FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Crossroads Grassroots Policy Strategies	)	MUR 6396
	)	
	)	
	)	

SUPPLEMENTAL STATEMENT OF REASONS OF COMMISSIONER STEVEN T. WALTHER

I. Introduction

On November 21, 2012, the First General Counsel Report ("FGCR") in Matter Under Review ("MUR") 6396 was submitted to the Commission for consideration.[1] The FGCR recommended that the Commission find reason to believe ("RTB") that the Respondent, Crossroads Grassroots Policy Strategies ("Crossroads GPS"), violated provisions of the Federal Election Campaign Act ("FECA" or the "Act") by failing to organize and register as a "political committee," and as a consequence, additionally, failed to file with the FEC the disclosure reports required of a political committee.[2] On December 3, 2013, the Commission met in executive session and voted on the RTB recommendation in the FGCR. Three Commissioners (Vice Chair Ann M. Ravel, Commissioner Ellen L. Weintraub and I) voted to approve the recommendation.[3] Three Commissioners (Chairman Lee E. Goodman, Commissioner Caroline C. Hunter and Commissioner Matthew S. Petersen, collectively, the "Controlling Group") voted against the

[1] The FGCR can be found at http://eqs.fec.gov/eqsdocsMUR/14044350839.pdf.

[2] Specifically, the FGCR recommended that the Commission find reason to believe that Crossroads GPS failed to organize, register, and report as a political committee as required, respectively, by 52 U.S.C. § 30102 (formerly 2 U.S.C. § 432) ("Organization of political committees"), 52 U.S.C. § 30103 (formerly 2 U.S.C. § 433) ("Registration of political committees") and 52 U.S.C. § 30104 (formerly 2 U.S.C. § 434) ("Reporting requirements"). Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table, *available at* http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. To avoid confusion, this Statement will not only reference the current citations, but will also include the former Title 2 citations as appropriate.

[3] The Commission meets regularly in closed session to discuss pending enforcement actions, litigation and other matters that, by law, are kept confidential. *See* http://www.fec.gov/agenda/agendas.shtml#executive.

recommendation. Following the 3-3 deadlock, the Commission voted unanimously, as a matter of common practice, to "close the file."[4]

On January 8, 2014, Chairman Goodman, Commissioner Hunter and Commissioner Petersen jointly submitted their "Statement of Reasons" ("Controlling Group SOR") stating why they voted against the recommendation of the Office of General Counsel ("OGC") in the FGCR, which vote effectively prevented the Commission from going forward with an investigation.[5] On January 10, 2014, Vice Chair Ravel, Commissioner Weintraub and I jointly issued a

[4] *See* Certification in MUR 6396, dated Dec. 3, 2013, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350869.pdf.

[5] *See* Controlling Group SOR in MUR 6396 by Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, dated Jan. 8, 2014, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf. In this matter, where one of the complainants that initiated the MUR, Public Citizen, has filed suit in U.S. District Court pursuant to 52 U.S.C. § 30109(a)(8) (formerly 2 U.S.C. § 437g(a)(8)), the Controlling Group is required to provide a "statement of their reasons" for voting against OGC's recommendation. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F. 2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that complaint, like any other, is judicially reviewable under Section 437g(a)(8). . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."); *Common Cause v. FEC*, 655 F. Supp 619 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988).

Notwithstanding my disagreement with the content of the Controlling Group SOR, I voted, consistent with Commission tradition and practice, to authorize OGC to defend the Commission in this suit. The following explanatory footnote was included as footnote 1 of the FEC's Answer to the Complaint, available at http://fec.gov/law/litigation/public_fec_answer.pdf:

> This litigation is commenced against the Federal Election Commission (Commission) on the grounds that the Commission did not approve a recommendation of the Commission's Office of General Counsel (OGC) to find "reason to believe" (RTB) that a violation of the FECA or of its regulations occurred in this case and that the file was consequently closed. 2 U.S.C. § 437g(a)(8) [now 52 U.S.C. § 30109(a)(8)]. The reason for the inaction of the Commission is because there were not four or more Commissioners' votes to proceed on the RTB recommendation. Courts have held that, in order to properly review the inaction of the Commission, the court must be supplied with a "statement of reasons" of those Commissioners who voted against, or abstained from voting for, the OGC recommendation, who the court has called the "controlling group." *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F. 2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that complaint, like any other, is judicially reviewable under Section 437g(a)(8) [now 52 U.S.C. § 30109(a)(8)] . . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."); *Common Cause v. FEC*, 655 F. Supp. 619 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988). The Commission has historically voted by a majority vote (pursuant to 2 U.S.C. §§ 437c(c) [now 52 U.S.C. § 30106(c)] and 437d(a)(6) [now 52 U.S.C. § 30107(a)(6)]) to authorize the OGC's appearance on behalf of the Commission in suits commenced pursuant to 2 U.S.C. § 437g(a)(8) [now 52 U.S.C. § 30109(a)(8)]. Accordingly, the views of the Commissioners who voted to pursue enforcement are not defended by the OGC, although their statements of reasons are part of the administrative record and available for the Court's consideration. Furthermore, the OGC's representational role in this matter does not change OGC's recommendation to find RTB or any of the reasons supporting it, which are part of the administrative record.

