



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6672
Bilirakis for Congress, et al.)

**STATEMENT OF REASONS OF
VICE CHAIRMAN DONALD F. McGAHN AND
COMMISSIONER CAROLINE C. HUNTER**

The complaint in this matter alleged that a Member of Congress impermissibly converted campaign funds to his personal use. Specifically at issue are small amounts of campaign funds disbursed about five years ago¹ to pay for event registration and membership to an eleemosynary Masonic fraternity organized under section 501(c)(3) and 501(c)(10) of the Internal Revenue Code. Because much of the alleged amounts are already beyond the Federal Election Campaign Act's ("the Act") five year statute of limitation, and the Commission has already declared *via* rulemaking that campaign funds may be paid to such community or civic organizations, we could not support a finding of reason to believe that a violation occurred.

A. Legal Background

It is well established that candidates have wide latitude when it comes to spending campaign funds.² As the Supreme Court observed in *Buckley v. Valeo*, "[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate."³ Accordingly, the Act gives candidates

¹ We note that although the complaint in this matter concerns small amounts of campaign funds spent and disclosed about five years ago, the complaint was not filed until October 23, 2012, a few weeks prior to the 2012 election, by a campaign opponent of Respondents. Thus, given the manifest delay, we take a skeptical eye to the factual allegations contained in the complaint.

² See e.g. Advisory Opinion 2011-17 (Giffords) (use of campaign funds for home security system); Advisory Opinion 2001-08 (Specter) (use of campaign funds to purchase candidate autobiography for distribution to contributors); Advisory Opinion 2001-03 (Meeks) (use of campaign funds to purchase automobile for campaign purposes); Advisory Opinion 2000-37 (Udall) (use of campaign funds to purchase and present Liberty Medals); Advisory Opinion 1995-42 (McCrory) (use of campaign funds for child-care expenses); Advisory Opinion 1990-21 (Madigan) (use of campaign funds for travel expenses of candidate's wife); Advisory Opinion 1980-138 (Murkowski) (use of campaign funds for moving expenses).

³ 424 U.S. 1, 56 (1976).

13044342680

discretion when it comes to decisions regarding the spending of campaign funds. Section 439a of the Act expressly permits the following uses of campaign funds:

- (1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;
- (2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;
- (3) for contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986;
- (4) for transfers, without limitation, to a national, State, or local committee of a political party;
- (5) for donations to State and local candidates subject to the provisions of State law; or
- (6) for any other lawful purpose unless prohibited by subsection (b) of this section.

Subsection (b) of section 439a of the Act prohibits the conversion of campaign funds to "personal use."⁴ A contribution is converted to "personal use" if:

the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including –

- (A) a home mortgage, rent, or utility payment;
- (B) a clothing purchase;
- (C) a noncampaign-related automobile expense;
- (D) a country club membership;
- (E) a vacation or other noncampaign-related trip;
- (F) a household food item;
- (G) a tuition payment;
- (H) admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and

⁴ 2 U.S.C. § 439a(b)(1).

13044342681

- (I) dues, fees, and other payments to a health club or recreational facility.⁵

Commission regulations provide further clarity regarding impermissible personal use of campaign funds. Section 113.1 defines "personal use" to mean:

Any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.⁶

The regulation goes on to list a number of examples of what would be included within the definition of personal use, such as household items, funeral expenses, some clothing, and mortgage payments. The regulation also includes as personal use:

Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises.⁷

In the Explanation & Justification accompanying the regulation, the Commission made clear that organizations for which campaign funds can be used to pay for membership dues need only have an indirect nexus to the campaign:

The rule allows a candidate or officeholder to use campaign funds to pay membership dues to an organization that may have political interests. This would include community or civic organizations that a candidate or officeholder joins in his or her district in order to maintain political contacts with constituents or the business community. Even though these organizations are not considered political organizations under 26 U.S.C. § 527, they will be considered to have political aspects for the purposes of this rule.⁸

⁵ *Id.* § 439a(b)(2)(D) & (I). We note that in the First General Counsel Report ("FGCR"), the Office of General Counsel ("OGC") claims that the Act states that "[d]ues, fees, or gratuities to a country club, health club, recreational facility, or other *nonpolitical organization*" is per se personal use. FGCR at 5-6 (emphasis in original). Not so. Contrary to OGC's claim, the Act does not declare dues to "other nonpolitical organizations" to be per se personal use. That language only appears in the Commission's pertinent regulations, which – as explained more fully below – do not reach organizations like the one at issue here.

