



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Hillary Victory Fund, *et al.*) MURs 7304 & 7331
)

**STATEMENT OF REASONS OF
VICE CHAIRMAN MATTHEW S. PETERSEN
AND COMMISSIONER CAROLINE C. HUNTER**

In the run-up to the 2016 presidential election, Hillary Clinton’s campaign participated in a highly ambitious and successful joint fundraising project with Democratic national and state party committees. Ordinarily, candidates’ and party committees’ participation in joint fundraising efforts is hardly a newsworthy event. But the very scope and success of this particular project seemed to inflame the public’s imagination.

Indeed, the Commission received complaints alleging that Clinton’s joint fundraiser violated the Federal Election Campaign Act (the “Act”) and Commission regulations. The only trouble was, the allegations that stated a cognizable claim under the Act were not supported by evidence, and the allegations supported by evidence did not state a cognizable claim under the Act.

The Commission’s Office of General Counsel (“OGC”) nonetheless concluded that the Respondents’ apparent compliance with the Act was, itself, evidence of noncompliance, and recommended that the Commission find reason to believe the Respondents violated the Act. We voted against these recommendations. This statement provides the reasons for our vote.

I. MUR 7304 & MUR 7331 (Hillary Victory Fund, *et al.*)

In August 2015, Clinton's principal campaign committee entered into a Memorandum of Understanding with the DNC regarding the creation and operation of a joint fundraising committee. The following month, Clinton's campaign committee and the DNC entered into a written joint fundraising agreement and formed Hillary Victory Fund to act as their fundraising representative. Dozens of state party committees signed on to the joint fundraising agreement. All told, 38 state party committees participated at one time or another in the joint fundraiser with Clinton's campaign committee and the DNC.

According to a formula in the joint fundraising agreement, Hillary Victory Fund allocated each contribution among the participating committees as follows: first to Clinton's campaign committee up to the contribution limit; second to the DNC up to its contribution limit; and, finally, any remaining funds to the participating state party committees in equal amounts up to their contribution limits. Thousands of individuals made contributions during the course of the fundraiser; OGC estimates that "[a]round 1,500" of these individuals contributed to the state party committees after reaching their limits for contributions to Clinton's campaign committee and the DNC.¹

A. Excessive contributions to the DNC

We voted against OGC's recommendation to find reason to believe the Respondents used the joint fundraiser to circumvent contribution limits to the DNC. OGC based its recommendation on (1) the percentage of joint fundraising proceeds transferred by the state party committees to the DNC; (2) the timing of those transfers after the state party committees received funds from Hillary Victory Fund; (3) the fact that the transfers started with the first distributions of joint fundraising proceeds to the state party committees; and (4) several state party committees' descriptions of, or failures to report, some transfers, which, in OGC's view, indicated that the funds "were never intended to stay in the accounts."²

OGC further concluded that the entire amount transferred by the state party committees to the DNC violated the contribution limits, given that state party committees received funds under the joint fundraising agreement only if the contributor had already maxed out on contributions to the DNC and Clinton's campaign committee. For the same reason, OGC also concluded that all state party committee-transferred funds that the DNC then contributed to, or spent in coordination with, Clinton's campaign committee violated the limits on contributions to her campaign.

Although, as explained further below, we found some of the Respondents' alleged conduct to be troubling, troubling is not the same as illegal. Our obligation as Commissioners is

¹ First General Counsel's Report at 10, MUR 7304 *et al.* (Hillary Victory Fund *et al.*) ("FGCR").

² *Id.* at 23; *see also id.* at 21-24.

to evaluate the facts in light of applicable law before finding reason to believe, and that includes the Act, Commission regulations, prior Commission decisions, and judicial precedent.