"Statement of Reasons" ("Ravel/Walther/Weintraub SOR") discussing our reasons for supporting OGC's recommendation to find RTB.[6]

Subsequent to the issuance of the two SORs by Commissioners in this matter, two important events occurred. First, on January 31, 2014, Public Citizen, along with the other complainants in MUR 6396, filed suit in U.S. District Court pursuant to 52 U.S.C. § 30109(a)(8) (formerly 2 U.S.C. § 437g(a)(8)), alleging that the Commission's dismissal of that matter was "contrary to law."[7] Second, on March 25 and on April 10, 2014, respectively, the Controlling Group issued (1) a Supplemental Statement of Reasons[8] and (2) a statement regarding the Commission's vote to authorize defense in the *Public Citizen* litigation.[9]

Based on the issues raised, I am issuing this Supplemental Statement of Reasons to discuss why I believe the court should (a) declare that the Controlling Group's rationale for not finding RTB is "contrary to law," and (b) "direct the Commission to conform with such declaration."[10]

II. The Controlling Group's Rationale For Not Finding Reason to Believe Is Contrary to Law

A. It is Uncontroverted that Crossroads GPS Spent Massive Amounts on Federal Campaign Activity in 2010 With Minimal Public Disclosure

As noted in the Ravel/Walther/Weintraub SOR, the uncontroverted information available at the pre-RTB stage indicated that Crossroads GPS's spending on campaign activity was vast, both in absolute terms and as a proportion of its total spending.[11]

[6] *See* SOR in MUR 6396 by Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub, dated Jan. 10, 2014, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350964.pdf.

[7] 52 U.S.C. § 30109(a)(8)(C) (formerly 2 U.S.C. § 437g(a)(8)(C)); *Public Citizen v. FEC*, Case No. 14-cv-00148 (D.D.C. filed Jan. 31, 2014) ("*Public Citizen* litigation"). *See* fn. 5. Three other complainants in the underlying matter – ProtectOurElections.org, Craig Holman and Kevin Zeese – joined Public Citizen as co-plaintiffs. The Complaint may be found at http://fecds005.fec.gov/law/litigation/public_citizen.shtml.

[8] *See* Supplemental Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen ("Controlling Group Supplemental SOR"), dated Mar. 25, 2014, *available at* http://eqs.fec.gov/eqsdocsMUR/14044352011.pdf.

[9] *See* Statement of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen Regarding the Commission Vote to Authorize Defense of Suit in *Public Citizen, et al. v. FEC*, Case No. 14-cv-00148 (RJL) ("Controlling Group Defense of Suit Statement"), undated (released Apr. 10, 2014), *available at* http://www.fec.gov/members/goodman/statements/PublicCitizenStatement_LEG_CCH_MSP.pdf.

[10] Section 437g(a)(8)(C) states: "In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is *contrary to law*, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint" (emphasis added).

[11] Ravel/Walther/Weintraub SOR at 3.

It is uncontroverted that:

1. Since June 1, 2010, the date of its formation, through December 15, 2010, a six-and-a-half month period, Crossroads GPS spent a total of $39.1 million, with at least $15,445,039 of this amount, or approximately 40% of its total spending, on reported independent expenditures.[12]

2. Additionally, in the same six-and-a-half month period in 2010, Crossroads GPS spent approximately $5.4 million on communications that it claims did not contain express advocacy, but that nonetheless criticized or opposed a clearly identified federal candidate, including $1,104,783.48 on reported electioneering communications.[13]

3. Combined, these communications total approximately $20.8 million, or 53.3% of the amount Crossroads GPS reported spending during the six-and-a-half months of Crossroads GPS's existence in 2010.

4. Additionally, in 2010, Crossroads GPS acknowledged that it spent another $15,860,000 for grants to "groups that share similar missions."[14]

Although Crossroads GPS publicly disclosed spending for what it asserted were independent expenditures and electioneering communications that identified federal candidates (totaling approximately $16.5 million), *it did not publicly disclose* the remainder of its spending

[12] In its response, Crossroads GPS acknowledges that it spent "[a]pproximately $39.1 million . . . on communications with the public, pre-production activities in support of these communications, and grants to other non-profit organizations engaged in social welfare activities. Of this amount, approximately $39.1 million, $15,445,039.50 was spent on independent expenditures that were reported to the FEC." Response of Crossroads GPS dated Dec. 22, 2010 at 7, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350759.pdf (providing spending information from June 1 through December 15, 2010). Regarding the period from December 2010 through August 2011, Crossroads GPS states that it "devoted substantial resources to a variety of issue advocacy, watchdog and accountability projects," one of which was an approximately $20 million project on ads criticizing President Obama and other federal officeholders. Response of Crossroads GPS dated Sept. 9, 2011, at 4-6, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350819.pdf.

[13] *See* Response of Crossroads GPS dated Dec. 22, 2010 at 8-9, cited in FGCR at 17. The FGCR included the text of these advertisements at pp. 19-22.

