FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	**Kieran Michael Lalor**
	)	**Kieran Michael Lalor 2008 (f/k/a**
MUR 5945	)	**Kieran Michael Lalor Congressional**
	)	**Exploratory Committee) and**
	)	**Christine Chisholm, as treasurer**

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. MCGAHN

The Commission received a complaint alleging that Kieran Michael Lalor, Kieran Michael Lalor 2008 (f/k/a Kieran Michael Lalor Congressional Exploratory Committee) and Christine Chisholm, in her official capacity as treasurer ("Respondents"), violated provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The complainant alleged that some of Respondents' activity went beyond "testing the waters" and that therefore Mr. Lalor became a candidate and failed to register and file the relevant forms with the Commission. We voted to close the file in this matter under the Commission's prosecutorial discretion because it involved a first-time candidate, a small amount of financial activity, and the questionable application of the Commission's testing the waters rules.[1]

I. BACKGROUND

The complainant in this matter alleged that Kieran Michael Lalor failed to file timely a Statement of Candidacy and a Statement of Organization for his authorized committee and that Kieran Michael Lalor 2008 failed to file a timely quarterly financial disclosure report. The complainant made four allegations: (1) an article indicated that Mr. Lalor told the media in April 2007 that he had raised $20,000 for his candidacy; (2) his website listed the contribution limits and indicated that he had an authorized committee; (3) Mr. Lalor paid for

[1] FEC Certification dated Feb. 13, 2009. A motion approving the recommendations in the First General Counsel's Report failed by a vote of 3-3 (Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively and Vice Chairman Petersen and Commissioners Hunter and McGahn dissented). A motion to dismiss this matter on the basis of prosecutorial discretion, *See Heckler v. Chaney*, 470 U.S. 821 (1985), failed by a vote of 3-3 (Vice Chairman Petersen and Commissioners Hunter and McGahn voted affirmatively and Chairman Walther and Commissioners Bauerly and Weintraub dissented). A motion to close the file passed unanimously.

an advertisement in a dinner program that said he was a candidate; and (4) a July 2007 article that allegedly said Mr. Lalor was running and that he raised more than $60,000.

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

Under the Act, an individual becomes a candidate for federal office when the individual has received or made contributions or expenditures in excess of $5,000 and has fifteen days to file a Statement of Candidacy with the Commission.[2] An individual who has not yet decided to run as a federal candidate may "test the waters" prior to declaring candidacy.[3] While testing the waters, the individual need not file reports with the Commission disclosing money received and spent, although all such activity is subject to the Act's limits and prohibitions.[4] If the individual becomes a candidate, all such financial activity must be reported.[5]

During the "testing the waters" period, the individual may, among other things, conduct polls, make telephone calls, and travel to determine the viability of their potential candidacy.[6] Under Commission regulations, certain activities may indicate that an individual is no longer testing the waters, such as: running general political advertising; raising funds in excess of that which would be reasonably required for exploratory activities; making or authorizing written or oral statements referring to the individual as a candidate; conducting activities in close proximity to the election; and taking action to qualify for the ballot under state law.[7]

B. Analysis

We voted to dismiss this case as a matter of prosecutorial discretion.[8] For a number of reasons, this matter simply does not warrant further use of the Commission's resources. Although the complainant alleges that portions of Mr. Lalor's statements, as they appeared in news articles, on his website, and in a paid advertisement in a New York Conservative Party

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[2] 2 U.S.C. § 431(2) and 2 U.S.C. § 432(e)(1).

[3] 11 C.F.R. §§ 100.72 and 100.131.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] 11 C.F.R. §§ 100.72(b) and 100.131(b).

[8] See *Heckler v. Chaney*, 470 U.S. 821 (1985).

dinner program, indicated that he went beyond testing the waters, other parts of often the same communications clearly indicated that he was, in fact, still exploring his candidacy. Thus, given Mr. Lalor's oft-repeated statements that he was exploring candidacy, we are hesitant to initiate a civil enforcement matter and subject Respondents to an intrusive process and a potentially significant civil penalty when the activity at issue was arguably legal. Complainant relies upon rhetorical flourishes, in occasional off-the-cuff comments to reporters, which cannot bear the legal significance ascribed to them by the complainant. Furthermore, the testing the waters rules, which are labeled a "general exemption" in the Commission's regulations, should not operate harshly to potentially lead to an investigation and penalty when the level of financial activity at issue is less significant relative to other matters before the Commission and there are overwhelming contemporaneous indications that the individual was, in fact, still exploring candidacy. This conclusion is in accord with the original Explanation and Justification for the proposed testing the waters general exemption: "This exception was made so that an individual is not discouraged from 'testing the waters'..."[9]