Starting with the Act, there is no limitation on the amount of funds that committees of the same political party may transfer to each other. In 1976, Congress carved out a specific statutory exemption for intra-party transfers and has maintained it ever since.³ The Act provides that the contribution limitations that ordinarily apply to party committees “do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party.”⁴

The Commission’s regulations are even clearer. “[T]ransfers of funds may be made without limit on amount between or among a national party committee, a State party committee and/or any subordinate party committee whether or not they are political committees . . . and whether or not such committees are affiliated,” except for certain restrictions not applicable here.⁵

The intra-party transfer exemption carries over into joint fundraising, as well. The procedures that “govern all joint fundraising activity”⁶ include a requirement that participants enter into a written agreement identifying the joint fundraising representative and the formula for allocating fundraising proceeds, and a requirement that participants include a notice with every solicitation identifying themselves and describing how they will allocate proceeds unless the contributor designates otherwise.⁷ But these requirements do not apply “if all of the participants in a fundraising activity are party committees of the same political party,” even if they have already agreed how to allocate proceeds, “[s]ince the party committees could decide, after the fundraising was concluded, to transfer any amount of the proceeds among themselves pursuant to [52 U.S.C. § 30116(a)(4)].”⁸

³ Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, § 112(2) (May 11, 1976), 90 Stat. 487, <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg475.pdf#page=20>.

⁴ 52 U.S.C. § 30116(a)(4).

⁵ 11 C.F.R. § 102.6(a)(1)(ii) (excluding intra-party transfers of Levin funds) (citation omitted); *see also* 11 C.F.R. § 110.3(c)(1) (same); Amendments to Federal Election Campaign Act of 1971; Regulations transmitted to Congress, 45 Fed. Reg. 15080, 15084 (Mar. 7, 1980) (“[T]ransfers of funds may be made without limit between any party committees, regardless of whether or not they are political committees or of whether or not they are affiliated”); Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26298 at 26296 (June 7, 1983) (“1983 E&J”) (“[P]arty committees of the same political party and affiliated committees may make unlimited transfers of funds”).

⁶ 11 C.F.R. § 102.17(b)(2).

⁷ 11 C.F.R. § 102.17(c)(1), (2).

⁸ 1983 E&J at 26298.

Similarly, the requirement that joint fundraising participants must allocate expenses based on each participant's percentage of receipts does not apply to party committees of the same political party.⁹ “[S]ince the Act permits unlimited transfers between . . . party committees of the same political party, no in-kind contribution results if one committee pays all expenses of a fundraising event.”¹⁰

The intra-party transfer exception implicitly recognizes a political party's right to allocate its internal resources as necessary for the selection and election of the party's candidates.¹¹ Nonetheless, OGC urged the Commission to disregard it here. Focusing, instead, on such factors as how long the joint fundraising proceeds sat in state party committee accounts, the percentages of state party committees transferring funds and the percentage of funds transferred, and isolated reporting irregularities by the state party committees, OGC argued that the funds were intended “at the outset” to go to the DNC, and the joint fundraiser was a mere pretext to circumvent individuals' contribution limits.¹² Applying the intra-party transfer exception, OGC claimed, “would effectively nullify the individual contribution limitations for a national party committee.”¹³

We disagree. The individual contribution limits are alive and well, regardless of the intra-party transfer exception. In fact, had the record contained credible information indicating that individual contributors knew or intended that their contributions would be “funneled” through the state party committees to the DNC, our votes in this matter likely would have been very different.¹⁴ But as OGC repeatedly acknowledged, the record contained “no information”

⁹ 11 C.F.R. §§ 102.17(c)(7)(i)(A), 102.17(c)(7)(ii).

¹⁰ 1983 E&J at 26300.

¹¹ See Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 9-10, MUR 5878 (Pederson) (Sept. 19, 2013) (“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 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.”) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (“political parties’ government, structure, and activities enjoy constitutional protection”), *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 230 (1989), and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that California’s blanket primary violated political parties’ First Amendment right of association); see also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 (1986) (“As we have said, ‘[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.’ ”)) (internal citations omitted).

¹² FGCR at 25.