⁶ 11 CFR § 113.1(g).

⁷ 11 CFR § 113.1(g)(1)(i)(G).

⁸ 60 Fed. Reg. 7866 (Feb. 9, 1995) ("Personal Use E&J"). We note, again, that the OGC misstates the law. The FGCR merely quotes the first sentence of this part of the E&J, and then declares that since the section 501(c)(3) fraternal organization does "not profess to have political interests," Respondents' reliance on the E&J is "misplaced." We are troubled that OGC elected to parse the E&J, and not include the actual language relied upon by Respondents, particularly since it goes on to explain that, for purposes of the

The E&J also provides, *inter alia*, that the rule is not intended to “include traditional campaign activity, such as attendance at county picnics, organizational conventions, or other community or civic organizations.”⁹ It also further explains the limited reach of the regulation:

[T]he rule does not require an explicit solicitation of contributions or make distinctions based on who participates in the activity, since this would be a significant intrusion into how candidates and officeholders conduct campaign business.¹⁰

Thus, the rule clearly distinguishes non-political organizations, such as country clubs, health clubs, and recreational entities, from community and civic organizations, the interaction with which are deemed to be sufficiently political for purposes of the personal use rule. Campaign funds may not be used to pay dues for the former type of entities, but may be used for the latter.¹¹ In other words, Commission regulations specifically permit a candidate or officeholder to use campaign funds to pay membership dues for

regulations, a group is sufficiently politically interested if a candidate or officeholder joins it “in order to maintain political contacts with constituents or the business community.” Commission regulations have tasked the OGC to prepare a recommendation regarding the merits of complaint-generated matters, 11 CFR § 111.7, and the General Counsel has been specifically told by the Commission that the supporting report will set forth a clear statement of the facts and the law, including, *inter alia*, a discussion of any relevant E&Js, whether favorable or adverse to the General Counsel’s recommendation. Such reports are not required under the Act, and instead are a creature created by the Commission to assist it in its duties under the Act. As such, they are not opportunities for OGC to be creative with novel legal theories or to present matters in a saluctive, argumentative way. We are particularly troubled here, as the omitted E&J language is dispositive.

⁹ *Id.*

¹⁰ *Id.*

¹¹ This point is further established by the history of regulation, where the rulemaking lasted about a year and a half and generated 63 comments from the public. At the time of the rules proposal, Members of Congress were spending campaign funds for many questionable uses. See Sara Fritz, “FEC Seeks Ban on Personal Use of Campaign Funds” Los Angeles Times (September 1, 1993) (providing examples of campaign spending). But, some voiced concern that the proposed rule might go too far and bar campaigns from paying dues not only for country clubs, health clubs, and recreational facilities, but for other social and community groups of the sort that candidate and officeholders join so as to support the local community and interact with constituents. For example, then-Congressman Martin Frost wrote to the Commission, questioning “how civic organizations such as chambers of commerce, Lions clubs, Rotary clubs, and other similar groups would be treated?” He noted that membership dues for these organizations “are clearly political in nature and often exist *because of* a candidate’s campaign or duties as a Federal officeholder.” Letter of Hon. Martin Frost to Trevor Power, Chairman, Federal Election Commission (Dec. 7, 1994) (“Frost Letter”) (emphasis in original). As a reaction to such comments, the regulation’s Explanation & Justification clarified the scope of the final rule’s dues section to address concerns about its application to civic and community organizations, and expressly permitted the payment of dues to such organizations. The FGCR does not include this relevant regulatory history.

