FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of	)	
	)	**MUR 5024**
Council for Responsible Government, Inc., et al.	)	
	)	

STATEMENT OF REASONS
CHAIRMAN BRADLEY A. SMITH AND
COMMISSIONERS DAVID M. MASON AND MICHAEL E. TONER

I. Background

In this matter the Commission considered a complaint alleging that the Council for Responsible Government, Inc. ("CRG" or "Respondents") violated the prohibition on corporate contributions by funding and mailing brochures referencing Tom Kean, Jr., a candidate in New Jersey's June 2000 Republican primary. As explained below, because the brochures did not contain express advocacy, the undersigned voted not to find reason to believe that a violation had occurred. Therefore, after a vote of 3-3 on the recommendations made by the General Counsel in the First General Counsel Report, the Commission voted unanimously to dismiss this matter.[1]

[1]The Commission considered the matter on November 4, 2003. After discussion, an updated tally vote reflected that the Commission failed by a vote of 3-3 to take the following actions with respect to MUR 5024: Find reason to believe that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. § 433; Find reason to believe that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. § 434; Find reason to believe that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. § 441b(a); Find reason to believe that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. § 441d(a); Find reason to believe that William "Bill" Wilson violated 2 U.S.C. § 441b(a); Find reason to believe that Gary Glenn violated 2 U.S.C. § 441b(a). Federal Election Commission, Minutes of an Executive Session, November 4, 2003 at 4-6 (Commissioners McDonald, Thomas, and Weintraub voted affirmatively; Commissioners Mason, Smith, and Toner dissented). Commissioner Mason then moved to close the file in MUR 5024 and send the appropriate letters and the motion carried on a vote of 6-0. *Id.* at 6.

Kean for Congress Committee filed a complaint in the United States District Court for the District of Columbia on September 18, 2001 challenging the Commission's alleged delay in reviewing MUR 5024 under 2 U.S.C. § 437g(a)(8)(A). *Kean for Congress v. FEC*, Civ. No. 01cv01979 (D.D.C., filed Sept. 18, 2001). On February 4, 2002, Kean for Congress Committee filed a notice of dismissal to which the Commission did not object.

II. Factual and Legal Analysis[2]

A. The Law

The Act prohibits corporations from making expenditures.[3] Expenditures that are communications must contain express advocacy to be subject to this prohibition.[4] The first part of the Commission's express advocacy regulation tracks the Supreme Court's opinion in *Buckley v. Valeo* and defines "expressly advocating" as any communication that uses phrases such as "vote for the President," or "'support the Democratic nominee' . . . or communications of campaign slogan(s) or individual word(s) which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s) . . . ."[5] With this background we turn to the two brochures that were the subject of the complaint.

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[2] The activity occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). All references or statements of law herein regarding the Federal Election Campaign Act of 1971, as amended ("the Act"), pertain to that law as it existed before BCRA's effective date. All references to the Commission's regulations pertain to the 2002 edition of Title 11, published prior to the Commission's promulgation of its regulations implementing BCRA. When the Commission considered this case, the Supreme Court was considering a challenge to BCRA it has since decided. *McConnell v. FEC*, 540 U.S. __ (2003).

[3] 2 U.S.C. § 441b(a).

[4] *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986). The Commission considered this MUR before the Court announced its opinion in *McConnell v. FEC*, 540 U.S. __ (2003). Accordingly, the Commission evaluated this matter under the governing law that existed prior to *McConnell v. FEC*. Prior to McConnell, several courts of appeals had held the express advocacy test to be an "irreducible constitutional minimum that no campaign finance restriction can diminish." *McConnell v. FEC*, 251 F.Supp. 2d 176, 363 (Henderson, C.J., concurring in the judgment in part and dissenting in part) (D.D.C. 2003); *prob. juris. noted*, 123 S.Ct. 2268. *See California Pro-Life Council Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2002); *Chamber of Commerce v. Moore*, 288 F.3d 187, 190 (5th Cir. 2002); *Perry v. Bartlett*, 231 F.3d 155, 162 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir.1997); *Faucher v. FEC*, 928 F.2d 468, 470-71 (1st Cir. 1991); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*). District courts have also so held. *See, e.g., Kansans for Life, Inc. v. Gaede*, 38 F.Supp.2d 928, 936 (D.Kan. 1999); *Right to Life, Inc. v. Miller*, 23 F.Supp.2d 766, 769 (W.D.Mich. 1998); *Planned Parenthood Affiliates, Inc. v. Miller*, 21 F.Supp.2d 740, 746 (E.D.Mich. 1998); *W. Virginians for Life, Inc. v. Smith*, 919 F.Supp. 954, 959 (S.D.W.Va. 1996). Two state courts have followed. *See Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 824 (Wash. 2000); *Osterberg v. Peca*, 12 S.W.3d 31, 50-54 (Tex.), cert. denied, 530 U.S. 1244 (2000).