¹³ *Id.*

¹⁴ See 52 U.S.C. § 30122 (prohibiting any person from making a contribution “in the name of another or knowingly permit[ting] his name to be used to effect such a contribution”).

to that effect¹⁵ — which raises the question: How could the party committees’ subsequent actions cause individual contributors to the joint fundraising committee to violate contribution limits? OGC’s legal theory relies on approximately 1,500 contributors’ making excessive contributions to the DNC totaling \$112 million; and yet, the record is “void of information” to suggest that any one of those 1,500 contributors knew about or intended to make contributions to the DNC in excess of the Act’s amount limitations.¹⁶

The information that we have supports the Respondents’ assertions that they engaged in a series of legal transactions. The Act does not limit the percentage of funds that may be transferred, or impose a waiting period before making transfers, or prohibit party committees from consulting with each other.¹⁷ To conclude that these apparently legal activities were, themselves, evidence of illegality would turn the law on its head and leave members of the public in an untenable position — unable to rely on the explicit provisions of the Act and Commission regulations. Consistent with our views in prior matters, the views of our predecessors on the Commission, and the Federal Court of Appeals for the D.C. Circuit, we declined to adopt this position.¹⁸

¹⁵ FGCR at 26 (“We have no information that any donor contributed to [Hillary Victory Fund] with knowledge that their contributions to the [state party committees] would be routed to the DNC.”); *id.* at 33 (“Despite our conclusion that [Hillary Victory Fund] was used to funnel excessive contributions to the DNC through the [state party committees], we have no information that the donors knew about this plan.”); *id.* at 33 n.119 (“We agree that there is no information in the Complaint that indicates that [Hillary Victory Fund] donors had actual knowledge of how the [state party committees] would use their contributions.”); *see also id.* at 33 (“The record is void of information necessary to determine whether [Hillary Victory Fund] contributors earmarked their contributions to the DNC for the benefit of Hillary Clinton or [her campaign committee].”); *id.* at 33 n.120 (“[T]here is no information that [Hillary Victory Fund] donors ‘telegraphed’ their intent to support a particular candidate.”).

¹⁶ *Id.* at 33.

¹⁷ *See id.* at 22 (“That [state party committees] across the country would independently decide each time they received a transfer from [Hillary Victory Fund] to transfer their [Hillary Victory Fund] proceeds to the DNC within a day or two strains credibility.”).

¹⁸ *See* MUR 5878 (Arizona State Democratic Central Committee, *et al.*), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (opining that independently legal transactions cannot be conflated into an illegal transaction); MUR 4250 (Republican National Committee), Statement of Reasons of Chairman Darryl R. Wold and Commissioners Lee Ann Elliott and David M. Mason (February 11, 2000) (same); *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”); MUR 5564 (Alaska Democratic Party), Statement of Reasons of Commissioners David M. Mason and Hans A. von Spakovsky at 2-3 & 10 (concluding that, when Commission has not proceeded against certain type of respondent previously, it should not proceed against similarly situated respondents in future unless public receives notice through rulemaking); *CBS v. FCC*, 535 F.3d 167 (3d Cir. 2008) (concluding agency cannot, in enforcement action, substantially deviate 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)).

In sum, the facts did not support a claim that any individual made excessive contributions to the DNC, and the law did not support a claim that any state party committee made excessive contributions to the DNC. Absent information indicating that anyone *made* an excessive contribution to the DNC, we voted against finding reason to believe the DNC knowingly *accepted* excessive contributions.

B. Reporting Violations

OGC's recommendation that the Commission find reason to believe the Respondents violated the reporting requirements was based on the erroneous premise that "most of the proceeds allocated by [Hillary Victory Fund] to the [state party committees] were in reality contributions to the DNC."¹⁹ Under this theory, OGC concluded that Hillary Victory Fund improperly reported the disbursement of these funds as transfers to the state party committees (rather than as transfers to the DNC); the state party committees, in turn, improperly reported receipt of those funds as transfers from Hillary Victory Fund and as contributions from individual donors; and the DNC improperly reported funds it received from the state party committees as transfers from them (rather than as transfers from Hillary Victory Fund and contributions from the individual donors).