13044342683

civic or community organizations if he or she believes there is a political benefit and to use campaign funds to participate in events sponsored by such organizations.¹²

B. Analysis

Here, Respondents used a small amount of campaign funds for event registration and dues to the Royal Order of Jesters. The complaint and its accompanying exhibits describe the Royal Order of Jesters as a "worldwide fraternal organization," that is an "offshoot group of the Shriners" with "191 groups or courts in North America with nearly 21 thousand members."¹³ There are 12 Jester Courts in Florida, second only to Texas for the highest number in any state. The Jesters are exempt from federal taxation under section 501(c)(3) and 501(c)(10) of the Internal Revenue Code, and is part of the Masonic fraternity, with one of its central purposes being "promoting fellowship and fraternity among members."¹⁴

This is precisely the sort of group the Commission had in mind when explaining the limited reach of its personal use regulations. It is a civic or community organization, and membership in such an organization provides a political benefit to a candidate or officeholder, particularly here, where Respondent represents the Tampa, Florida area, and joined the Tampa chapter. The complaint does not counter any of this – in fact, the complaint all but agrees that the Royal Order of Jesters is such a group, as does the Office of General Counsel: "The uncontradicted record shows that the Royal Order of Jesters is a social, *fraternal* organization"¹⁵

It is these sorts of fraternal contacts, and not the overall purpose of the group, which make the group "political" for purposes of the rule. Merely because a group also claims to promote "fellowship and mirth" does not diminish the political value in joining such a group so as to, in the words of the E&J, "maintain political contacts with constituents or the business community." While the purpose of the Royal Order of Jesters may be more light-hearted than the community service focus of a Kiwanis Club or the business mission of a local chamber of commerce, its focus still appears to be upon group interaction and networking – the type of associating that would allow a federal officeholder or candidate "to maintain political contacts with constituents or the business community."¹⁶ In other words, the Royal Order of Jesters looks like a community

¹² This principle is in harmony with the obligations members of the House of Representatives have under their rules. There, Members "may not convert campaign funds to personal use in excess of an amount representing reimbursement for *legitimate and verifiable campaign expenditures*." Rules of the House of Representatives, 113th Congress, Rule XXIII, clause 6(b). Thus, an officeholder may use campaign funds for activities that legitimately have a political benefit for that member under the Act and House Rules.

¹³ MUR 6672 (Bilirakis), Complaint Attachment B at 7 n.3

¹⁴ *Id.*

¹⁵ MUR 6672 (Bilirakis), FGCR at 6 (emphasis added).

¹⁶ Personal Use E&J, at 7866.

1304434268A

organization "that will be considered to have political aspects for the purposes of [the personal use] rule,"¹⁷ and is a far cry from a country club, health club or the like.¹⁸

Instead of addressing the proper legal standard, the complaint points to the failings of some other Jesters chapters, none of which concern the Tampa chapter or are otherwise tied to the Respondents. Inclusion of such salacious factoids may be great for politically motivated headlines on the eve of an election, but are not particularly relevant to deciding the pertinent legal issue. Thus, since such accusations are not relevant to Respondents, we do not need to address them in any detail. Nonetheless, a simple analogy illustrates the flaw in the complaint's guilty-by-association smear: say a campaign has paid dues to a local chamber of commerce, something that all agree is not prohibited by the regulation. Simply because the president of that chamber of commerce chapter gets caught robbing a bank, drinking and driving, or engaging in other criminal conduct does not make the use of campaign funds to pay dues suspect or, worse, result in their conversion to personal use. To proceed down the road urged by the complaint, and egged on by OGC, would do just that. Worse, it would require the Commission to ignore its own regulations, as clearly explained in the accompanying E&J. We know of no authority that permits the Commission to do that.¹⁹

Finally, some perspective is in order. What is at issue is a little more than \$1,000, spent about five years ago. Some of this is already time-barred under the Act's five year statute of limitations. The remainder is of an amount that has been deemed *de*

¹⁷ *Id.*

¹⁸ Further, a cursory review of reports filed with the Commission shows *numerous* examples of payment of dues to organizations like the National Republican Club (i.e., the "Capitol Hill Club") and the National Democratic Club. See Federal Election Commission Disclosure Data Catalog; <http://www.fec.gov/data/index.jsp>. OGC's approach would seem to prohibit these payments as well.