[5] 11 C.F.R. § 100.22(a). The second prong of the Commission's regulation at 11 C.F.R. § 100.22(b) has been held unconstitutional. *Virginia Society for Human Life v. FEC*, 264 F.3d 379 (4th Cir. 2001); *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996).

B. Two Brochures

The first brochure shows two identical photographs of Tom Kean, Jr., a large one covering the whole page and a smaller photograph superimposed on the larger one. *See* Attachment 1. In both pictures, Tom Kean, Jr. is wearing a suit with a campaign button or sticker on the left breast pocket of his suit jacket, reading "Tom Kean Jr. for Congress." Superimposed over the photographs is the following text: "**TOM KEAN JR.** No experience. Hasn't lived in New Jersey for 10 years. It takes more than a name to get things done." The second page reads:

> **NEVER.** Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean Jr. may be a nice young man and you may have liked his dad a lot—but he needs more experience dealing with local issues and concerns. For the last 5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean Jr. . . **New Jersey needs New Jersey leaders.**

"Paid for by the Accountability Project of the CRG," is the disclaimer at the bottom of this page.

The second brochure shows a full-page photograph of Tom Kean, Jr. on the first page. *See* Attachment 2. The photograph appears to be the same photograph used in the first brochure. Superimposed over the picture is the following text:

> For the last 5 years Tom Kean Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress—Tom never paid property taxes. No experience. **TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrisey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**

"Paid for by the Accountability Project of the CRG," appears at the bottom of the first page.

The second page shows four tiled pictures: former professional basketball player Larry Bird, Senator Edward Kennedy, a statue of a Revolutionary War "Minuteman" and the photograph of Tom Kean, Jr. with the "Tom Kean Jr. for Congress" campaign button or sticker. Superimposed over the photographs is the following text: "What do all these things have in common? They all have homes in Massachusetts."

C. Analysis

1. Express Advocacy

Because both of the brochures contain pictures of a clearly identified candidate,[6] this matter turns on whether the brochures contain express advocacy. According to the complainants, the brochures are similar to the "vote Pro Life" flyer in *FEC v. Massachusetts Citizens for Life* ("*MCFL*")[7] because of the text, "New Jersey needs New Jersey leaders," and the identification of "Tom Kean [Jr.] as the candidate who does NOT have New Jersey 'experience'" (emphasis in original). The complainants further contend that the "Tell Tom Kean Jr." language, in essence, is an electoral directive like "vote Pro Life" in *MCFL* and that the brochures, like the *MCFL* flyer, should not be regarded "as a mere discussion of public issues that by their very nature raise the names of certain politicians."[8] Complainants assert that the brochures do not purport to discuss any issue other than Tom Kean Jr.'s qualifications to hold federal office.

We look to the language of the brochures to determine whether they contain express advocacy. The first brochure contains the text "Never" and "New Jersey needs New Jersey leaders," but the language fails the express advocacy test as established by *Buckley* and *MCFL* not only because they are not explicit words of advocacy but also because this language and the brochure's other text fails to exhort readers to vote for or against a candidate. The deduction that the reader must make to fill the gap between the campaign sticker on the front page, that places the brochure in the context of an election, and the only language that arguably approaches a call to action to vote against Mr. Kean, Jr. on the following page is fatal to the complainant's argument that the first brochure contains express advocacy.

As noted in CRG's response, "The fact that the communication [in *MCFL*] included an *explicit* term of advocacy, i.e., **VOTE**, and direct reference to those candidates that the electorate should vote *for* was precisely what rendered the [MCFL] communication 'express' advocacy" (emphasis in original). The connection between the language of the CRG brochure and the exhortation to vote, if any, is simply too fragile to support a finding of express advocacy. "Never" is very close to the language of *FEC v. Furgatch*, "Don't let him do it," but even if *Furgatch* guided our analysis its exhortation requirement is still not met because "never" is more naturally read in this brochure as an adjective modifying the itemized list of what Mr. Kean has allegedly never done in his life: namely, never worked in New Jersey,

[6] The term "clearly identified" is defined in the Act and Commission regulations. 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.

[7] 479 U.S. 238 (1986).

[8] *MCFL*, 479 U.S. at 249 (1986).

never ran for office, never held a private sector job, and never paid New Jersey property taxes.[9] Thus, the first brochure simply lacks any explicit exhortation to take electoral action.

The second brochure does not contain the word "Never" on its second page but, like the first, contains the purported slogan "New Jersey needs New Jersey leaders." But this slogan simply does not constitute a campaign slogan, such as "Dean for America," because there is no information that the slogan appearing in these brochures was employed or adopted by any of Kean's opponents as part of their campaigns. There is simply no basis to conclude that this slogan is identified with any campaign or that readers can perform this identification.

