



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Joseph Gallagher) MUR 5651
Blount County Democratic Committee, and)
Arnold G. Pesterfield, Treasurer)

**STATEMENT OF REASONS OF CHAIRMAN MICHAEL E. TONER AND
COMMISSIONERS DAVID M. MASON AND HANS A. von SPAKOVSKY**

The matter arises from a complaint filed by Don Sparks, a Maryville, Tennessee, resident, regarding a headquarters opened by Respondent Joseph Gallagher for the 2004 presidential and vice-presidential campaign of Senators John Kerry and John Edwards in Blount County, Tennessee. The Commission voted unanimously to accept the recommendation of the Office of General Counsel (“OGC”) to exercise prosecutorial discretion and dismiss the complaint under *Heckler v. Chaney*, 470 U.S. 821 (1985).¹ We write separately to note that the scope, extent and cost of the activities described in the complaint, response and publicly available sources extend far beyond the facts of the previous Commission matter cited in support of dismissal, *see In re Morton* (“Muleshoe”), Matter Under Review (“MUR”) 5156, Statement of Reasons (“SOR”) of Comm’r Wold (F.E.C. March 22, 2002); *id.* SOR of Chairman Mason & Comm’r Smith (F.E.C. April 25, 2002) (concurring in part in Comm’r Wold’s SOR); *id.* SOR of Comm’r Thomas (F.E.C. July 15, 2002), and thus establish a new threshold below which exercise of prosecutorial discretion is appropriate.

I. BACKGROUND

Gallagher opened a “Blount County Kerry for President” bank account² and a Blount County Kerry-Edwards headquarters.³ He and others raised approximately \$13,000 in Blount County,⁴ expressly advocated the election of Kerry and Edwards, and filed a report with the

¹ Voting affirmatively were Chairman Toner, Vice Chairman Lenhard and Commissioners Mason, von Spakovsky, Walther, and Weintraub.

² First Gen. Counsel’s Report (“GCR”) at 1-3 (April 20, 2006); *see id.* Attach. 3 at 3.

³ *E.g.*, GCR Attach. 3 at 2-3.

⁴ GCR at 2; *id.* Attach. 3 at 3. The \$3,700 figure in this matter, *see In re Gallagher*, MUR 5651, SOR of Vice Chairman Lenhard & Comm’rs Walther & Weintraub at 3 (F.E.C. Sept. 21, 2006), reflects only the approximate

Blount County Election Commission indicating that the “Kerry-Edwards Blount County Campaign,” *inter alia*:

- Registered almost 1,100 voters at the Kerry-Edwards headquarters.
- Organized telephone and door-to-door canvassing, and letter writing.
- Organized drivers for early voting and Election Day.
- Organized public demonstrations at high-school football games and at Maryville College.
- Purchased campaign yard signs, bumper stickers, T-shirts, campaign buttons, three billboards, caps, fliers, brochures, campaign office supplies, food and beverages, and
- Purchased Maryville *Daily Times* campaign ads in part with three donations from the Blount County Democratic executive committee.⁵

The sources of other donations to Blount County Kerry for President included the Blount Democrat Women’s Club.⁶

Before his Blount County efforts began, Gallagher was in contact with party and Kerry-Edwards campaign officials. Gallagher’s counsel himself notes that if

a full analysis of the facts in this case were warranted, we suspect that they would show that Mr. Gallagher was originally contacted by the [s]tate [h]eadquarters for Kerry regarding organizing its efforts in Blount County. His efforts overlapped with both the [s]tate and local party leaders, and he was unaware of any requirement that he independently register with the Federal Election Commission.⁷

In recommending that the Commission dismiss this matter based on prosecutorial discretion, OGC suggests that this matter would be an imprudent use of Commission resources. On the one hand, OGC asserts, if Gallagher was acting on behalf of the Kerry-Edwards campaign, nothing in the record suggests a significant violation of the Federal Election Campaign Act (“FECA”), 2 U.S.C. § 431 *et seq.*, may have occurred. On the other hand, OGC also recommends the Commission take no action if this matter is similar to *Muleshoe*,⁸ a matter so named because it arose from events in Muleshoe, Texas. *See generally infra at 5.*

The complaint also alleges that Gallagher deposited into the Blount County Kerry for President account at least five checks made out to the county Democratic party.⁹ Gallagher

total of Respondent Blount County Kerry for President’s disbursements that the Kerry-Edwards campaign would have been required to itemize in its own disclosure reports. GCR at 7. This is not the total amount at issue here.