Absent reason to believe the state party committees were "mere pass through[s] for contributions to the DNC,"²⁰ however, there was no reason to believe the Respondents violated the reporting requirements. In fact, the record indicates that Hillary Victory Fund allocated joint fundraising proceeds consistently with the joint fundraising agreement and reported accordingly.²¹ Further, the record does not indicate that the state party committees failed to disclose their receipts from Hillary Victory Fund or transfers to the DNC (with few exceptions), or that the DNC failed to disclose its receipts from the state party committees.

We declined to hold the Respondents' apparent compliance with the joint fundraising and disclosure requirements against them. Accordingly, we voted against OGC's recommendation.

¹⁹ FGCR at 27.

²⁰ *Id.* at 26.

²¹ See Response of Hillary Victory Fund, Ex. C (Declaration of Elizabeth Jones, Treasurer, Hillary Victory Fund) (Feb. 15, 2018) (declaring under penalty of perjury that "[Hillary Victory Fund] proceeds were consistently distributed according to the allocation formula set forth in the joint fundraising agreement for HVF. I know of no instance in which funds allocated to a State Party Committee were transferred to the DNC, instead of to a State Party Committee depository.").

C. Coordinated Expenditures

Finally, we voted against OGC's recommendation to find reason to believe the DNC made, and Clinton's campaign committee accepted, excessive contributions in the form of coordinated expenditures. OGC based its recommendation on the August 2015 Memorandum of Understanding between Clinton's campaign committee and the DNC, in which Clinton's campaign committee reportedly agreed to raise funds jointly with the DNC in exchange for authority over DNC decisions involving staffing, budget, expenditures, and general-election related communications, data, technology, analytics, and research, along with a statement by former DNC Chair Donna Brazile that she "couldn't write a press release without passing it by" Clinton's campaign committee.²²

This is the part of the record that we find most troubling. If accurate, it suggests an unusual degree of closeness between Clinton's campaign committee and the DNC in a contested race more than five months before the Iowa caucuses and almost a full year before Clinton formally received her party's nomination.²³

But, as noted previously, troubling is not the same as violating the Act. To support a reason to believe finding, allegations in a complaint must be based on more than mere speculation. Here, OGC acknowledged the lack of information supporting the allegations: "[T]he Complaint does not identify any specific communications that the DNC coordinated with [Clinton's campaign committee] or specific expenditures not already reported that should count toward the DNC's party coordinated expenditures."²⁴ OGC nonetheless asserted that a "reasonable inference" could be made that the amount of unreported coordinated expenditures (if any) "likely exceeds" the DNC's remaining coordinated expenditure allowance.

Consistent with our positions in prior matters, we declined to engage in this level of speculation, particularly on the key element of a reason to believe finding.²⁵ Accordingly, we voted against OGC's recommendation.

²² FGCR at 30-31. Ms. Brazile wrote that she couldn't write a press release "without passing it by Brooklyn." Donna Brazile, *Inside Hillary Clinton's Secret Takeover of the DNC*, POLITICO MAGAZINE (November 02, 2017), <https://www.politico.com/magazine/story/2017/11/02/clinton-brazile-hacks-2016-215774>. In the FGCR, OGC changed "Brooklyn" to "HFA," for Clinton's campaign committee Hillary for America.

²³ Iowa held the first-in-the-nation presidential primary (caucus) in the 2015-2016 election cycle on February 1, 2016. See National Conference of State Legislatures, 2016 Primary Dates, Presidential Primaries (Feb. 9, 2016), <http://www.ncsl.org/research/elections-and-campaigns/2016-state-primary-dates.aspx#Pres>. Clinton received her party's nomination for President in July 2016. See Patrick Healy and Jonathan Martin, Democrats Make Hillary Clinton a Historic Nominee, NY Times (July 26, 2016), <https://www.nytimes.com/2016/07/27/us/politics/dnc-speakers-sanders-clinton.html>.