The complainant's other arguments in support of an express advocacy finding rest on factors that are simply insufficient to support such a finding: whether the ad discusses public policy issues or whether it addresses issues other than qualifications to hold federal office. Further, if a conclusion that this brochure contains express advocacy is based on a divining of CRG's intent in this manner without regard to the explicit language of the text, such a conclusion falls outside of the requirements of the express advocacy test, which excludes such analysis under established precedent.

As to both brochures, to the extent that the complainant or the Office of the General Counsel suggests that the sticker or button alone transforms the communication into express advocacy, the Commission's conclusion here comports with the disposition of a past case involving a communication containing a campaign sticker. Although in MUR 4313 (Coalition for Good Government) the Commission concluded that a Richard Lugar for President bumper sticker featured in a television advertisement provided a basis for an express advocacy finding by prominently displaying Senator Lugar's image and the campaign bumper sticker, as to two other bumper stickers appearing in the television advertisement the Office of the General Counsel noted that "[a]lthough the Dole bumper sticker which appears in the advertisement contains the words 'for President' and the Gramm bumper sticker contains 'President,' the message of the advertisement as to these two candidates is negative, thus making a finding of express advocacy as to their candidacies more problematic."[10]

This matter is the more problematic case, and unlike the more prominent bumper sticker in MUR 4313 that was "enhanced by the positive prominence given to Senator Lugar's stand on the sugar issue,"[11] at best the Kean sticker here merely places the picture in the context of an election. Because the principal effect of the sticker here is to put the communication in the context of an election, and Mr. Kean, Jr., is not the intended beneficiary of the ostensible express advocacy, CRG's brochures fail the express advocacy standard under

[9] *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

[10] First General Counsel Report in MUR 4313 dated Oct. 18, 1996 at 31 n.6. The full text of the television advertisement appears in the First General Counsel Report in MUR 4313 dated Oct. 18, 1996 at 11-12.

[11] First General Counsel Report in MUR 4313 dated Oct. 18, 1996 at 31.

all major cases except possibly *Furgatch*, and even under *Furgatch*, as described above, the call to action is too tenuous to support an express advocacy finding.[12]

When faced with "very close call[s]"[13] involving express advocacy, the Commission experiences the same predicament faced by judges in analyzing advertisements under this test.[14] In *FEC v. Christian Coalition*, for example, within the same case the court had several calls and came down on one side as to one communication and on another with respect to a different communication.[15] And as the opinion in *Furgatch* described, "Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis*, offering limited guidance for subsequent decisions."[16] This type of complex analysis is the natural result when decision makers are faced with politically volatile communications and must apply a judicially-created standard like the express advocacy test.

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[12] *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). *Furgatch* describes its standard as follows:

> We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. at 864.

[13] *FEC v. Christian Coalition*, 52 F. Supp.2d 45, 61 n.26 (D.D.C. 1999)(quoting *FEC v. Furgatch*, 802 F.2d 857, 861 (9th Cir. 1987)).

[14] In a matter under review considered around the same time as MUR 5024, the Commission divided along the same lines in a case involving allegations of interest group support of a Democratic candidate. On October 21, 2003, the Commission voted 6-0 to dismiss another express advocacy case, MUR 5154 (Sierra Club, Inc.), after a vote of 3-3 on the recommendations of the Office of the General Counsel. Federal Election Commission, Minutes of an Executive Session at 7 (Oct. 21, 2003) (motion by Commissioner Thomas to find reason to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a) failed 3-3, Commissioners McDonald, Thomas, and Weintraub voting affirmatively, Commissioners Mason, Smith, and Toner dissented). *See* Statement of Reasons in MUR 5154 (Sierra Club, Inc.) of Commissioners Smith, Mason, and Toner dated Dec. 6, 2003.

[15] *See FEC v. Christian Coalition*, 52 F. Supp.2d 45, 64 (D.D.C. 1999) (the court provides analysis to describe its finding express advocacy in a letter referring to Newt Gingrich as a "Christian Coalition 100 percenter" and failing to find express advocacy in a "Reclaim America" mailing).

[16] *FEC v. Furgatch*, 807 F.2d 857, 861 (9th Cir. 1987).

2. Political Committee Theory

The conclusion that these brochures lack express advocacy, and hence are not expenditures, requires that the Commission reject complainants' theory that CRG's major purpose is political activity and that it should therefore be forced to register with the Commission, disclose its donors, and observe the Act's contribution limits and prohibitions, as a political committee.[17] The Commission thus rightly did not approve the Office of the General Counsel's request to conduct what could be an extensive investigation into the corporation's activity, including interrogatories, document subpoenas, and depositions to pursue this untenable theory, and closed the file in this matter.

