



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of)
The Arizona State Democratic Central Committee and)
Rick McGuire, in his official capacity as treasurer)
Arizona State Democratic Party-North Carolina Account)
Pederson 2006, and Jeff Marella, in his official)
capacity as treasurer)
Jim Pederson)

MUR 5878

STATEMENT OF REASONS
VICE CHAIRMAN DONALD F. McGAHN AND COMMISSIONERS CAROLINE
C. HUNTER AND MATTHEW S. PETERSEN

In this matter, the Arizona Republican Party (“ARP” or “Complainant”) filed a complaint alleging that Respondent Arizona State Democratic Central Committee (“ASDCC”) paid for federal election activity (“FEA”) with funds that were not subject to the limitations, prohibitions, and reporting requirements of the Federal Election Campaign Act of 1971, as amended, (“the Act”).¹ In support of its allegations, ARP references vote by mail activities as well as a series of money transfers between the ASDCC and other Democratic state party committees, and speculates that these transfers resulted in the payment of FEA with impermissible funds. The Office of General Counsel (“OGC”) recommended that the Commission find that there was a reason to believe a violation occurred. The Commission failed to approve the recommendation and closed the file.²

Upon examination of the complaint, Respondents’ reply, and their disclosure reports, it is evident that there is an insufficient basis to support a finding of reason to believe that a violation of the Act occurred. The available evidence supports the Respondents’ assertions that what occurred was actually a series of legal transactions, and that the ASDCC did not use funds from an impermissible source to pay for FEA. Contrary to OGC’s recommendations, this string of legal transactions is not

¹ As discussed below, Federal Election Activity (“FEA”) is a specifically defined term of art for activity that triggers certain payment and reporting requirements. See 11 C.F.R. § 100.24.

² MUR 5878 (Arizona State Democratic Central Committee), Certification (Nov. 18, 2008). (General Counsel’s recommendations failed by a vote of 3-3).

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"circumvention," it is compliance. As a result, we voted against OGC's recommendation to find reason to believe that the ASDCC violated 2 U.S.C. § 441i(b).

I. BACKGROUND

Respondent Jim Pederson served as the Chairman of the Arizona Democratic Party from 2001 to 2005. During his chairmanship and thereafter, Pederson was a significant financial supporter of the party. According to disclosure reports, Pederson gave nearly \$7.3 million to the ASDCC from 2001 through 2006 in dozens of individual transactions. During the 2006 election cycle, in more than twenty-five separate transactions, Jim Pederson gave \$1.3 million of his personal funds to the ASDCC's non-federal account.

In 2006, Jim Pederson ran for the U.S. Senate, challenging Senator Jon Kyl.³ Complainant asserts that the ASDCC impermissibly used Pederson's non-federal donations to directly benefit his senatorial candidacy. In response to these allegations, Pederson asserted in a sworn affidavit that none of his contributions were earmarked in any manner and were "given to support the party's general activities."⁴

Complainant cites a newspaper article paraphrasing the Chairman of the ASDCC that the Pederson donations "were being used for programs including candidate training and a vote by mail campaign – but not for Pederson" as proof that the donations and transfers were being used illegally as non-federal and federal components respectively of FEA payable with so-called "Levin funds." "Levin funds" are non-federal funds that can be used in conjunction with federally-permissible funds to pay for certain kinds of FEA.

In its response to the complaint, the ASDCC clarified that all Pederson donations were "handled in strict compliance with federal . . . laws."⁵ Further, the ASDCC's own disclosure filings show that the ASDCC had raised more than enough money to pay the non-federal portion of its get-out-the-vote activity without using either the money donated by Pedersen or money transferred from other state party committees.

Complainant also alleges that Pederson's contributions to the ASDCC, and the ASDCC's transfer of some of its non-federal funds to other Democratic party committees and receipt of federal funds from other Democratic party committees amounted to a "scheme" to allow Pederson to circumvent the Act's contribution limits for his campaign. But Complainant does not claim that the Act prohibits any of the specific fund transfers

³ Senator Kyl defeated Jim Pederson, 53% to 44%.

⁴ Nor was Pederson's giving during 2006 inconsistent with his past giving. In fact, the average of Pederson's non-federal donations per cycle in the prior two election cycles is actually higher than his non-federal donations in the 2006 cycle.

