FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6391 / 6471
Commission on Hope, Growth, and Opportunity	)	
	)	

SUPPLEMENTAL STATEMENT OF COMMISSIONER LEE E. GOODMAN

This matter was dismissed because there was no prospect of a successful administrative enforcement action or federal court litigation against the Respondent. The Respondent was a defunct organization without agents or assets, which would have made further enforcement efforts ultimately futile. The only clear violations (reporting and disclosure) arose from activity in September and October 2010 that was time barred by the time the Commission voted on the matter in October 2015. The more debatable violation (political committee status) had not even progressed to a reason to believe finding, the statute of limitations would have run within four months, and it was practically impossible to take all required steps in the enforcement process within that period.[1]

Some Commissioners nonetheless wanted the Commission to vote on the political committee theory in order to make academic findings. I did not believe the purpose of the enforcement process was to make purely symbolic gestures. However, now that the enforcement case is closed, I write separately to make an observation that concerned me throughout the Commission's consideration of the matter. The Office of General Counsel's (OGC) analysis for determining whether an organization is a "political committee" varied throughout this matter which indicates a fundamental problem with the Commission's approach to such cases.

The Commission's responsibilities include determining whether two or more persons engaged in core First Amendment activities are "political committees" within the meaning of the Federal Election Campaign Act of 1971, as amended (the "Act"), and thus subject to a host of costly and burdensome prohibitions, limits, and reporting obligations.[2] Political committee

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[1] *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MURs 6391/6471 (Commission on Hope, Growth, and Opportunity).

[2] *See, e.g.*, 52 U.S.C. § 30101(4) ("political committee" defined); *id.* § 30102 (organizational and recordkeeping requirements); *id.* § 30103 (registration requirements); *id.* § 30104 (reporting requirements); *id.* § 30116 (limitations on contributions and expenditures); *id.* § 30120 (disclaimers required on communications).

status means, among other things, that donors to the organization must have their names, addresses, occupations, and employers' names permanently disclosed for public consumption on the Commission's website. In its seminal case of *Buckley v. Valeo*, the Supreme Court correctly concluded that the Act's vague definition of "political committee" threatened to chill the protected speech of groups engaged in activities that were unrelated to those which the Act was designed to regulate.[3] To save this part of the Act from unconstitutionality, the Court required political committee status to be reserved only for those groups whose major purpose is the election or defeat of federal candidates—so that we could assume that the group's expenditures were what Congress intended to regulate and could regulate consistent with the First Amendment.[4]

For the same reason the Court was concerned that the definition of "political committee" cannot be vague, I am concerned that the Commission's application of the major purpose test cannot be inconsistent or incoherent. The public and the Commission must share a common and clear conception of what activity triggers status as a political committee and the heavy burdens of regulation applicable to political committees. Unfortunately, in this matter, OGC presented the Commission with three different descriptions of the major purpose test that were neither consistent nor coherent.

In its revised First General Counsel's Report, dated December 27, 2013 ("Revised FGCR"),[5] OGC acknowledged that the courts "[i]n large measure" have left "the contours of [defining] political committee status" to the Commission.[6] The Revised FGCR advocated analyzing CHGO's major purpose by focusing on two categories of expenditures: first, expenditures on communications that contained express advocacy; second, expenditures on communications that "support or oppose a clearly identified candidate."[7] OGC deduced that non-express advocacy "ads evidenced that the organization's major purpose was federal campaign activity because they 'support,' 'oppose,' 'praise,' or 'criticize' the federal candidates."[8] Accordingly, OGC considered CHGO's payments for ads that lacked either express advocacy or its functional equivalent, but which OGC deemed had "supported" or "opposed" federal candidates, as indicating the requisite major purpose.[9] Significantly, however,

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3 *See also, Van Hollen v. Federal Election Commission*, No. 15-5016, slip op. at 24-26 (D.C. Cir. Jan. 21, 2016) (acknowledging the chilling effects of FEC disclosure rules).

4 *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

5 The OGC's initial First General Counsel's Report, dated August 31, 2011, was withdrawn and replaced by a revised First General Counsel's Report, dated December 27, 2013.

6 Revised FGCR at 25; *id.* at 28 (*Buckley* "did not mandate a particular methodology" (quoting *Real Truth About Abortion, Inc., v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012))).

7 *Id.* at 33; *id.* at n. 21 (citing past MURs in which the Commission considered payments for communications that supported or opposed a candidate, but which fell short of express advocacy).

8 *Id.* at 35.