[14] Controlling Group SOR at 3-4 (citing response of Crossroads GPS dated Apr. 23, 2012). It is unclear how much of this $15,860,000 was spent during 2010 (the figure apparently represents spending from June 1, 2010 through May 31, 2011; *see* FGCR, fn. 16). However, if this amount is divided by the 12-month period at issue, the monthly amount would be $1,321,667; if the same 6½ month period is prorated on the monthly basis, the amount would be $8,590,835 for the same period in 2010. Assuming these "similarly situated" groups spent 53.3% on federal candidate-centric communications, the resulting figure of $4,578,915 would essentially raise the level of this type of spending by Crossroads GPS from 53.3% to approximately 65%. Crossroads GPS contends that these grants were made under the condition that the funds be spent on activities "consistent with each organization's Section 501(c)(4) exempt purpose." Response of Crossroads GPS dated Dec. 22, 2010 at 12, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350759.pdf. However, it is Crossroads GPS's position that all non-express advocacy communications would fall in that category (*see, e.g.*, Response of Crossroads GPS dated Dec. 22, 2010 at 2, 7, 13), consistent with its conclusion, which I consider erroneous, that only express advocacy communications should be considered in determining an organization's "major purpose." *Id.* at 3-4.

to the Commission and *did not publicly disclose any* information about the sources of its funding, thereby frustrating the *public's right to know* about the group's spending and funding in advance of federal elections.

As discussed below, by any measure, the Commission was required by law to find RTB that Crossroads GPS may have violated the Act by failing to organize, register, and report as a political committee. Because the Controlling Group did not support such a finding, there was no mechanism for the Commission to look beyond the information available to it at the time to formally investigate the entire nature and extent of Crossroads GPS's spending – which would have ultimately determined whether or not there was probable cause to believe its major purpose was federal campaign activity. As the Commission has stated, in examining an organization's major purpose in prior matters, "[e]ach organization's *full range of campaign activities* was evaluated, including whether the organization engaged in any activities that were not campaign related." [15]

B. Standard of Review

The uncontroverted facts of this matter – which facts the Controlling Group SOR concurs with or does not dispute – compel, in my opinion, a finding of reason to believe that FECA violations may have occurred, and any vote against the recommendation was not rationally based, and thus contrary to law. In other words, any conclusion to the contrary is not rationally based on the available undisputed facts. Accordingly, I believe the court should reject the Controlling Group SOR's interpretation of the Act, as applied to the uncontroverted facts elicited in this matter, as arbitrary and capricious, and therefore contrary to law; if the court agrees, it should remand this matter to the Commission for appropriate proceedings.

Under the Act, a court may not disturb the dismissal of a Commission enforcement matter unless that dismissal was "contrary to law."[16] Courts have construed this phrase to reflect the standard that normally governs judicial review of administrative decisions; *i.e.*, a Commission dismissal may be overturned only if it was "arbitrary or capricious, or an abuse of discretion," or rests on an "impermissible interpretation of the Act."[17] Although the "arbitrary and capricious" standard of review is a deferential one that presumes an agency's action to be valid, a court is not required "to accept 'meekly administrative pronouncements clearly at variance with established facts.'"[18]

[15] *See* Political Committee Status, 72 Fed. Reg. 5,595, 5,596-97 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 E&J") (emphasis added), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=347892007.

[16] *See* fn. 10.

[17] *La Botz v. FEC*, 889 F.Supp.2d 51, 59-60 (D.D.C. 2012) ("*La Botz*"), *quoting Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); *see* 5 U.S.C. § 706(2)(A).

[18] *Antosh v. FEC*, 599 F. Supp. 850 (D.D.C. 1984), *citing Environmental Defense Fund v. Costle*, 657 F.2d 275, 283 (D.C.Cir.1981), *Braniff Airways, Inc. v. Civil Aeronautics Board.* 379 F.2d 453, 463 (D.C.Cir.1967) (*quoting NLRB v. Morganton Full Fashioned Hosiery Co.*, 241 F.2d 913, 916 (4th Cir.1957)).

A court must not abdicate its judicial duty to carefully "review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence,"[19] and may reject the Commission's reasons for dismissal when it finds that the Commission has "ignored persuasive evidence in the administrative record."[20] The Controlling Group SOR must therefore articulate a "satisfactory explanation" for the Commission's action, including a "rational connection between the facts found and the choice made."[21] That did not occur here.

It is important to recognize that, although the exclusive focus of judicial review is *solely* on the Controlling Group SOR and its interpretation of the Act and regulations,[22] there is historical precedent for a court to reject, *as a matter of law*, a controlling group's rationale for not finding RTB. In *DSCC v. FEC*,[23] the court found the dismissal of a matter to be contrary to law, vacated the Commission's dismissal of the complaint in the underlying enforcement matter, and ordered the Commission to initiate appropriate enforcement proceedings against the respondent.[24] Accordingly, the court has the clear authority, if it deems appropriate, to reject the Controlling Group's rationale not to find RTB, and to return this matter to the Commission for appropriate action. Only after finding RTB does the Commission have the statutory authority to investigate whether or not there is "probable cause to believe" that Crossroads GPS is a political committee under the Act.[25]

[19] *La Botz*, 889 F.Supp.2d at 60, *quoting Natural Res. Def. Council v. EPA*, 902 F.2d 962, 968 (D.C. Cir. 1990) (*internal quotation marks omitted*).

[20] *Antosh*, 599 F. Supp. at 855.

[21] *La Botz*, 889 F.Supp.2d at 60, *quoting Motor Vehicle Mfrs. Assoc. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[22] *See* fn. 5.

[23] 918 F. Supp. 1 (D.D.C. 1994).