⁵ ASDCC Response at 4.

at issue or "swaps" in general. Instead, Complainant speculates that the ASDCC's various transfers resulted in using Pedersen's donations illegally.⁶

According to its disclosure reports, during the 2006 election cycle, the ASDCC raised more than \$3.5 million in federal contributions, and received more than \$5.5 million in non-federal support. During the 2006 election cycle, the federal component of the ASDCC's activities payable with "Levin funds" was just over \$400,000, and the non-federal portion was slightly in excess of \$1.5 million. During the same period, the ASDCC made a series of transfers of funds not subject to the limitations or prohibitions of Federal law to other Democratic party committees, and received transfers of funds subject to the limitations and prohibitions of Federal law from the same Democratic party committees. Specifically, on October 5, 2006, the ASDCC transferred \$258,000 in non-federal funds to the North Carolina Democrats, and on October 9, 2006, the North Carolina Democrats transferred \$225,000 in federal funds to the ASDCC; on March 30, 2006, the ASDCC transferred \$100,000 in non-federal funds to the Indiana Democrats; and on that date, the Indiana Democrats transferred \$100,000 in federal funds to the ASDCC; and on January 26, 2006, the ASDCC transferred \$115,000 to the South Dakota Democrats, who transferred \$100,000 in federal funds to the ASDCC on February 6, 2006.

For many years, the Arizona Democratic Party has found itself in possession of excess non-federal funds, and has regularly "contributed those funds to the non-federal accounts of other state Democratic party committees as an incentive for those committees to contribute federal funds to the ADP."⁷ In total, the ASDCC transferred approximately \$483,200 in non-federal funds to other party committees, and received from those other party committees approximately \$425,000 in federal funds. The non-federal funds transferred by the ASDCC to the other party committees were deposited into the other party committees' non-federal accounts, and the transfers of federal funds received from other party committees were deposited by the ASDCC into a separate segregated federal account.⁸

⁶ See Complaint at 1 (characterizing the Respondent's activities as "knowing and willfully engaging in a deliberate scheme to circumvent and otherwise violate" the Act, and "knowingly and willfully accepting and disbursing funds in excess of the federal limits"). As Respondent correctly suggests, Complainant in this matter does not make any specific allegations as to how the federal funds received by the ASDCC were used, but rather cobbles together a series of unfounded and speculative allegations.

⁷ Reply of ASDCC at 3.

⁸ As the Commission's Campaign Guide for Political Party Committees explains, a state party committee that finances activity in connection with both federal and non-federal elections may establish one or more federal accounts and one or more nonfederal accounts. FEC Campaign Guide for Political Party Committee (Aug. 2007) at 4. Only funds permissible under the Act may be deposited into the federal accounts, and the committee must use the federal accounts or an allocation account for all disbursements, contributions, or expenditures in connection with any federal election; the non-federal account may be used for non-federal activity, including the non-federal components of activities payable with Levin funds. 11 C.F.R. § 102.5(a)(1)(i); 11 C.F.R. § 300.30(c). According to the Respondent, the funds from this particular segregated federal account were used only for operating costs and FEA and did not include any activities payable with Levin funds. See ASDCC's Reply at 3.

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II. ANALYSIS

Even in light of these exculpatory facts, and despite the lack of additional specific factual allegations, OGC adopted Complainant's novel legal theory: that, while transfers of federal and non-federal funds among state party committees are legal, the expenditure of federal funds involved in "swaps" is somehow suspect. So suspect, in fact, that the Commission should find reason to believe that a state party committee spending those "swaps" violated the Act. But as Respondents explain, such a legal theory "is difficult to piece together."⁹ Even if all the facts alleged are assumed to be true, and even if, as Complainant speculates, the ASDCC's activities were subjectively "designed to help federal candidates," there has been no violation of the Act. Federally permissible funds in segregated accounts remain federally permissible regardless of whether another party committee transferred those funds to the ASDCC – even if the ASDCC had previously given that committee non-federal funds. To hold otherwise would impose a novel legal standard that has no basis in law, statute, or practice.

A. The Complaint and Reason to Believe

Under the Act, any complaint must "be in writing, signed and sworn . . ."¹⁰ In addition, Commission regulations provide that a complaint "should":

- clearly identify as a respondent each person or entity who is alleged to have committed a violation;
- statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainant's believe in the truth of such statements;
- contain a clear and concise recitation of the facts which describe a violation of statute or regulation; and
- be accompanied by any documentation supporting the facts alleged.¹¹

At the Commission's 2009 hearing on agency procedures, one commenter expressed support for making it unmistakable that these pleading requirements are mandatory.¹² This suggested approach is consistent with past Commission action in prior

⁹ Reply of Jim Pederson, *et al.* at 4.

