FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6627
Mike Moon for Congress, *et al.*	)	
	)	

STATEMENT OF REASONS
VICE CHAIRMAN DONALD F. MCGAHN

On the anniversary of the Boston Tea Party, Mike Moon declared his candidacy in the 2012 Republican Party Primary in Missouri's seventh congressional district. During his campaign, Mr. Moon handed out pocket-sized copies of the Constitution of the United States. On the back of each Constitution was a small rectangular sticker stating "Mike Moon for U.S. Congress" and providing a web and mailing address for Mr. Moon's campaign.[1]

The question in this case is whether a candidate must place a federal government-approved disclaimer on pocket copies of the United States Constitution. Not only did the Office of the General Counsel ("OGC") believe such pocket Constitutions require a disclaimer; they thought Moon's sticker was insufficient. According to OGC, "it appears that the pocket constitution was handed out on behalf of the Committee, much like flyers or pamphlets, and could fall into the category of 'general public political advertising.'"[2] The Act requires campaigns to place disclaimers on "general public political advertising."[3] Thus, according to OGC, the Constitution of the United States is akin to a flyer or pamphlet produced and distributed by a campaign, and would thus require a disclaimer.

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[1] Moon raised just over $16,000 for his campaign. A summary is available here: http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do

[2] MUR 6627 (Mike Moon for Congress), First General Counsel's Report at 17.

[3] 2 U.S.C. § 441d; *see also* 11 C.F.R. § 110.11.

Setting aside the dubious claim that the Constitution could constitute "political advertising" under the Act, what about the campaign sticker? Is that not enough? Apparently not. Under the Act, a disclaimer must be large enough to be readable, contained within a printed box set apart from the rest of the communication, and be printed with a reasonable degree of color contrast between the background and the printed statement.[4] The Moon campaign placed a box-shaped sticker on the back of the pocket Constitutions, which stated "Mike Moon for Congress," and listed the campaign's web address and mailing address in a color and font that is clearly readable.[5] No one was confused about who was handing out the pocket Constitutions, as the complainant included a picture, taken from the Committee's Facebook page, of the candidate himself holding one of the offending Constitutions.[6] Yet, OGC still suggested that this sticker might be insufficient – because it lacked works "paid for by" and was not in a printed box (although the sticker itself was box-shaped).

In countless other cases, both OGC and the Commission have either (1) waived the disclaimer requirement entirely on small items or where impracticable, or (2) taken a sensible "close enough for government work" approach, and found substantial compliance in cases that could otherwise be nitpicked.[7] But not here. Instead, when dealing with a Tea Party candidate handing out pocket Constitutions, after suggesting that they might need a disclaimer, OGC recommended that the Commission avoid the issue and dismiss the allegation "given that the Committee acknowledges distributing the

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[4] 2 U.S.C. § 441d; *see also* 11 C.F.R. § 110.11.

[5] MUR 6627 (Mike Moon for Congress), Complaint at F.

[6] MUR 6627 (Mike Moon for Congress), Complaint at A2.

[7] *See, e.g.*, MUR 6428 (Bill Marcy for Congress) (dismissing the matter); MUR 6392 (Kelly for Congress) (dismissing the matter); MUR 6378 (Conservatives for Congress) (dismissing the matter where the Respondent first neglected to include any disclaimer, then added a disclaimer lacking a proper box as a remedial measure); MUR 6367 (Veterans for the Constitution) (dismissing allegations that the respondent's billboard did not contain a box around a disclaimer); MUR 6365 (Sager for Congress) (dismissing an allegation that the Respondent failed to place a box around disclaimers placed on yard signs and other large signs); MUR 6335 (Moak for Congress) (dismissing an allegation that the Respondent failed to include a box around a disclaimer); MUR 6316 (Pridemore for Congress) (dismissing allegations that the Committee failed to include a box around its disclaimers); MUR 6274 (Committee to Elect Matt Miller) (dismissing allegations that the Committee failed to include a proper box around its disclaimer); MUR 6270 (Rand Paul for US Senate) (dismissing or finding no reason to believe that the respondents violated the Act's disclaimer requirements); MUR 6260 (Rocky for Congress) (dismissing allegations that the Committee failed to place disclaimers in a proper box); MUR 6041 (Richard Hanna for Congress Committee) (dismissing the matter where the Respondent's campaign literature initially did not include a disclaimer or included a disclaimer that was not set aside in a proper box); MUR 5534 (Business Alaska, Inc.) (taking no further action with respect to allegations including a failure to place disclaimers in a proper box).