[24] *See* http://www.fec.gov/law/litigation_CCA_D.shtml#dscc_93 (FEC summary of case). The underlying enforcement matter in *DSCC v. FEC* arose from a complaint in which the Democratic Senatorial Campaign Committee ("DSCC") alleged that the National Republican Senate Committee ("NRSC") had exceeded its spending limit under 52 U.S.C. § 30116(d) (formerly 2 U.S.C. § 441a(d)) in the 1992 Georgia Senate race. The Commission deadlocked 3-3 on OGC's recommendation to find RTB that the NRSC violated the Act and then voted 6-0 to close the file. The controlling group issued two SORs, one issued by two Commissioners and the other by one Commissioner, which the court treated as an "aggregate of the three members that prevailed under the regulations." 918 F. Supp. at fn. 2. The court rejected – and deemed contrary to law – the controlling group's interpretation of the regulatory language at issue. Consistent with the court's direction, on remand, the Commission found RTB that the NRSC violated the Act. The matter was closed after the Commission reached a settlement with the NRSC. *See* MUR 3708 public file, *available at* http://www.fec.gov/disclosure_data/mur/3708.pdf.

[25] 52 U.S.C. § 30109(a)(2) and (3) (formerly 2 U.S.C. § 437g(a)(2) and (3)).

C. The Legal Standard Asserted by the Controlling Group is Incorrect

With all due respect to the views expressed by my colleagues in the Controlling Group SOR, I respectfully believe that SOR misstates the proper legal standard of proof that the Commission was required to apply:

The Controlling Group SOR states, *in its introductory sentence*:

"In this matter we must determine if . . . Crossroads GPS . . . is a 'political committee' under the . . . Act."[26]

After discussion, the Controlling Group SOR then *concludes that*:

"Given the facts before us, Crossroads GPS was not required to register with the Commission and file reports with the Commission as a political committee."[27]

It is unnecessary for the court in the *Public Citizen* litigation to even examine, much less determine, whether or not the Controlling Group SOR erred in concluding that Crossroads GPS was not a political committee under the Act. The *only* question that the court may properly consider in the *Public Citizen* litigation is whether it was contrary to law for the Commission to have rationally reached any conclusion other than finding *reason to believe* a violation *may* have occurred. In making that analysis and decision, the court must look only to the Controlling Group SOR, since that is by law the determinative focus of the court's analysis.[28]

An RTB finding merely gives the Commission the statutory authority to open an investigation in order to determine whether or not there is probable cause to believe a violation, in fact, occurred.[29] Put another way, the Act requires the Commission to find "reason to believe that a person has committed, or is about to commit, a violation" of the Act *as a precondition* to opening an investigation into the alleged violation.[30] It does not set in motion an investigation that tilts in any way toward finding additional evidence of a violation; rather it is an effort to learn additional facts, both exculpatory and inculpatory, to determine if there is a basis to conclude, or not a basis to conclude, there is probable cause to believe that a violation occurred.

The court need not reach the question, as the Controlling Group SOR prematurely would suggest, as to whether or not Crossroads GPS is a "political committee" under the Act. The Act does not require such a legal examination (much less conclusion) to be made at this nascent stage of the enforcement process, and to suggest otherwise is, in itself, contrary to law.

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[26] Controlling Group SOR at 1.

[27] Controlling Group SOR at 28.

[28] *See* fn. 5.

[29] 52 U.S.C. § 30109(a)(2) (formerly 2 U.S.C. § 437g(a)(2)).

[30] *Id.*

It is quite possible, as has occurred in the past, that a post-RTB investigation of Crossroads GPS would yield insufficient inculpatory evidence, or perhaps yield exculpatory evidence that outweighs any inculpatory evidence, to cause the Commission to dismiss the matter prior to the "probable cause" stage that follows the preliminary "reason to believe" stage.[31] The Commission has in fact recognized that – at the post-RTB stage – it may obtain a wide variety of evidence – including exculpatory information that may tend to favor the respondent.[32]

At the pre-RTB stage (meaning the Commission has not yet voted on the question of whether there is reason to believe a violation may have occurred), the only information before the Commission may be scant. It generally consists of a complaint filed against the respondent and the reply of the respondent, except that certain information in the public domain and/or information from another government agency (such as the Department of Justice) may occasionally be available, as well as voluntary supplemental responses from respondents to informal requests for clarification from OGC.[33] Unless and until the Commission otherwise explicitly authorizes an investigation following a vote that finds RTB, the Commission may not engage in any formal discovery, including interviews, depositions, interrogatories and document requests.

At the pre-RTB stage, even the complainant that initiated the matter is not contacted for more information than is contained in the complaint. The Commission is essentially limited to the credible detail in a complaint and the specificity of the denials in the responses, along with certain publicly available information. Conclusory statements in a complaint and vague denials

[31] *See* 52 U.S.C. § 30109(a)(3) and (4) (formerly 2 U.S.C. § 437g(a)(3) and (4)) (addressing "probable cause to believe"). Some of these matters include MUR 5415 (Club for Growth) (although Commission found reason to believe a violation of the Act occurred based on information showing that Club for Growth may have coordinated certain advertisements with a federal candidate committee, after the investigation revealed no evidence of coordination, the Commission dismissed the matter), General Counsel's Report #3, dated March 31, 2008, *available at* http://eqs.fec.gov/eqsdocsMUR/28044222020.pdf; and MUR 5664 (International Union of Painters and Allied Trades District Council 53) (although Commission found reason to believe a violation of the Act occurred based on information showing that a union may have forced its employees to conduct political activities during paid working hours and on nights and weekends, the Commission dismissed the matter after the investigation revealed insufficient evidence to pursue the matter), General Counsel's Report #2, dated April 4, 2008, *available at* http://eqs.fec.gov/eqsdocsMUR/29044222596.pdf.