¹⁰ 2 U.S.C. § 437g(a).

¹¹ 11 C.F.R. § 111.4(d).

¹² Comments of Wiley Rein LLP Election Law and Government Ethics Group at 2, available at <http://www.fec.gov/law/policy/enforcement/2009/comments/comm33.pdf> ("The Commission should make compliance with these factors mandatory and should not accept complaints that fail to satisfy them."). I read the regulation as being mandatory. It bears noting that "should" is not the same as "may," but instead

MUR's. For example in MUR 4960, where OGC's recommendation was rejected in favor of a finding of no reason to believe, the Commission summarized these requirements as follows:

The Commission may find "reason to believe" *only if* a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge *must* identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.¹³

This standard for determining the sufficiency of a complaint essentially mimics a verified complaint under a fact pleading standard.¹⁴ However, merely because a complaint may appear to meet this standard does not end the analysis. The Commission cannot find reason to believe until it allows respondents to explain why the Commission should not act on the complaint:

- (a) A respondent shall be afforded an opportunity to demonstrate that no action should be taken on the basis of a complaint by submitting . . . a letter or memorandum setting forth reasons why the commission should take no action.
- (b) The Commission shall not take any action, or make any finding, against a respondent other than action dismissing the complaint, unless it has considered such a response or unless no such response has been served upon the Commission. . . .¹⁵

is the past tense of the word "shall." "The traditional, commonly repeated rule is that *shall* is mandatory and may be permissive." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 112, Antonin Scalia & Bryan A. Garner (2012) (emphasis in the original). Thus, while "drafters have been notoriously sloppy with their *shalls*, resulting in a morass of confusing decisions on the meanings of this modal verb," the use of the word "should" in this section may plausibly be read as creating a mandatory obligation (*i.e.* Complaints *must* include the enumerated information) rather than offering permissive guidance. *Id.*

¹³ MUR 4960 (*Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.*), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1 (emphasis added).

¹⁴ As opposed to notice pleading, fact pleading serves as a higher bar that complainants must meet before being entitled to discovery. This serves several important purposes: notice, issue narrowing, pleading facts with particularity and eliminating meritless claims. *Compare, e.g.*, Rules of Supreme Court of Virginia Rule 1:4(d) ("Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.") and South Carolina Rules of Civil Procedure, Rule 8 (requiring pleading of the facts (rather than a "statement of the claim") with Fed. R. Civ. P. 8(a)(2) (a claim for relief must contain "a short and plain statement of the claim").

¹⁵ 11 C.F.R. § 111.6; *see also* 2 U.S.C. §437g(a)(1).

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This requires some assessment by the Commission of the facts and their credibility as well as the law before finding reason to believe. The Commission cannot find reason to believe unless it considers a properly submitted response, and the Commission cannot investigate alleged violations until it makes this finding. Together, these requirements provide procedural safeguards that protect respondents from frivolous complaints meant to harass, prevent unwarranted or premature discovery,¹⁶ and streamline enforcement by excluding innocuous respondents while allowing the Commission to better focus its resources. But this procedure also means that the response must be given more weight than its litigation analogue: the “answer,” where a defendant’s denials generally are tested through formal discovery. The standard for finding reason to believe – which is necessary for the Commission to conduct any type of investigation or take any discovery – is higher than the Federal Rules of Civil Procedure standard regarding sufficiency of a complaint – which allows discovery on virtually every complaint that identifies any potential legal or equitable claim. It is not enough for the Commission to believe that there is a reason to investigate whether a violation occurred.¹⁷ Instead, the Commission must identify the sources of information and examine the facts and reliability of the sources to determine whether they “reasonably give[] rise to a belief in the truth of the allegations presented.”¹⁸ After all, as the D.C. Circuit Court of Appeals has held, “mere ‘official curiosity’ will not suffice as the basis for FEC investigations”¹⁹ And, by necessary implication, it will not suffice to find reason to believe.