⁵ *Id.* Attach. 3 at 2-5, 7.

⁶ *Id.* Attach. 3 at 3.

⁷ *Id.* Attach 2.

⁸ GCR at 6-7.

⁹ Compl. (March 3, 2005).

attached to his response a letter from county party chairman Brandon Cook, who said that each check was brought to the Blount County Kerry for President headquarters, that Gallagher unintentionally deposited a \$100 check into the Blount County Kerry for President account, and that five other checks made out to “Democratic Party” and totaling \$145 were meant for Blount County Kerry for President.¹⁰ Gallagher later gave \$865 – the balance in the Blount County Kerry for President account – to the county party, which the party’s executive committee accepted “with a resounding approval and vote of appreciation to Mr. Gallagher for his efforts in the 2004 campaign.”¹¹

II. DISCUSSION

If this matter involved only \$245 in checks, dismissing the complaint based on prosecutorial discretion would be unremarkable, except to observe again that FECA, as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), regulates some grassroots political speech that federal law did not previously regulate. *See, e.g., In re Tenaflly Democratic Campaign 2004*, MUR 5619, *Tenaflly Two* SOR of Vice Chairman Toner & Comm’r Mason at 3-8 (F.E.C. Dec. 7, 2005). However, there is more to this matter than \$245 in checks.

A. Grassroots Political Speech

FECA, as amended by BCRA, establishes four categories of “federal election activity” (“FEA”). 2 U.S.C. § 431(20)(A) (2002). They include, with exceptions not relevant here, *see id.* § (B):

- Voter registration activity¹² 120 days or fewer before a regularly scheduled federal election. *Id.* § (A)(i).
- Voter identification,¹³ get-out-the-vote activity,¹⁴ or generic campaign activity¹⁵ in connection with an election where a candidate for federal office is on the ballot. *Id.* § (A)(ii), and
- A public communication¹⁶ that refers to a clearly identified candidate for federal office and promotes, supports, attacks, or opposes (“PASOs”) a candidate for that office. *Id.* § (A)(iii).

¹⁰ Resp. (April 22, 2005); *id.* Attach. at 1-2 (April 18, 2005).

¹¹ GCR at 3.

¹² Defined in 11 C.F.R. § 100.24(a)(2) (2002), amended, 71 FED. REG. 14357, 14360 (March 22, 2006).

¹³ Defined in *id.* § (a)(4).

¹⁴ Defined in *id.* § (a)(3).

¹⁵ Defined in 2 U.S.C. § 431(21); *see also* 11 C.F.R. § 100.25 (2002), republished, 71 FED. REG. 18589, 18612 (April 12, 2006).

¹⁶ Defined in 2 U.S.C. § 431(22) and 11 C.F.R. § 100.26 (2002), amended, 71 FED. REG. at 18612-13. The definition of “public communication,” in turn, uses the terms “mass mailing” and “telephone bank.” “Mass mailing”

FECA then requires, with exceptions not relevant here, *see id.* § 441i(b)(2)(A), (B) (2002), that any expenditure or disbursement for FEA by (1) a state, district, or local political-party committee, (2) an entity established, financed, maintained, or controlled by such a committee, or (3) an association or similar group of state or local candidates or officeholders, be from federal money, *i.e.*, money subject to FECA limits,¹⁷ prohibitions,¹⁸ and reporting requirements.¹⁹ *Id.* § (b)(1). Even amounts that these entities spend to raise money for FEA must be from federal money. *Id.* § (c). Moreover, a state or local candidate or officeholder may not use nonfederal money for the third type of FEA – namely, a public communication that refers to a clearly identified candidate for federal office and PASOs a candidate for that office. *Id.* § (f)(1) (citing *id.* § 431(20)(A)(iii)).