[32] *See* FEC Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34,986 (Jun. 15, 2011), *available at* http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-06.pdf. As stated in that document, "[w]hen advising the Commission on whether OGC intends either to proceed with its probable cause recommendation or to withdraw the recommendation, OGC will also provide and discuss the potentially exculpatory evidence, as well as any available mitigating evidence. *See* 11 CFR 111.16(d)." 76 Fed. Reg. at 34,989.

[33] *See* OGC Enforcement Manual, Office of the General Counsel, Federal Election Commission, June 2013, *available at* http://www.fec.gov/agenda/2014/documents/mtgdoc_14-60-b.pdf, at pp.40-41 (a pre-RTB letter "should state that: (1) OGC is providing the respondent with an opportunity to clarify the factual record; (2) there is no legal obligation to respond; and (3) no adverse inference will be drawn from the lack of a response"). In this matter, Crossroads GPS was afforded the opportunity to respond, *and did respond*, to several news articles that were not referenced in the Complaint. *See* Response of Crossroads GPS dated Oct. 10, 2011, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350828.pdf.

in a response leave the Commission with virtually no other meaningful tools to thoroughly evaluate the status of the matter at the pre-RTB stage. Accordingly, the standard of proof as to whether or not to find RTB must be (and is) very low; if it were otherwise, the Commission could very seldom open an investigation.

Although the Commission only has civil (*i.e.*, non-criminal) jurisdiction, the pre-RTB standard is lower than the commonly accepted standards of proof in a civil matter, namely, "preponderance of the evidence," and "clear and convincing evidence," and far lower than the two commonly accepted standards in a criminal case, namely, "probable cause" and "beyond a reasonable doubt."

In fact, the Commission has unanimously announced three times – in 2007, 2009 and 2012 – that the standard for an RTB finding only requires that the Commission find reason to believe that a violation *may* have occurred. In 2007, when the Commission issued its *Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process*, the Commission stated the following:

> The Federal Election Commission (''Commission'') is issuing a Policy Statement to clarify the various ways that the Commission addresses Matters Under Review (''MURs'') at the initial stage of enforcement proceedings. The Commission may take any of the four following actions at this stage: find ''reason to believe,'' ''dismiss,'' ''dismiss with admonishment,'' and find ''no reason to believe.'' . . . Commission ''reason to believe'' findings have caused confusion in the past because they have been viewed as definitive determinations that a respondent violated the Act. In fact, ''reason to believe'' findings indicate only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred. Indeed, the Commission has recommended that Congress modify the FECA to clarify this point. *See* Legislative Recommendations in 2003 and 2004 FEC Annual Reports. . . . For example: A ''reason to believe'' finding followed by an investigation would be appropriate when a complaint credibly alleges that a significant violation *may* have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.[34]

In addition to the 2007 Statement of Policy, in an FEC Guidebook made available publicly and published on the FEC website to provide formal guidance to complainants and respondents in enforcement matters, the Commission in 2009 and 2012 voted to provide the following explanation of an RTB finding:

> The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2) [now 52 U.S.C. § 30109(a)(2)]. A "reason to

[34] *See* FEC Agency Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (emphasis added), *available at* http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-06.pdf.

believe" finding is not a finding that the respondent violated the Act, but instead *simply means that the Commission believes a violation may have occurred*."[35]

Accordingly, any assertion in the Controlling Group SOR or the Supplemental Controlling Group SOR that intimates the need to meet a higher standard of proof than the low threshold standard that there must simply be reason to believe a violation may have occurred – such as the statements in the Controlling Group SOR quoted above – should be disregarded.

D. Limiting Major Purpose Review to Independent Expenditures Was Unreasonable and Contrary to Law

Regarding the examination of Crossroads GPS's "major purpose,"[36] it was arbitrary and capricious – and therefore contrary to law – for the Controlling Group to consider and rely upon, for purposes of determining the RTB threshold, only an organization's spending on express advocacy (and possibly its functional equivalent) in relation to its other spending.

The Controlling Group SOR claims that lower courts "that have examined spending ratios in political committee cases have focused on express advocacy spending;"[37] however, the Supreme Court has described the relevant major purpose under the Act as "the nomination or election of a candidate," or more simply as "campaign activity," terms that reach beyond explicit directions to vote a particular way.[38]

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[35] *See* "Guidebook for Complainants and Respondents on the FEC Enforcement Process" ("Guidebook") at 12 (emphasis added), *available at* http://www.fec.gov/em/respondent_guide.pdf. The Guidebook was unanimously approved by the Commission on Dec. 17, 2009; an updated edition was unanimously approved on May 10, 2012. *See* Minutes of FEC Dec. 17, 2009 Open Meeting, *available at* http://www.fec.gov/agenda/2010/mtgdoc1002.pdf; Minutes of FEC May 10, 2012 Open Meeting, *available at* http://www.fec.gov/agenda/2012/mtgdoc_1237.pdf.