The reason to believe standard has been analyzed by the Commission through OGC in subsequent MURs. For example, in MUR 5467 (Michael Moore), OGC stated that “[p]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred.”²⁰ As explained in MUR 4545 (Clinton/Gore '96 Primary Committee, Inc.),

¹⁶ The Act does not permit discovery prior to a finding of reason to believe. See generally 2 U.S.C. § 437g(a)(2); see also MUR 6540 (Rick Santorum for President), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioner Caroline C. Hunter. See also Comment from Perkins Coie, LLP Political Law Group, on Request for Comment on Enforcement Process (April 19, 2013), available at <http://www.fec.gov/law/policy/enforcement/2013/perkinscoie.pdf>; Annual Report of Committees: Report on the Reform of the FEC’s Enforcement Procedures, vol. 19 (Amer. Bar. Ass’n. Section of Admin. Law 1982).

¹⁷ In fact, despite several Commission legislative recommendations, Congress has refused to lower the standard to “reason to investigate.” See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) (noting past legislative recommendations to “clarify” that reason to believe means reason to investigate).

¹⁸ MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1.

¹⁹ *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

²⁰ MUR 5467 (Michael Moore), First General Counsel’s Report, at 5 (quoting MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 3). Ironically the complainant in

since "the available evidence is inadequate to determine whether the costs of [President Clinton's train trip to the Democratic National Convention in August 1996] were properly paid, the complainant's allegations are not sufficient to support a finding of reason to believe" ²¹ Likewise, in MUR 3534 (Bibleway Church of Atlas Road), OGC acknowledged that the complaint was "lengthy and rather disjointed," "voluminous and rambling... consist[ing] mostly of letters [written to numerous federal and state agencies requesting an investigation of the respondent]," cites to no specific statutory provisions which Respondents allegedly violated," and is "apparently based on" two allegations "buried deep within [the] complaint." ²² OGC nonetheless recommended a reason to believe finding. In rejecting OGC's recommendation, however, a unanimous Commission explained the "several reasons" supporting its decision, including that "the complaint was quite vague," "there was a lack of evidence," and "any investigation . . . would require a significant amount of Commission resources and a thorough legal analysis of what statutes, if any, were violated by the alleged activity." ²³

B. The Complaint Provides Insufficient Factual Support to Find Reason to Believe and Other Available Facts Support Respondent's Claim That It Used Appropriate Funds for Its Activities Payable With "Levin Funds"

Notwithstanding its more general prohibitions applicable to party committees, Federal law allows certain activities (including voter registration and "get out the vote" ("GOTV") activities which do not mention a federal candidate) to be paid with a mixture of federal and certain non-federal funds (commonly referred to as "Levin funds"). ²⁴ Money used to pay for activities payable with "Levin funds" must meet the following criteria:

MUR 5467 was Citizens United, the producers of Hillary: The Movie. Although the Commission did not seek to ban the liberal 9/11 Fahrenheit movie, it attempted to ban the conservative Citizens United film.

²¹ MUR 4545 (Clinton/Gore '96 Primary Committee, Inc.), First General Counsel's Report at 17.

²² MUR 3534 (Bibleway Church of Atlas Road), First General Counsel's Report at 1-2.

²³ *Id.*, Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Trevor Potter, and Commissioners Joan D. Aikens, Lee Ann Elliot, Danny Lee McDonald, and John Warren McGarry at 2. Likewise, unwarranted legal conclusions from asserted facts (*see* MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom, and Scott E. Thomas), or mere speculation (*see* MUR 4850 (Fossella), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas), will not be accepted as true. In addition, while credibility will not be weighed in favor of the complainant or the respondent, a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint, *see* MUR 4852 (Wiebe), or available from public sources such as the Commission's reports database. *See* MUR 5141 (James P. Moran, Jr., *et al.*).

²⁴ 2 U.S.C. § 441i(b)(2).

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- Neither the federal nor the non-federal components may come from transfers;²⁵
- The non-federal component must be composed of funds which were raised by the state or local committees spending the funds and comply with state campaign finance law;²⁶
- No person may contribute more than \$10,000 even if state law allows greater amounts;²⁷ and
- Neither candidates nor other party committees may jointly raise "Levin funds."²⁸

In this matter, contrary to Complainant's speculation, Respondents campaign finance reports provide no indication whatsoever that transfers from other Democratic party committees or donations from Mr. Pederson were used as either a part of the federal or non-federal components respectively of the activities payable with "Levin Funds."²⁹ In fact, these reports support the opposite conclusion. The size of the non-federal component of the ASDCC's "Levin funds" expenditures was small enough (slightly more than \$1.5 million) that the ASDCC could have easily paid this from its non-federal contributions (over \$5.5 million), even after subtracting the \$1.3 million that Pederson contributed during the cycle. This leaves more than \$4.2 million to pay the non-federal component, which should have been sufficient even taking into account the "Levin funds" restrictions.