FECA also provides that spending for political speech coordinated with a federal candidate or a federal candidate’s authorized committee is a contribution to the candidate. Likewise, spending for political speech coordinated with a national, state, or local political-party committee is a contribution to the committee. *Id.* § 441a(a)(7)(B)(i)-(ii).

Commissioners have reluctantly observed how FECA reaches some grassroots political speech, including FEA by some local political organizations. *See, e.g., Tenaflly*, SOR of Vice Chairman Toner & Comm’r Mason at 3-8. This matter is similar, though not identical, to *Tenaflly* in that Respondents include an individual and a local political-party committee that engaged in FEA. In addition, Blount County Kerry for President may have been established, financed, maintained, or controlled by the state or local political party, and its effort, which included express advocacy, may have been coordinated with the state or local party, or the Kerry-Edwards campaign. If its express-advocacy efforts were not coordinated, they were independent expenditures, *see* 2 U.S.C. § 431(17), and FECA requires that persons making independent expenditures exceeding \$250 in a calendar year disclose them to the Commission. *Id.* § 434(c). Complicated FECA disclaimer requirements may also come into play. *See id.* § 441d (2002).²⁰

B. Prosecutorial Discretion

Honorable people may disagree about whether federal statutes and regulations should intrude on grassroots political speech to this extent, yet the Commission’s duty is to enforce the

is defined in 2 U.S.C. § 431(23) and 11 C.F.R. § 100.27 (2002), and “telephone bank” is defined in 2 U.S.C. § 431(24) and 11 C.F.R. § 100.28 (2002).

¹⁷ 2 U.S.C. § 441a(a), (c), (f) (2002).

¹⁸ *Id.* § 441b(a) (2002).

¹⁹ *Id.* § 434 (2004); *see also id.* § 433 (1980) (registration requirements).

²⁰ As for FECA violations not raised in the complaint, others have expressly considered political-committee status without expressly acknowledging the presence of (1) FEA, (2) coordinated communications, even those with express advocacy, and (3) independent expenditures. *See* GCR at 5; *Gallagher*, SOR of Vice Chairman Lenhard & Comm’rs Walther & Weintraub at 2.

law as it is, not as it should be. *See id.* § 437g (2002); *cf.* THE FEDERALIST No. 78 (Alexander Hamilton).

Nevertheless, agencies do have prosecutorial discretion, *see Heckler v. Chaney, supra*, and the Commission frequently exercises it. *See, e.g., Muleshoe*, SOR of Comm'r Wold at 3-4. *Muleshoe* involved an amusing contest of independent expenditures by two neighbors, one supporting the 2000 campaign of then-Vice President Al Gore, and the other supporting the campaign of then-Governor George W. Bush. The Commission exercised prosecutorial discretion, because the political speech was engaged in

by individuals, not by a candidate or an ongoing political committee; it involved a small amount of money by any measure; there was no coordination with a candidate; and there was nothing secret about the identity of the perpetrators. In short, this is the kind of spontaneous expression of political opinion that individuals should be free to engage in without concern over compliance with government regulations.

Id. (footnotes omitted). Prosecutorial discretion is not limited to matters similar to *Muleshoe*, *see, e.g., In re Jerry Falwell Ministries, Inc.*, MUR 5491, SOR of Chairman Thomas, Vice Chairman Toner & Comm'rs Mason, McDonald, Smith & Weintraub at 2-3 (F.E.C. Aug. 2, 2005), yet the facts of this matter extend far beyond *Muleshoe*.

First, according to Gallagher's counsel, "Gallagher was originally contacted by the [s]tate [h]eadquarters for Kerry regarding organizing its efforts in Blount County." This raises questions about whether the activity was coordinated with (*e.g.*, requested by) the Kerry campaign. The main statement dismissing *Muleshoe* specifically cited lack of coordination as one reason for the dismissal. *Muleshoe*, SOR of Comm'r Wold at 3-4.