[36] The Act and Commission regulations define a "political committee" as "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." 52 U.S.C. § 30101(4)(A) (formerly 2 U.S.C. § 431(4)(A)); 11 C.F.R. § 100.5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court ruled that defining political committee status "only in terms of the annual amount of 'contributions' and 'expenditures'" may be overbroad, as it would reach groups "engaged purely in issue discussion." *Id.* at 79. The Court therefore concluded that the term "political committee" "need only encompass organizations that are under the control of a candidate or the *major purpose of which is the nomination or election of a candidate*." *Id.* (emphasis added). Accordingly, under the relevant provisions of the Act as construed by the Supreme Court, an organization that is not controlled by a candidate must register as a political committee only if (1) it satisfies the $1,000 threshold and (2) it has as its "major purpose" the nomination or election of federal candidates.

[37] Controlling Group SOR at 14, *citing, e.g., Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004).

[38] *Buckley*, 424 U.S. at 79. To the extent that the cases cited above for support by the Controlling Group (*see* fn. 37) suggest – or are interpreted as suggesting – that only express advocacy spending should be considered when examining a group's overall spending in determining that group's major purpose, they do not comport with the Supreme Court's pronouncements on major purpose in either *Buckley* and in *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238, 262 (1986). *See Richey v. Tyson*, 120 F. Supp.2d 1298, fn. 11 (S.D. Ala. 2000) (plaintiffs "inaccurately describe" the "relevant major purpose as one to 'expressly advocate' a particular election result . . . while the Supreme Court has described the relevant major purpose (under FECA) as 'the nomination or election of a candidate,'' . . . or simply 'campaign activity,' . . . terms that comfortably reach beyond explicit directions to vote a

The Commission itself has never limited a major purpose inquiry to express advocacy communications; indeed, such a narrow focus would effectively eviscerate the statutory test for political committee status, which is triggered when a group receives "contributions" or makes "expenditures" aggregating in excess of $1,000 during a calendar year – since the Commission has consistently interpreted the term "expenditures" to include communications that contain "express advocacy."[39] The Commission's longstanding view, consistently upheld by the courts, has been that the required major purpose test is not limited solely to communications that contain express advocacy (or the functional equivalent of express advocacy).[40] The Commission has in fact provided examples from prior enforcement matters that it has categorized as "campaign related spending," included "direct mail attacking or expressly advocating the defeat of a Presidential candidate," "television advertising opposing a Federal candidate," spending on "candidate research, polling, and advertising," and "other spending . . . for public communications mentioning Federal candidates . . . ."[41]

The $5.4 million that Crossroads GPS acknowledged spending on non-express advocacy communications that criticize or oppose a clearly identified federal candidate clearly falls within the scope of the above types of spending. However, even assuming the Commission has the discretion to determine in a particular case which communications comprise "campaign activity" when examining major purpose, the Controlling Group's rejection of an approach that clearly satisfied the low RTB threshold that a violation may have occurred in the underlying matter was not rationally based in view of the uncontroverted facts, and therefore was arbitrary and capricious and contrary to law.

As noted earlier, the information available at the pre-RTB stage is that Crossroads GPS spent (1) a total of $39.1 million, with at least $15,445,039, or approximately 40% of total

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particular way.") (citations omitted). *But see WRTL v. Barland*, 751 F.3d 804 (7th Cir. May 14, 2014) (In finding unconstitutional a state statute that required groups to register as political committees if they, inter alia, receive contributions or make disbursements – defined as anything of value given or spent "for political purposes" – in excess of $300 in a calendar year, the court stated that "[t]o avoid overbreadth concerns in this sensitive area, *Buckley* held that independent groups not engaged in express election advocacy as their major purpose cannot be subjected to the complex and extensive regulatory requirements that accompany the PAC designation.").

[39] *See* 52 U.S.C. §§ 30101(4)(A) and (17)(A) (formerly 2 U.S.C. § 431(4)(A) and (17)(A)).

[40] 2007 E&J, 72 Fed. Reg. at 5,596-97; *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013), *cert. denied*, 134 S.Ct. 2288 (May 19, 2014) (No. 13-772) (Commission's policy of determining political committee status on case-by-case basis by first considering a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, and then evaluating organization's major purpose, as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents, was not overbroad under First Amendment); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013) (Commission's multi-factored approach to deciding political committee status – which did not limit major purpose test to express advocacy expenditures – was not unconstitutionally overbroad); *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007) (Commission's 2007 E&J – which employs a case-by-case adjudication of whether groups are political committees and does not limit major purpose examination to express advocacy expenditures –is not arbitrary and capricious); *see also Koerber v. FEC*, 583 F.Supp.2d 740, 746-48 (E.D.N.C. 2008) (denying a motion for a preliminary injunction against the enforcement of the 2007 E&J because the constitutional challenge was unlikely to succeed on the merits).

[41] 2007 E&J at 5,605.

spending, on express advocacy communications in a six-and-a-half month period in 2010,[42] and (2) approximately $5.4 million during the same period on communications that it contends did not contain express advocacy, but that nonetheless criticized or opposed a clearly identified federal candidate, including $1,104,783.48 on electioneering communications.[43]

As stated, the combined amount of approximately $20.8 million comprised *53.3% of Crossroads GPS's total spending*; accordingly, in examining Crossroads GPS's major purpose, whether only express advocacy communications are considered or whether that amount is combined with amounts spent on federal candidate-centric advertisements, Crossroads GPS spent tens of millions of dollars on federal campaign activity in the first six-and-a-half months of its existence, making up a significant portion of its overall spending.