Likewise, the ASDCC raised more than \$3.5 million in federal funds irrespective of monies received from transfers. Given that the federal component of the "Levin funds" was less than a half million dollars, it is difficult to imagine the \$425,000 received in the transfers cited by ARP would have been part of the funds used to pay for the federal component of the "Levin funds." Furthermore, Respondents specifically state that the transferred funds were segregated from the other federal funds from which the federal component of the activities payable with "Levin funds" was paid. There is no fact

²⁵ 11 C.F.R. § 300.34.

²⁶ 2 U.S.C. § 441i(b)(2)(B)(iii); 11 C.F.R. § 300.31(d); 11 C.F.R. § 300.34.

²⁷ 2 U.S.C. § 441i(b)(2)(B)(iii); 11 C.F.R. § 300.31(d).

²⁸ 2 U.S.C. § 441i(b)(2)(C); 11 C.F.R. § 300.31(e).

²⁹ We note that Pederson could have spent unlimited amounts for this activity – even his own personal funds – through his own campaign. See *Buckley v. Valeo*, 424 U.S. 1 (1976). However, at the time of this campaign the FEC was enforcing provisions of the so-called "millionaires amendment" that were subsequently declared unconstitutional. See *Davis v. FEC*, 554 U.S. 724 (2008). OGC's analysis hints that part of the supposed "scheme" was to avoid the limitations imposed by the millionaire's amendment, *i.e.*, by giving money directly to his own campaign, Pederson's opponent could have taken advantage of enhanced contribution limits, whereas his funding of the state party would not. Even if such speculation is true, such subjective intent does not convert what is otherwise a series of lawful transactions into some of illegal scheme. See generally *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (rejecting an "intent-and-effect" test for evaluating political speech).

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pled by Complainant or otherwise presented in OGC's analysis of the Committee's disclosure reports that would indicate that either the Pederson donations or the federal funds transferred to ASDCC were spent on activities payable with "Levin funds."³⁰

The sentence paraphrasing the Chairman of the ASDCC upon which the Complaint relies is not sufficient to overcome the reports and respondents' answer. Another statement by the Chairman, which is in the news article attached to but not otherwise relied upon in the complaint, corroborates the ASDCC's claim that it complied with "Levin fund" source requirements: "[t]he one thing we are precluded from doing is spending any of that money on Jim [the candidate]. We absolutely cannot spend a dime of it on him."³¹ This, combined with the information contained in the party's campaign finance disclosures, are far more than sufficient to refute any questions that might be raised by an ambiguous and unsubstantiated newspaper article such as the one presented here.

In past matters before the Commission, such allegations, particularly when refuted by Respondents, have been insufficient to sustain a reason to believe finding. For example, in MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), the Commission concluded that mere allegations in a newspaper (specifically, an unsubstantiated quote) that could be read multiple ways are insufficient evidence to find a reason to believe. Similarly, in MUR 5843 (ACORN, *et al.*), a state party committee filed a complaint, and supported its allegations by reference to an Internet video. Respondents generally denied the allegations, and submitted sworn statements from two individuals alleged to have been involved in the activity at issue. Having found "weak support for the claim," and that "the complaint [was] based solely on allegations in an Internet video and a newspaper story to which no one [had] sworn, and complainant itself claim[ed] no personal knowledge of the alleged facts," OGC recommended the Commission find no reason to believe.³²

Thus, since a reason to believe finding must be at least supported by specific, reliable facts which, if proven true, would constitute a violation of the Act, and these facts must reasonably give rise to a belief in the truth of the allegations presented, the facts in this matter compel a finding of no reason to believe.

C. Transfers Between State Party Committees Are Permissible and Do Not "Circumvent" Federal Contribution Limits

Transfers between party committees have been part of campaign finance even before FECA and certainly have been an active part ever since. These transfers allow for

³⁰ ASDCC Reply at 3.

³¹ Paul Giblin, Pederson Financing Campaign, Dems, Records Show: Candidate's \$1M In Contributions To Party Began In '04, *The Tribune* (Mesa, Ariz.) (Sept. 1, 2006), available at 2006 WLHR 15184626.

³² See MUR 5843 (ACORN, *et al.*).