Second, contacts with the state and local party, including assistance with financial matters, apparent cooperation in activities, receipt of money from the local party and subsequent donation of money back to the party on dissolution, and reporting of activities to the party committee raise questions about whether Blount County Kerry for President was established, financed, maintained, or controlled by the county Democratic party committee or was coordinating its activities with that committee. There was no indication of involvement by or with a political-party committee in *Muleshoe*. *See id.*

Third, Blount County Kerry for President may have been a political committee under FECA. The definition of "political committee" includes "any committee, club, association, or other group of persons which 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); *see generally Buckley v. Valeo*, 424 U.S. 1, 42-44 & n.52, 78-80 (1976); *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995). Political committees must appoint a treasurer, 2 U.S.C. § 432(a) (2004), register with the Commission, *id.* § 433, keep accounts and records as FECA prescribes, *id.* § 432(b)-(i), and file reports with the Commission, *id.* § 434, not to mention comply with contribution limits and prohibitions. *Id.* § 441a(a), (c), (f); *id.* § 441b(a).

Fourth, the amount of money involved – \$13,000 – is not “a small amount of money by any measure.” In many counties in America, this is a significant amount of money for a local political organization.

In fact, a review of the Commission’s *Heckler v. Chaney* dismissals based on the amount at issue reveals that \$13,000 is a new threshold for such dismissals, and that the highest amount at issue in prior *Heckler v. Chaney* dismissals was \$9,500, in a matter involving a statewide committee. See *In re Republican Party of Ark.*, Audit Referral (“AR”) 01-01/MUR 5235, First Gen. Counsel’s Report (“FCGR”) at 2, 4 (F.E.C. Sept. 26, 2001) (dismissing a matter as to three individuals whose contributions, taken together, exceeded contribution limits by \$9,500); *id.* Certification (F.E.C. Oct. 11, 2001); see also *In re Iosco County Republican Party*, MUR 5632, FCGR at 5 (F.E.C. Jan. 17, 2006); *id.* Certification (F.E.C. March 8, 2006); *In re Alcona County Republican Comm.*, MUR 5631, FCGR at 3, 5 (F.E.C. Jan. 13, 2006); *id.* Certification (F.E.C. March 8, 2006); *In re Oregon-Washington Veteran Action Comm., Inc.*, MUR 5519, SOR of Chairman Thomas & Comm’rs Mason, McDonald & Weintraub at 1-2 (F.E.C. May 18, 2005); *In re Michigan Republican State Comm.*, AR 00-06/MUR 5287, FGCR at 20 (F.E.C. July 11, 2002); *id.* Certification (F.E.C. July 24, 2002); *In re Engel for Congress*, MUR 5220, SOR of Chairman Mason, Vice Chairman Sandstrom & Comm’rs Smith & Thomas at 1 (F.E.C. April 18, 2002); *In re IUE-Local Union No. 323*, MUR 5219, SOR of Chairman McDonald, Vice Chairman Mason & Comm’rs Sandstrom & Thomas at 1 (F.E.C. Oct. 23, 2001); *In re Wu for Congress*, AR 00-03/MUR 5176, FCGR at 3 (F.E.C. Feb. 15, 2001); *id.* Certification (F.E.C. Feb. 21, 2001); *In re Spartanburg County Republican Party*, MUR 5147, FCGR at 6, 9-10 (F.E.C. April 22, 2002); *id.* Certification (F.E.C. May 8, 2002); *In re McCormick for Congress*, AR 99-20/MUR 5055, FCGR at 2 (F.E.C. July 18, 2000); *id.* Certification (F.E.C. July 24, 2000); *In re Friends of Ronnie Shows*, AR 99-21/MUR 5017, FCGR at 14-15, 18 (F.E.C. May 14, 2001); *id.* Certification (F.E.C. May 23, 2001); *In re Dear for Congress*, AR 00-02/MUR 4935, FCGR at 12 n.5, 15 (F.E.C. July 17, 2000); *id.* Certification (F.E.C. July 28, 2000); *In re Mary Landrieu for Senate Comm., Inc.*, AR 98-07/MUR 4898, FCGR at 5-6 (F.E.C. May 17, 1999); *id.* Certification (F.E.C. May 21, 1999); *In re Five Civilized Tribes Political Action Comm.*, RAD Referral 97L-25/MUR 4867, FCGR at 16-17 (F.E.C. Oct. 30, 1998); *id.* Certification (F.E.C. Dec. 3, 1998); *In re Tierney for Congress Comm.*, MUR 4803, Gen. Counsel’s Report No. 2 at 12 (F.E.C. Aug. 28, 2000); *id.* Certification (F.E.C. Sept. 13, 2000); *In re Ryan for Congress*, MUR 4791, SOR of Vice Chairman Wold & Comm’rs Elliott, Mason, McDonald & Sandstrom at 2 (F.E.C. April 15, 1999); *In re Huckabee Election Comm. (U. S. Senate)*, MURs 4317 & 4323, SOR of Chairman Thomas, Vice Chairman Wold & Comm’rs Elliott, McDonald, Mason & Sandstrom at 1-2 (F.E.C. June 14, 1999); *In re Washington County Democratic Party*, Pre-MUR 383, Factual & Legal Analysis of Chairman Wold, Vice Chairman McDonald & Comm’rs Elliott, Mason, Sandstrom & Thomas at 2 (F.E.C. April 17, 2000).