material and has indicated that it spent only $220 in connection with the material."[8] But what if a Tea Party candidate wanted to hand out more than $220 worth of pocket Constitutions? It seems OGC is saying that could be a problem. Although the Commission rejected OGC's recommendation and concluded, "[h]ere, the constitutions did not require a disclaimer,"[9] that is still a ruling limited to these facts (hence the inclusion of the word "here," at the insistence of some Commissioners). What if a candidate wanted to spend $500 on Constitutions? What about $5,000? Such an approach leaves people in limbo based upon some unknown notion of *de minimis* spending, and subject speakers to the mercurial whims of the censor.[10] The Supreme Court has already admonished the FEC for "creat[ing] a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests."[11] Yet, here we are.

Some perspective is in order. The purpose of the Act's reporting and disclaimer requirements are to prevent corruption in the form of *quid pro quo* arrangements and allow the public to know who is responsible for certain types of electoral speech. It is clear that there is no risk of *quid pro quo* corruption associated with the Constitution of the United States – the campaign bought them with campaign money It is equally apparent that no one was confused as to who was responsible for distributing these copies of the Constitution – the candidate was pictured with them, and they have his name stuck on the back. And unlike bumper stickers, t-shirts and skywriting that carries a campaign-written message (and yet do not require disclaimers), the Constitution is something different entirely. At the FEC, it might require a disclaimer? Really? Maybe it ought to be affixed on top of the First Amendment?

The Constitution was written more than 200 years ago. Although certainly out of fashion in some modern circles, it is hard to imagine that it could be equated to a campaign pamphlet or flier, or that it is the sort of subversive speech that requires a government-approved disclaimer. After all, available in any incumbent officeholder's office are similar copies – without disclaimers and paid for by our tax dollars. Is this now a form of campaigning, or in the words of the Act, "general public political advertising"? To me, if a campaign wants to spend all of their campaign money on pocket Constitutions to hand out, so be it. The Act does not impose a disclaimer requirement on it.

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[8] MUR 6627 (Mike Moon for Congress), First General Counsel's Report at 17-18.

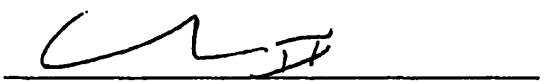
[9] MUR 6627 (Mike Moon for Congress), Factual and Legal Analysis for Mike Moon for Congress at 16.

[10] *See Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010) (noting that "the FEC's 'business is to censor ...'").

[11] *Id.*

In *FEC v. Wisconsin Right to Life*, Chief Justice Roberts noted "[t]he Framers' actual words put these [campaign finance] cases in proper perspective."[12] Those actual words: "Congress shall make no law . . . abridging the freedom of speech."[13] That we have reached a point where some in the government bureaucracy find that the dissemination of those words without a disclaimer may be corrupting, or that the public has a need to know who is behind it, is a sad commentary on how far we have strayed from those very words, and the scope of modern regulatory overreach. Bumper stickers do not need disclaimers. Campaign t-shirts do not need disclaimers. Skywriting does not need a disclaimer. But the Constitution? Maybe it does. Sometimes.

I wonder what the FEC would have required of Publius?



DONALD F. McGAHN II
Vice Chairman

9-16-13
Date

[12] *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007).

[13] U.S. Const. amend. I.