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the efficient use of funds in all of the locations sending and receiving transfers and thereby further the associational rights of the contributors to the parties.³³ Prior to BCRA, the national as well as state and local parties transferred millions of dollars, receiving and distributing both federal and non-federal funds.³⁴ As a result, the parties were able to send the money to the state where it was most needed as well as sending the type of funds that were most needed in any particular place:

The national parties have transferred considerable amounts of the money they have raised to the state parties. Both parties, in fact, have been giving considerable sums of money, and in particular soft money, to the states in recent years for "party building" and "issue advocacy" activities. In 1995-1996, for instance, the RNC gave \$66.3 million, while the DNC gave \$74.3 million. In the 2000 federal elections, the two parties raised roughly \$500 million in soft money and transferred \$280 million to their respective state parties. Parties channel their funds in this manner because federal and state regulations are more permissive of state spending of soft money than of federal spending.³⁵

This practice of transferring non-federal and federal funds among party committees is entirely lawful, and is clearly contemplated by the free transferability of funds under federal and most state laws. The Act specifically permits unlimited transfers between and amongst party committees.³⁶ In fact, the Commission has already publicly

³³ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("political parties' government, structure, and activities enjoy constitutional protection") (citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 230 (1989)). See also *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that California's blanket primary violated political parties' First Amendment right of association).

³⁴ See Sara Fritz, *Transfer Makes Soft Money Hard*, *St. Petersburg Times*, Nov. 5, 2002 at 5A (Reporting that in 2001-2002, the Florida Republican Party received \$3.2 million in non-federal funds from the NRSC and transferred to the NRSC \$2.7 million in federal funds, and the DSCC transferred \$1.1 million in non-federal funds to the Michigan Democratic State Central Committee, which subsequently returned \$917,000 in hard dollars to the DSCC. "Towson Fraser, spokesman for the Florida GOP, and the NRSC's Dan Allen acknowledged the transfers and emphasized that both parties use this technique. 'It's completely legal,' Fraser said. 'It's what we do and what the Democrats do also.'"). See also Scott Wilson, *DNC Swaps Funds with Its State Affiliates (Exchange Increases Latitude in Spending by Avoiding Limits)*, *The Washington Post*, Apr. 24, 1998 at A01; Steve Campbell, *Maine Democratic Party Swaps 'Hard,' 'Soft' Money*, *Portland Press Herald*, Mar. 2, 1997 at 2C; Ira Chinoy, *In Trades Between Party Committees Not All Dollars Are Equal*, *The Wash. Post*, Feb. 18, 1997 at A07.

³⁵ Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 *Nw. U. L. Rev.* 977, 1009 (2002). Swaps also can include direct contributions to candidates. *Id.* at 1010 ("one recent study found that national parties will transfer soft money to state and local parties with the understanding that the state and local parties will make hard money contributions to national candidates"). See also Denise Roth Barber & Kathy Helland, *Passing the Bucks: Money Games that Political Parties Play*, *The Institute on Money in State Politics* (2003) (revealing large number of money swaps across the country between 1997 and 2002).

³⁶ 2 U.S.C. § 441a(a)(4).

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acknowledged that the practice of a party committee transferring federal funds to another party committee that has transferred nonfederal funds to the first party committee, is entirely lawful.³⁷ All efforts by critics of “swaps” and transfers to get Congress to outlaw the practice have failed.³⁸

In light of this incontestable background, any examination of whether BCRA changed the law regarding transfers must be analyzed with the presumption that Congress was fully aware that transfers of the type that took place in this case were common and generally perceived as legal. Although BCRA made it illegal for the national party committees to possess any non-federal funds, there was no change in the section of the law regarding their ability to make transfers, and they still make transfers with the federal funds they acquire.³⁹ Likewise, this same section of the federal law also remains unchanged as regards state and local parties and they will possess, as they always have, both federal and non-federal funds.

The only language in BCRA which did restrict transfers specifically described activities payable with “Levin Funds.” This is a different section of the statute from the general transfer provision which, when appropriate canons of statutory interpretation are applied, clearly shows that the law regarding all other transfers remains unchanged.⁴⁰ As a matter of statutory construction, that Congress chose to limit transfers in one manner, yet remain silent as to other common practices well known to Congress is significant. Where the law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is excluded was intended to be excluded.⁴¹ Applying this well-established canon of construction, it is evident that Congress did not prohibit the practice of so-called “swaps.” Not only was Congress aware of the practice of the transfer of federal and non-federal funds among party committees, in considering the question, Congress chose to specifically prohibit certain uses of transferred funds, but purposefully left alone so-called “swaps” generally. Moreover, despite the complaint’s

³⁷ See “In Trades Between Party Committees, Not All Dollars Are Equal,” The Wash. Post, Feb. 18, 1997 at A07 (quoting a Federal Election Commission spokesman as saying that exchanges between party committees are legal). See also Federal Election Commission Campaign Guide for Political Party Committees (Aug. 2007) at 48 (“state and local parties can typically transfer among themselves without limit”).