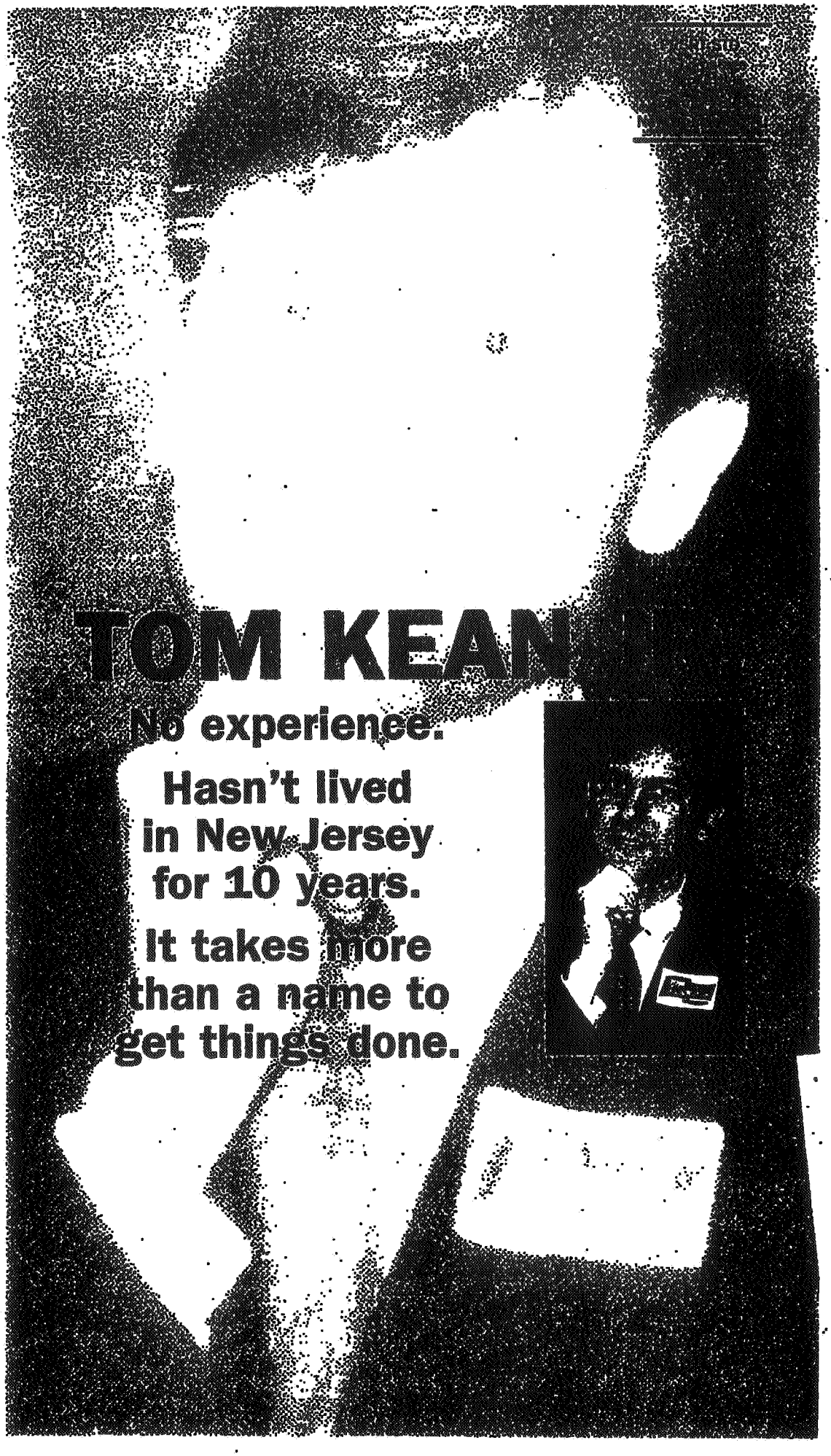
January 13, 2004

Bradley A. Smith
Chairman

David M. Mason
Commissioner

Michael E. Toner
Commissioner

[17] *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996). See Statement of Reasons in Pre-MUR 395 (College Republican National Committee), Commissioners Mason, Smith, and Wold at 4 ("Thus, major purpose alone, however defined, is not enough to subject a group to the Act."). The *McConnell* decision's declaration that the express advocacy doctrine was a statutory, rather than a constitutional, construction raises questions about whether the Commission may or should consider non-express advocacy communications in determining whether an organization's major purpose is the election or defeat of a candidate. No such analysis was attempted here as the General Counsel's recommendation turned on the express advocacy determination consistent with the then-prevailing cases cited in footnote 4.



Att. 1
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