²⁴ FGCR at 29. Nor do the committees' campaign finance reports indicate that the DNC transferred funds directly to Clinton's campaign, as alleged in the Complaint.

²⁵ See, e.g., MURs 6789/6852 (Special Operations for America, *et al.*), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4 ("We do not authorize Commission

II. McCutcheon v. FEC

OGC, the Complaints, and one of our colleagues on the Commission have noted certain similarities between the facts alleged here and hypothetical situations addressed by the Supreme Court in *McCutcheon v. FEC*.²⁶ Although our votes in these matters did not depend on our interpretation of *McCutcheon*, we would nonetheless like to point out what we believe to be a crucial difference between the hypothetical scenarios considered in *McCutcheon* and the facts alleged here.

In *McCutcheon*, the Court considered scenarios in which individuals might circumvent their “base” contribution limits in the absence of aggregate contribution limits.²⁷ The scenarios generally involved an individual making large contributions to several political committees, or to a single joint fundraising committee, that the individual had earmarked for a particular candidate and which, in the aggregate, exceeded the individual’s contribution limits for that candidate; the recipient political committees then obligingly forwarded the contributions to, or spent them in coordination with, the candidate designated by the contributor. The Court acknowledged that “[m]any of the scenarios that the Government and the dissent hypothesize involve at least implicit agreements to circumvent the base limits.”²⁸

By contrast, OGC described the record here as “void of information necessary to determine whether [Hillary Victory Fund] contributors earmarked their contributions to the DNC for the benefit of Hillary Clinton or [her campaign committee].”²⁹ In addition, OGC found “no information that [Hillary Victory Fund] donors ‘telegraphed’ their intent to support a particular candidate.”³⁰ The record also contained “no information” that any contributor to the Hillary

investigations based on mere speculation”), citing *FEC v. Machinists Non-partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (“[M]ere ‘official curiosity’ will not suffice as the basis for FEC investigations”) (footnote omitted); *see also Machinists*, 655 F.2d at 387 (distinguishing Commission from administrative agencies “vested with broad duties to gather and compile information and to conduct periodic investigations concerning business practices the FEC has no such roving statutory functions”); MUR 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (“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.”).

²⁶ 134 S.Ct. 1434 (2014) (plurality op.) (finding aggregate contribution limits to be unconstitutional).

²⁷ The Court described “base limits” as “restrict[ing] how much money a donor may contribute to a particular candidate or committee,” and contrasted them with aggregate limits, which “restrict[] how much money a donor may contribute in total to all candidates or committees. *Id.* at 1442.

²⁸ *Id.* at 1459.

²⁹ FGCR at 33.

³⁰ *Id.* at 33 n.120.

Victory Fund acted “with knowledge that their contributions to the [state party committees] would be routed to the DNC,”³¹ much less that the contributions would be used by the national party committee to support Clinton’s campaign. Without an individual contributor’s requisite donative intent, what the recipient political committees did with the individual’s contribution after it was made would not count against the individual’s contribution limits.³²

³¹ FGCR at 26.

³² See *McCutcheon*, 134 S.Ct. at 1452 (stating, “[t]he Government admits that if the funds [over which a contributor has “ceded control”] are subsequently re-routed to a particular candidate, such action occurs at the initial recipient’s discretion — not the donor’s”); see also *id.* (“there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly”; “the risk of *quid pro quo* corruption is generally applicable only to ‘the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder’”) (citations omitted). Even if an individual contributed to Hillary Victory Fund hoping that the participating state and national party committees would ultimately use some of that contribution for the benefit of Clinton’s campaign — which would not be unreasonable, given the name of the joint fundraising committee and the fact that Clinton’s campaign received contributions first under the allocation formula — that individual’s contribution “will be significantly diluted by all the contributions from others to the same” political committees; accordingly, the individual’s “salience as a [Clinton] supporter has been diminished, and with it the potential for corruption.” *Id.* at 1453.



Matthew S. Petersen
Vice Chairman

8/30/2019

Date



Caroline C. Hunter
Commissioner

9/30/2019

Date