³⁸ See H.R. 2123, 105th Cong. (2nd Sess. 1998) (Congressmen Asa Hutchinson and Tom Allen introduced H.AMDT.862, an amendment that would have banned transfers between state parties; however, the amendment failed by a vote of 147-222, and the final bill passed by the House of Representatives did not include such a provision).

³⁹ 2 U.S.C. § 441i(a); 2 U.S.C. § 441a(a)(4).

⁴⁰ 2 U.S.C. § 441i(b)(2), *et seq.* (limited to those activities payable with Levin Funds).

⁴¹ See, e.g., *American Wildlands v. Browner*, 94 F. Supp. 2d 1150 (D. Colo. 2000), *aff’d*, 260 F.3d 1192 (10th Cir. 2001) (discussing *inclusio unius est exclusio alterius*). See also *Barnhart v. Peabody Coal*, 537 U.S. 149, 168 (2003); *Cottage Savings Ass’n v. Commission*, 499 U.S. 554, 562 (1991) (when Congress revises a statute, its decision to leave certain sections unchanged indicates acceptance of the preexisting construction and application of the unchanged terms).

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implied theory that the federal funds transferred to the ASDCC could not be spent as funds raised pursuant to the Act's limits and prohibitions, the Commission has *never* previously presumed that when two party organizations make mutual transfers that the two transfers are the same money.⁴² That the Commission did not address the issue in this matter in a subsequent rulemaking provides further confirmation that swaps remain perfectly legal.⁴³

Given the longstanding practice and the proper application of interpretive canons to the Act, both the Act and Commission regulations do not prohibit state party committees to make unlimited transfers of federal and non-federal funds between themselves.⁴⁴ Here, the ASDCC provided non-federal funds to certain other state parties, who then, at some later time, transferred their own federal dollars to the ASDCC. Even if the initial transfers were intended to induce the recipient party committees to make federal transfers to the ASDCC, such transfers would have been legal.⁴⁵ Therefore,

⁴² A controlling block of Commissioners have previously opined that two independently legal transactions cannot be conflated into an illegal transaction. This interpretation was later upheld by the United States Court of Appeals for the District of Columbia. See MUR 4250 (Republican National Committee), Statement of Reasons of Chairman Darryl R. Wold and Commissioners Loe Ann Ellint and David M. Mason (February 11, 2000); *In re Sealed Case*, 223 F. 3d 775,782 (D.C. Cir. 2000) (“[the Commission’s] view that there is no basis for treating the several legally distinct transactions as one is reasonable”). Adopting the OGC’s legal theory requires reversing this controlling interpretation, an interpretation that has been sustained by the D.C. Circuit Court, and relied upon by various political parties. If the Commission wishes to abandon this interpretation in favor of the theory advocated by the OGC, it is not appropriate to do this in a MUR where Respondents have been provided no notice that the Commission is changing its policies, procedures and interpretation of the underlying statute as well as its views of the statute’s constitutional limitations. See MUR 5564 (Alaska Democratic Party) Statement of Reasons of Commissioners David M. Mastai and Haas A. von Spakovaky at 2-3 & 10 (When the Commission has not proceeded against a certain type of respondent previously, it should not proceed against similarly situated respondents in the future unless the public has notice through a rulemaking); *CBS v. FCC*, 535 F.3d 167 (3d Cir. 2008) (An agency cannot, in an enforcement action, take a substantial deviation from prior enforcement policies without sufficient notice of change in policy.). See also *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-2316 (2012) (“In the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and ‘show that there are good reasons for its new policy.’” (quoting *FCC v. Fox Television Stations*, 556 U.S. 502 at 515 (2009) (“*Fox I*”))).

⁴³ Subsequent to this MUR, the Commission unanimously approved a swap of \$10,000 in nonfederal funds in exchange for \$10,000 in federal funds concerning the Orange County Republican Executive Committee. See MUR 6212 (Orange County Republican Executive Committee) (March 16, 2010) (finding no reason to believe a violation occurred).

⁴⁴ 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 102.6(a).