¹⁹ Remarkably, OGC urged us to do just that, claiming that an alternative interpretation would be contrary to the Act—at least as it was rewritten by OGC to include language found only in the regulation. Even if we could ignore the Commission's clear and contemporaneous explanation of its own regulation, which specifically grants permission for the type of spending at issue here, the time to do that is not in a confidential enforcement matter. Due process demands much, much more. See *FCC v. Fox Television Stations ("Fox II")* 132 S. Ct. 2307, 2317 (2012). ("[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required"). Similarly, if there exists a desire to revise the Commission's regulation, or its interpretation thereof, that the proper course of action would be to draft a proposed rule, publish it in the Federal Register, and seek public comment on the proposal. See 5 U.S.C. § 553 (rulemaking provision of the Administrative Procedures Act). Such a rulemaking effort may be worthwhile undertaking, as the current regulation could be susceptible to *Chevron* problems, as it includes additional prohibitive language not found in the Act. This Commission knows all too well what can happen when its regulations go astray of the Act. See *Emily's List v. Federal Election Commission* 581 F.3d 1 at 35 (D.C. Cir. 2009) ("The FEC runs roughshod over the limits on its statutory authority when it presumes that any public communications that merely 'refer' to a federal candidate necessarily seek to influence a federal election.") (emphasis in original); *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) ("cumulative[ing] that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997).

13844342685

minimis in other matters²⁰ and not the sort of thing that justifies the use of additional Commission resources.²¹ For example, in MUR 5424 (Virginia Foxx for Congress), the Commission did not pursue a personal use issue where a candidate used campaign funds to pay chamber of commerce dues, since such payment was *de minimis*.²² Even if one were to go it alone and ignore the E&J so as to declare a violation in the current matter, the same result ought to follow, and no further action be taken.

CONCLUSION

For the aforementioned reasons, we could not support OGC's recommendation to find reason to believe. To do so would have upended twenty years of understanding surrounding the application of the personal use regulations to the payment of dues to community and civic organizations within a candidate's or officeholder's district by ignoring a duly passed E&J that allows such payments.

²⁰ Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) ("Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter when the matter does not merit further use of Commission resources, due to factors such as the small amount or significance of the alleged violation...").

²¹ See *Hesler v. Chaney*, 470 U.S. 821, at 831-35 (1985) (noting both the expansive discretion that an agency has in determining what to advance an enforcement action and the "general unavailability for judicial review of agency decisions to refuse enforcement").

²² MUR 5424 (Virginia Foxx for Congress), FGCR at 8-9. OGC once again does not tell the whole story, this time regarding Commission precedent. First, they fail in their report to distinguish ADR 056 (Bilirakis), which appears to be directly on point, opting instead to flippantly characterize that matter as "non-precedential." As for MUR 5242, OGC fails to explain that there was never a personal use allegation in the complaint. The allegation was that a federal candidate had used state campaign money to pay chamber of commerce dues. The federal candidate then received a refund of the state campaign funds, and then paid the dues using federal campaign money, so as to avoid the complaint's allegation of a prohibited contribution from the state committee. See 2 U.S.C. § 441i(e)(1)(a); 11 CFR § 110.3(d). In typical head-in-win-tails-you-lose fashion, OGC declared that this was a personal use violation, never afforded the respondent an opportunity to respond, and recommended closing the matter. Although the committee was "admonished," such action is without legal effect, as it is not contemplated by the Act. See 2 U.S.C. § 437g(a)(4)(C) & 437g(a)(5)(A)-(B) (providing the only two methods – conciliation and administrative fines – that the Commission can impose penalties short of court action). Thus, the ultimate holding was dismissal. Regarding the merits of OGC's argument in that MUR, it makes no sense to declare payment of chamber of commerce dues to be impermissible simply because the particular chapter is located outside of a congressional district, and at the same time say that dues to chapters within the district are permissible. After all, as the Supreme Court noted long ago, members of the House of Representatives represent the sovereign people of their respective states, and not just their apportioned districts. *McPherson v. Blacker*, 146 U.S. 1, 7 (1892) ("It has never been doubted that representatives in congress thus chosen represented the entire people of the state acting in their sovereign capacity.")

13044342686



DONALD F. MCGAHN II
Vice-Chairman

9/18/13
Date



CAROLINE C. HUNTER
Commissioner

9/18/13
Date

13044342687