Turning to the articles and information cited in the complaint, the complainant alleged that a July 2007 political party dinner program containing an exploratory committee advertisement indicated that Mr. Lalor was a candidate. Before turning to the contents of the dinner program advertisement, we note that it appeared in a political party communication and not a communication intended for the general public. Just as the Commission's regulations exempt the costs of a State, district, or local political convention, meeting, or conference from the definition of "federal election activity"[10] in consideration of the important associational rights of individuals and parties, we would not chill these rights in the testing the waters context.[11] Even if we reached the question of the advertisement's contents, the statement read, "With your help, we can reclaim our seat in the House of Representatives so it reflects our values, not those of Hollywood elites and liberal extremists." This statement, and other similar statements, however, can reasonably be read as a "rallying cry" for ousting the incumbent. The statement is a far cry from a definitive declaration of present intent to seek federal office, especially in light of the express language in the same advertisement that Mr. Lalor was then "aggressively exploring" candidacy.[12]

Two April 2007 statements are cited as evidence Mr. Lalor became a candidate. The first was a news article reporting that Mr. Lalor had raised $20,000. He apparently stated,

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[9] Federal Election Commission, Explanation and Justification Compilation, 11 C.F.R. § 100.1(b), available at http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf#page=5 (emphasis added).

[10] 11 C.F.R. § 100.24(c)(4)

[11] See also *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)(explaining that "our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences.") (internal citations omitted).

[12] Complaint, Att. B.

"The early support for my candidacy is confirmation that voters in the district are excited to embrace a true conservative."[13] Second, *Congressional Quarterly* quoted another April 2007 statement: "The more people I meet, the more I'm encouraged that I am going to ultimately make the decision to run . . . It would take something major – maybe the second coming of Ronald Reagan in the 19th District – to take me off track."[14] We cannot definitively hold that Mr. Lalor transformed his exploratory effort into a full-fledged candidacy with this type of political rhetoric. To do so could read the testing the waters regulations exemption out of the Commission's regulations, or at least serve as a convenient way to ensnare the unwary based upon statements that can be read in several ways, all after-the-fact.

With respect to the first statement, at the risk of stating the obvious, before an individual becomes a candidate, a potential "candidacy" exists; merely noting that there is support for a "candidacy" is a hallmark of exploratory efforts. An individual who says he or she is exploring "candidacy" is not, without more, a "candidate" under the Act or Commission regulations. With respect to the second quotation's reference to "the second coming of Ronald Reagan," and Mr. Lalor's invocation of this phraseology in similar comments to the media, we decline any invitation to require the Commission to police and parse conversations between an individual who may be seeking federal office and a reporter so as to require potential first-time candidates to have their lawyers vet or script their off-hand remark.

Finally, the amount of receipts Kieran Michael Lalor 2008 disclosed on its 2007 Year End Report, about $31,000, would not alone trigger candidate status because this amount is not in excess of "what could reasonably be expected to be used for exploratory activities," one of the Commission's regulations' testing the waters examples.[15] Under well-established Commission precedent, the amount Mr. Lalor raised was clearly within the scope of permissible testing the waters activities.

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[13] David Paulsen, Iraq Vet Eyes Hall Challenge, *Poughkeepsie Journal*, April 4, 2007, available at http://www.kml2008.com/eyes_hall (accessed through http://www.archive.org).

[14] Iraq Vet Touts "True Conservatism" in New York 19 Take Back Bid, *The New York Times/CQPolitics.com*, April 10, 2007, available at http://www.kml2008.com/true_conservatism.htm (accessed through http://www.archive.org).

[15] 11 C.F.R. § 100.72(b)(2). In MUR 2710 (Sloane), the Commission concluded that a committee raising $200,000 was not sufficient by itself to warrant a finding that the scope of the testing the waters provision was exceeded.

III. CONCLUSION

We voted to close the file in this matter as an exercise of the Commission's prosecutorial discretion because this matter involved a first-time candidate, a small amount of financial activity, and a questionable application of the Commission's testing the waters rules. In the interest of the proper ordering of the Commission's priorities and resources, we therefore voted to dismiss the matter and this Statement provides the basis for our decision.

March 11, 2009

Matthew S. Petersen
Vice Chairman

Caroline C. Hunter
Commissioner

Donald F. McGahn II
Commissioner