⁴⁵ In fact, past Commission action is consistent with this reading. Respondents rely upon Advisory Opinion (“AO”) 2006-33, where the Commission analyzed a fundraising plan proposed by the National Association of Realtors (“NAR”). NAR, which has a federal political action committee (“PAC”), is affiliated with a host of state associations, many of whom have nonfederal PACs. Many of the contributions raised by NAR for its PAC are the fruits of joint fundraising efforts carried out between NAR’s PAC and the state associations’ state PACs. As part of a plan to help boost the funding of its federal PAC, NAR proposed to provide the state associations with infusions of corporate treasury funds as “incentive payments.” The amount paid to each association would “approximately equal the amount of contributions” the federal PAC

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neither the ARP nor OGC have stated a legal theory that, even if the allegations were true, would constitute a violation of the law. Thus, there is no reason to believe that a violation occurred here.⁴⁶

III. CONCLUSION

Various contributors gave the Arizona Democratic Party non-federal dollars to be spent to benefit Democrats in the most effective way. The ASDCC, at its discretion, transferred that money, as it legally was allowed, to the North Carolina Democrats as well as other Democratic party committees. That money was spent by the North Carolina Democrats and other Democratic party committees on non-federal expenses. The North Carolina Democrats and other Democratic party committees possessed federal funds that were raised in compliance with the Act's provisions, and they transferred those funds, as they are legally permitted to do, to the ASDCC. These funds were federal funds and could be spent on any FEA, except on activity implicating "Levin funds."

Therefore, there is no basis to conclude that the ASDCC's practice of so-called "swaps" may have been an effort to circumvent the Act's contribution limits.⁴⁷ The Commission has never previously presumed that when two political participants make mutual transfers that the two transfers are the same money, a presumption upon which the complaint relies. To change this policy now and effectively regulate by MUR would raise substantial legal doubt about our enforcement that is neither necessary nor prudent.⁴⁸ Thus, the Commission declined to accept OGC's invitation to attempt to invent new law -- that is the business of Congress, not the Commission or its staff.

would receive above current levels. The principal legal question in the AO was whether the proposed plan violated the regulatory ban on using the PAC's "establishment, administration, and solicitation" process as a means of exchanging treasury monies for voluntary contributions. The Commission concluded that it did not. In other words, the proposed fundraising plan by a federal PAC and several state PACs would not violate the law even if money swaps of corporate and non-corporate funds occurred. Respondents reliance on this advisory opinion is well-founded: the same principle applies here, even though NAR is not a political party committee.

⁴⁶ Since it is impossible on the legal theories presented to the Commission in this complaint for the other respondents to have violated the Act if the ASDCC has not violated the Act, there is no reason to believe that the other Respondents in this matter (Arizona Democratic Party-North Carolina Account, Pederson 2006, and Jeff Maraha, in his official capacity as treasurer, and Jim Pederson) violated the Act.

⁴⁷ Nor should federal law be used as subterfuge to void practices that are legal and long-established under state law.


⁴⁸ See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (Although a regulatory agency's interpretations of its own statute are normally entitled to deference, where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."))). See also *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part)

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(noting that “[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt”). Subsequent to this matter, the Court has reiterated that “validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013). Given that the Supreme Court has recognized strong associational rights within the party committee structure, *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) and *California Democratic Party v. Jones*, 530 U.S. 567 (2000), and the constitutional protection afforded the giving of money, *see Citizens United Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) (“Contributions by individuals to support concerted action by a committee advocating a position . . . is beyond question a very significant form of political expression.”), to attempt to interfere in the workings of the party committee as presented in this matter raises constitutional doubt. Given the constitutional doubt of the theory under which the Respondents were alleged to have violated the Act, the lack of evidence and that it would represent a departure from other Commission enforcement actions, as well as the lack of notice to the Respondents of the theory, the Commission would also be justified in dismissing this Complaint based upon prosecutorial discretion as outlined in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“...[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion... [and] the presumption of reviewability of agency action does not apply to an agency's decision not to undertake certain enforcement actions.”).

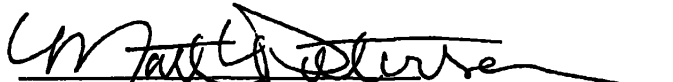
9/19/13
Date


Donald F. McGahn II
Vice Chairman

9/19/13
Date


Caroline C. Hunter
Commissioner

9/19/13
Date


Matthew S. Petersen
Commissioner

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