Accordingly, there was sufficient undisputed information, as a matter of law, to find RTB and open an investigation in the underlying matter.

E. Rejecting a Calendar Year Analysis Under These Facts Was Not Rationally Based and Therefore Contrary to Law

It was contrary to law for the Controlling Group to reject an analysis based upon a calendar year (or increment thereof) and to suggest arbitrary and unworkable time frames for examining Crossroads GPS's major purpose.

In the final analysis, the time period under discussion – which was the analytical focus supporting OGC's RTB recommendation – is the 6 ½ month period from the formation of Crossroads GPS on June 1, 2010 through December 15, 2010, the date through which Crossroads GPS included spending figures in its response (it provided no specific information about its 2010 spending beyond that date). By any analysis – fiscal year, calendar year, or any other time frame that the Controlling Group arbitrarily chooses – that period must necessarily be included.

The basis of the Controlling Group's assertion that Crossroads GPS's major purpose was not the nomination or election of a federal candidate – an assertion that completely bypassed the required RTB threshold – relies on the argument that OGC used a "myopic and artificial window of a single calendar year" to determine that the majority of Crossroads GPS's spending was electoral in nature and therefore triggered political committee status. The Controlling Group contends that "[l]imiting ourselves to short time periods or time periods other than those utilized by the group in question provides an incomplete and distorted picture of that group's major

[42] FGCR at 16-17, citing Response of Crossroads GPS dated Dec. 22, 2010 at 7, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350759.pdf (Response provided spending information from June 1 through December 15, 2010).

[43] FGCR at 17.

purpose."[44] Crossroads GPS has argued that spending during its 2010 fiscal tax year, which ran from June 1, 2010, to May 31, 2011, should provide the basis for a major purpose analysis.[45]

In support of its RTB recommendation, OGC concluded that a calendar year, not a self-selected fiscal year, provides the most solid statutory footing for the Commission's major purpose analysis because it is consistent with the plain language of the Act, which defines "political committee" in terms of expenditures made or contributions received "*during a calendar year*."[46] Further, there is no support in the history of the Commission for using a fiscal year that does not coincide with the calendar year.[47]

Examining a group's spending with reference to a calendar year, rather than a fiscal year, is consistent with the Commission's actions in the enforcement matters cited as guidance in its 2007 E&J.[48] Under a calendar year approach, as stated above, Crossroads GPS spent approximately $20.8 million in 2010 – an amount which is acknowledged in its responses – on the type of communications that the Commission considers to be federal campaign activity.

Although the Controlling Group contends that the calendar year approach provides an "incomplete and distorted picture" of a group's major purpose, the two alternatives they appear to prefer – either a fiscal year or an unspecified period of time exceeding one year – are completely untethered from the Act.[49] If organizations can arbitrarily self-select a period of time for the apparent purpose of evading transparency, then enforcement of the Act's disclosure regime would be crippled. The term "fiscal year," for example, is mentioned nowhere in the Act or regulations; indeed, it would be inherently inconsistent to use the statutorily required calendar year for measuring the $1,000 expenditure threshold and using fiscal year as the basis for examining major purpose. The possibility of such a flawed analysis is underscored by the ability

[44] Controlling Group SOR at 20-21.

[45] Responses of Crossroads GPS dated Dec. 22, 2010, Sept. 9, 2011, and Nov. 10, 2011, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350759.pdf, http://eqs.fec.gov/eqsdocsMUR/14044350819.pdf, and http://eqs.fec.gov/eqsdocsMUR/14044350828.pdf. Crossroads GPS's fiscal year in 2011 ran from June 1 through December 31, 2011 (*see* Response of Crossroads GPS dated Sept. 9, 2011 at 1), after which it changed its fiscal year to coincide with the calendar year. *See* FGCR at 25. The fact that *Crossroads GPS used three different fiscal year periods in the first few years of its existence* further undermines any contention that a calendar year basis (or increments thereof) is not appropriate here.

[46] 52 U.S.C. § 30101(4) (formerly 2 U.S.C. § 431(4)) (emphasis added).

[47] The term "fiscal year" is found nowhere in Act, whereas the term "calendar year" – in addition to being part of the statutory definition of "political committee" at 52 U.S.C. § 30101(4)(A) (formerly 2 U.S.C. § 431(4)(A)) – is used throughout the Act. *See, e.g.*, 52 U.S.C. § 30102(c)(3) (formerly 2 U.S.C. § 432(c)(3)) (identification of any person who makes contributions aggregating more than $200 during a calendar year); 52 U.S.C. § 30109(d) (formerly 2 U.S.C. § 437g(d) (penalties for knowing and willful violations based on amounts in violation aggregated by calendar year); 52 U.S.C. § 30116 (formerly 2 U.S.C. § 441a (contribution limitations based on calendar year); 52 U.S.C. § 30118(b) (formerly 2 U.S.C. § 441b(b)) (solicitations for contributions based on calendar year); 52 U.S.C. § 30125 (formerly 2 U.S.C. § 441i) (references to donation limits and solicitations pegged to calendar year).

[48] *See* fn. 15.