9 *Id.* at 35-36, 38.

it was the substantive content of CHGO's ads—that they "supported" or "opposed" candidates—that made them count toward a major purpose calculation. The revised FGCR did not argue that all "electioneering communications"[10] count toward major purpose merely because they refer to a candidate. Finally, OGC reached the conclusion that CHGO was a political committee considering CHGO's spending for only one calendar year, 2010.[11]

By contrast, OGC's Second General Counsel's Report ("Second GCR")[12] abandoned the "support" or "oppose" paradigm altogether and instead stated that *all* CHGO ads evidenced the major purpose of electing federal candidates because "each of CHGO's advertisements was either an express-advocacy independent expenditure or electioneering communication, both of which are indicative of major purpose."[13] Like the Revised FGCR, the Second GCR counted only CHGO's spending in calendar year 2010.[14]

Finally, in its Third General Counsel's Report ("Third GCR"),[15] OGC stated, as it had in the Second GCR, that to determine whether an organization satisfied the Supreme Court's major purpose test, the Commission should consider how much an organization spent on "federal campaign activity," an undefined term but one which included both independent expenditures and all electioneering communications (without regard to their "support" or "oppose" content).[16] But, in contrast to the Revised FGCR and the Second GCR, OGC stated that it would apply the major purpose test to the amount spent by CHGO in 2010 *and* 2011, that is, "during the entire duration of its existence."[17]

In sum, OGC's major purpose test has varied in this matter. On the one hand, OGC would count all electioneering communications as indicative of the requisite major purpose, but on the other hand only those that "support," "oppose," "praise," or "criticize" federal candidates would count. Similarly, one year, two years, or the entire duration of an organization's existence are acceptable time periods for measuring an organization's major purpose. Fluctuations in these analytical criteria would not necessarily have been dispositive in this matter, but in other matters these discrepancies could be outcome-determinative.

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[10] An "electioneering communication" is an advertisement that references a federal candidate (but does not expressly advocate the election or defeat of a candidate) and is broadcast on television or radio within 60 days of a general election or 30 days of a primary election. *See* 11 C.F.R. § 100.29(a).

[11] *Id.* at 33.

[12] The Second GGR was dated July 28, 2015.

[13] Second GCR at 10.

[14] *Id.* at 35.

[15] The Third GCR was dated September 24, 2013.

[16] Third GCR at 18.

[17] *Id.*at n.62.

The Commission has decided to determine major purpose on a case-by-case basis,[18] but the decisive criteria the Commission applies to different groups cannot keep changing within the Commission—indeed, within the course of a single matter. Nor can its analysis turn on distinctions so subtle they are beyond detection by the public or, worse, so subjective they can be manipulated to reach desired results in a "heads I win, tails you lose" approach.[19] The criteria must be consistent and clear.

What this case underscores is that CHGO and groups like it, such as Crossroads GPS, Americans for Job Security, and American Action Network, among others, were never afforded clear notice as to the legal criteria that the Commission would apply to them in order to subject them to the significant regulatory burdens applicable to "political committees." This uncertainty is all the more disrupting because it impacts pure issue speech that Americans may make through such organizations within the electioneering communication window. Under one test proposed by OGC, pure issue speech ("call Senator Jones and ask him to support the education bill") would have triggered political committee status if it was broadcast within 60 days of an election, but would not under another test counting only ads that "supported" or "opposed" candidates. Furthermore, altering the time period under scrutiny to exclude an organization's spending during non-election years, while emphasizing their spending in election years punctuated by numerous electioneering communication windows and occasions for independent expenditures, would further render the political committee analysis incoherent and unpredictable, if not arbitrary.

For this reason I continue to support a clear, bright line test to count toward each group's major purpose: speech that unambiguously indicates an intent to influence elections, that is, express advocacy.[20] And I believe a group's spending over its entire existence is the truest measure of the organization's major purpose, rather than an arbitrary or myopic snapshot in time. Only then can we reasonably assume that the group's main activities fall within the "core area" the Supreme Court demarcated for regulation.

Lee E. Goodman
Commissioner

March 3, 2016
Date

[18] *Political Committee Status*, 72 Fed. Reg. 5595, 5601-5602 (Feb. 7, 2007).

[19] *Federal Election Commission v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007).

[20] *See also* Concurring Statement of Reasons of Commissioners Lee E. Goodman and Caroline C. Hunter, MUR 6795 (Citizens for Responsibility and Ethics in Washington) (concurring with unanimous Commission decision to dismiss allegation of political committee status based on properly limited scope of review); Concurring Statement of Reasons of Commissioner Lee E. Goodman, MUR 6660 (Americans Elect) (concurring with unanimous Commission decision to find no reason to believe respondent was a political committee because ostensible "federal campaign activities"— including $35 million to gain ballot access for, nominate, and elect *unspecified* independent candidates for federal office — did not count toward the major purpose of nominating or electing *clearly identified* federal candidates, a decision consistent with *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010)).