be to complete the reports in the other matters assigned to the staff before starting on the Probable Cause Report.

Both the other matters took longer than expected and when the staff person finally began work on the Probable Cause Report, it became apparent that the response briefs presented both legal and factual defenses not previously raised, therefore requiring a more extensive Probable Cause Report than was originally anticipated. Once the Associate General Counsel was apprised of the seriousness of the situation, immediate steps were taken to complete the Probable Cause Report as soon as possible.

The resulting report distills respondents' multi-faceted and overlapping arguments into five concise categories. The report, along with a cover memo noting the statute of limitations problem, was placed on the September 14<sup>th</sup> agenda by this office.

This office takes full responsibility for the lateness of the report recommending probable cause to believe and the fact that it was circulated to the Commission only five days prior to the meeting at which we requested it be discussed. Even with extending the discussion to Thursday, we recognize that this gives Commissioners only one week to consider our report, along with the briefs that have been in-house for six months. Unfortunately, as we have explained, unless the Commission makes a decision this week, it is unlikely we will be able to file suit, if necessary, prior to the running of the statute of limitations. It was our judgment, given the significance of the matter and the timing problems, that it was better to give the Commissioners the opportunity to consider the report, even if it was only for one week, than to deprive the Commission of any chance to act before the statute ran.

Again, I apologize for the delay in getting this matter before the Commission and, as noted above, this office is taking steps to assure that this will not happen again.

cc: The Commission