[49] Controlling Group SOR at 20-21.

of a nonprofit organization to change, at any time, its tax filing period with the IRS – *which Crossroads GPS actually did in 2011.*[50]

When the essential and undisputed facts before the Commission are that a group spent vast sums on advertisements during 2010 that criticized or opposed a clearly identified federal candidate and which ran in the candidate's respective state shortly before an election – and there is no specific information that the group spent money on any other types of communications – the Commission is required by law to adhere to a reasonable approach for examining that group's major purpose, and in so doing, not "ignore[] persuasive evidence in the administrative record."[51] Accordingly, the Controlling Group's rejection of a time frame that easily satisfied the low RTB threshold for examining major purpose (a calendar year or increment thereof) was arbitrary and capricious and therefore contrary to law.[52]

III. Conclusion

This matter, at its core, ultimately concerns the Commission's primary mission of publicly disclosing campaign finance information and enforcing the provisions of the Act, and the public's right to be informed of such information.[53] Where the voting public was deprived of basic information regarding the nature of an unregistered group's funding and spending, the Commission should take its disclosure mission seriously and carefully consider whether the low RTB standard is met. Here, the undisputed preliminary pre-RTB facts showed that an unregistered group spent tens of millions of dollars on political advertising attacking federal candidates leading up the 2010 general election.[54] The greater the amount of spending by such groups on federal elections, the greater the potential impact on our electoral process and the greater the need for transparency.

The Supreme Court has repeatedly and emphatically recognized a strong governmental interest in providing the public with campaign finance information prior to an election. For

[50] *See* fn. 45.

[51] *Antosh*, 599 F. Supp. at 855.

[52] Even if the Commission were to use an expanded time frame that included 2011 activity, given the information available at the time provided by Crossroads GPS regarding its spending from December 2010 through August 2011, the RTB threshold for major purpose would easily be satisfied. *See* fn. 12.

[53] *See* FEC Mission and History, http://www.fec.gov/info/mission.shtml.

[54] In fact, a survey of the top 100 unregistered groups that partially disclosed their spending ranked Crossroads GPS as the third highest political spender in the nation during the 2010 election cycle. Based on disclosure information (*e.g.*, independent expenditures and electioneering communications) reported to the Commission by unregistered 501(c) groups, the Center for Responsive Politics ("CRP") ranked Crossroads GPS third (over $16 million) out of a list of 100 such groups. Only the U.S. Chamber of Commerce (approximately $34 million) and American Action Network (approximately $19 million) outranked Crossroads GPS in terms of political spending. *See* "2010 Outside Spending, by Group," *available at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U.

example, eight justices in *Citizens United* stated that effective disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[55]

When balancing the competing governmental interests of the public's informational interest in transparency against the burden of registering as a political committee and publicly disclosing campaign spending, the conclusion should be in favor of transparency, not secrecy. This is particularly so in a case such as this that involves the Act's political committee disclosure requirements, because those provisions "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'"[56] In urging that those who exercise political rights should not be protected by anonymity, Justice Scalia succinctly stated that "*[r]equiring* people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[57]

In sum, it was contrary to law for the Commission to reach any conclusion other than finding RTB that a violation may have occurred; any act or interpretation not rationally based is by definition contrary to law. It is the duty of the court in the *Public Citizen* litigation to carefully "review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence,"[58] and to reject the Commission's dismissal if it finds – as has occurred here – that the Controlling Group has "ignored persuasive evidence in the administrative record."[59] Upon making such a finding, the court should return this matter to the Commission for appropriate proceedings. At this early stage, where the Commission is limited to reviewing the pre-investigation facts before it, the available information is sufficient, as a matter of law, to satisfy the low threshold set forth in the Act.

[55] *Citizens United v. FEC*, 130 S. Ct. 876, 914-16 (2010). More recently, in *McCutcheon v. FEC*, 572 U.S. __ (2014), the Court stated that "[d]isclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election-related spending."). *Id.*, Slip Op. at 35-36.

[56] *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) (quoting *Buckley*, 424 U.S. at 64, and *McConnell v. FEC*, 540 U.S. 93, 201 (2003)); *see also, e.g.*, *Free Speech*, 720 F.3d at 790; *Real Truth About Abortion, Inc.*, 681 F.3d. at 556 (4th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 486-91 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55-57 (1st Cir. 2011); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1003-05 (9th Cir. 2010); *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827 (9th Cir. May 20, 2014).

[57] *Doe v. Reed*, 130 S.Ct. 2811, 2837 (2010) (concurring opinion of Justice Scalia) (emphasis added).

[58] *La Botz*, 889 F. Supp.2d at 60.

[59] *Antosh*, 599 F. Supp. at 855. Further, given the undisputed factual record in this matter, it is clear there is no genuine issue as to any material fact necessary to find RTB that a violation occurred. *See* Fed. R. Civ. P. 56.

Unlike the Controlling Group, I believe that the preliminary information before us regarding the nature and degree of Crossroads GPS's campaign spending clearly triggered, as a matter of law, the RTB threshold and that dismissal of this matter as a result of the 3-3 Commission deadlock was unreasonable and therefore contrary to law.

For the foregoing reasons, I voted to approve the General Counsel's recommendation to find reason to believe that Crossroads GPS failed to organize, register, and report as a political committee as required by the Act.

12/30/14
Date

Steven T. Walther
Commissioner