Moreover, \$13,000 exceeds the amount at issue in a recent matter that involved a Michigan resident who spent less than \$2,000 on a Traverse City *Record-Eagle* ad expressly advocating the defeat of a member of Congress. There was no coordination with any candidate or party, so the express-advocacy ad was an independent expenditure. See 2 U.S.C. § 431(17). However, the ad lacked a disclaimer, and the Michigander did not report the independent expenditure to the Commission. See generally *id.* § 441d(a)(3), (c); *id.* § 434(c). After the Commission accepted a recommendation to assign the matter to alternative dispute resolution

("ADR"), see *In re Jones*, MUR 5662/ADR 303, Recommendation to Assign Case (F.E.C. Dec. 12, 2005), the Michigander agreed to accept a \$200 civil penalty. See *id.* Recommendation to Approve Settlement Agreement (F.E.C. Jan. 23, 2006). Although the Commission exercised prosecutorial discretion in rejecting the settlement agreement, see *id.* Certification (F.E.C. March 21, 2006), that does not diminish the fact that there was no recommendation of prosecutorial discretion and no exercise of prosecutorial discretion when the Commission agreed to assign the matter to ADR.

Furthermore, in other matters involving other issues, the Commission has accepted settlement agreements – rather than exercise prosecutorial discretion – where the amount at issue was less than \$13,000. See, e.g., *In re Carter's Inc.*, MUR 5643, Conciliation Agreement (F.E.C. March 14, 2005) (corporate contributions in the name of another); *id.* Certification (F.E.C. March 10, 2006); *In re Casal*, MUR 5389, Conciliation Agreement (F.E.C. May 7, 2004) (foreign-national contributions); *id.* Certification (F.E.C. April 29, 2004); *In re MSBDF A Management Group, Inc.*, MUR 4928, Conciliation Agreement (F.E.C. March 1, 2000) (corporate contributions in the name of another); *id.* Certification (F.E.C. Feb. 16, 2000);²¹ *In re Rust Envtl. & Infrastructure*, MUR 4901, Conciliation Agreement (F.E.C. Sept. 13, 2001) (corporate/federal-contractor contributions in the name of another); *id.* Certification (F.E.C. Sept. 7, 2001);²² *In re Cadeau Express, Inc.*, MUR 4876, Conciliation Agreement (F.E.C. March 23, 1999) (corporate contributions in the name of another); *id.* Certification (F.E.C. March 15, 1999);²³ *In re Broadcast Music*, MUR 4871, Conciliation Agreement (F.E.C. March 21, 2001) (corporate contributions in the name of another); *id.* Certification (F.E.C. Feb. 15, 2001);²⁴ *In re Elections Comm. of the County of Orange*, MUR 4866, Conciliation Agreement (F.E.C. April 8, 1999) (late filing of report); *id.* Certification (F.E.C. April 7, 1999); *In re WPXI, Inc.*, MUR 4748, Conciliation Agreement (F.E.C. Aug. 23, 2000) (corporate contributions in the name of another); *id.* Certification (F.E.C. Aug. 17, 2000); *In re Doyle*, MUR 4434, Conciliation Agreement (F.E.C. Jan. 18, 2000) (excessive contributions in the name of another); *id.* Certification (F.E.C. Jan. 11, 2000).

²¹ Based on the facts of *MSBDF A Management*, the Commission also reached settlement agreements with co-respondents. *In re Tucker*, MUR 4928 (F.E.C. March 1, 2000); *In re Smoot*, MUR 4928 (F.E.C. March 1, 2000); *In re Lockhart*, MUR 4928 (F.E.C. March 1, 2000); *In re Croxton*, MUR 4928 (F.E.C. March 1, 2000); *In re MSBDF A Management Group, Inc.*, MUR 4928, Certification (F.E.C. Feb. 16, 2000) (same certification as for MSBDF A Management Group).

²² Based on the facts of *Rust Environmental*, the Commission also reached a settlement agreement with a co-respondent. *In re Gonzales*, MUR 4901, Conciliation Agreement (F.E.C. Nov. 28, 2001); *id.* Certification (F.E.C. Nov. 20, 2001).

²³ Based on the facts of *Cadeau Express*, the Commission also reached a settlement agreement with a co-respondent. *In re Desage*, MUR 4876, Conciliation Agreement (F.E.C. March 23, 1999); *id.* Certification (F.E.C. March 15, 1999) (same certification as for Cadeau Express).

²⁴ Based on the facts of *Broadcast Music*, the Commission also reached a settlement agreement with a co-respondent. *In re Riccobono*, MUR 4871 (F.E.C. Sept. 17, 2001); *id.* Certification (F.E.C. Sept. 12, 2001).

C. *Gallagher* Threshold

Our colleagues note²⁵ that a variety of factors other than the amount of the violation appropriately weigh in our prosecutorial-discretion decisions.²⁶ We agree. Our difference is that we view those factors as absent²⁷ or as weighing in favor of pursuing this matter.

Normally, the involvement of a presidential campaign or the implication of BCRA violations involving FEA weighs in favor of enforcement. Thus, we see no rationale other than the raw dollar total for dismissal of this matter. As a result of this MUR, the Commission has now established a \$13,000 threshold for pursuing (1) FEA, (2) coordinated communications, even those with express advocacy, (3) independent expenditures, and (4) political-committee status. In the future, the Commission should not pursue enforcement actions for activity below this threshold.

After all, it is important that the Commission enforce FECA consistently, rather than reach different results in matters with materially indistinguishable facts. *See, e.g., In re Robert*, MUR 5321, SOR of Comm'r Mason at 1 (F.E.C. July 13, 2004) (contrasting *In re Ferguson for Congress*, MUR 5138 (F.E.C.)); *see also id.* at 5-6.

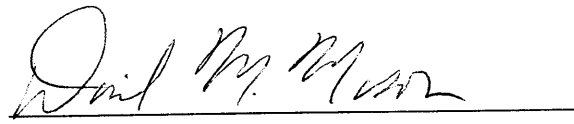
III. CONCLUSION

With the foregoing understanding, we agreed to accept the OGC recommendation to dismiss this matter based on prosecutorial discretion.

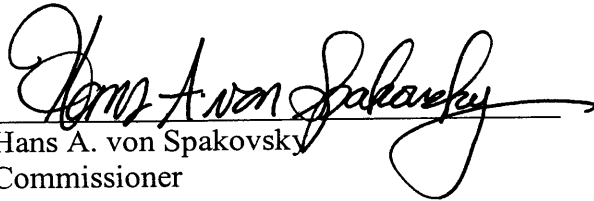
September 25, 2006



Michael E. Toner
Chairman



David M. Mason
Commissioner



Hans A. von Spakovsky
Commissioner

²⁵ *See Gallagher*, SOR of Vice Chairman Lenhard & Comm'rs Walther & Weintraub at 3-5 & nn.4-14.

²⁶ We note that some factors cited by our colleagues, such as the "type of grassroots activity involved[.]" *id.* at 2, and the difficulty of investigating Respondents, *id.* at 3, were not, however, cited by OGC. *See GCR* at 5-7.

²⁷ While *Gallagher* appears to have lacked familiarity with federal campaign-finance law, his contacts with the Kerry campaign and the county-party committee make his ignorance less excusable.