PERKINSCOIE

700 13th Street, NW
Suite 600
Washington, DC 20005-3960

+1.202.654.6200
+1.202.654.6211
perkinscoie.com

March 9, 2015

Marc E. Elias
Jonathan S. Berkon
Joseph P. Wenzinger
D. (202) 654-6200
F (202) 654-6211
MElias@perkinscoie.com
JBerkon@perkinscoie.com
JWenzinger@perkinscoie.com

VIA HAND DELIVERY

Office of the General Counsel
Secretary and Clerk of the Commission
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

Re: MUR 6394

Dear Office of the General Counsel:

Attached please find three copies of the joint response brief of Chellie Pingree, Pingree for Congress, Anne Rand in her official capacity as Treasurer of Pingree for Congress, and Donald S. Sussman (collectively, "Respondents") to the General Counsel's Brief submitted on January 26, 2015. In addition, Respondents request a hearing pursuant to 72 Fed. Reg. 64919 (Nov. 19, 2007) and 74 Fed. Reg. 55443 (Oct. 28, 2009) for an extended opportunity to contest allegations and expand upon their arguments in the joint response brief.

Respondents expect to address each issue raised in their joint response brief, including but not limited to:

(1) whether the OGC failed to make a threshold finding that the flights at issue were an "expenditure" or "contribution" and whether such a finding is required by the Federal Election Campaign Act and Commission regulations;

(2) whether the flights at issue did, in fact, result in an "expenditure" or "contribution";

(3) whether proceeding in this matter would raise grave due process concerns;

(4) whether the Commission should apply the constitutional avoidance doctrine in constructing HLOGA; and

(5) whether the Commission should dismiss the matter regarding Mr. Sussman and withdraw the "reason to believe" finding against him.

Please let us know if you have any questions or require more information.

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
Joseph P. Wenzinger
Counsel for Respondents

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Rochelle M. Pingree	)	MUR 6394
Pingree for Congress	)	
Anne Rand in her official capacity as treasurer	)	
Donald S. Sussman	)	

RESPONDENTS' RESPONSE TO GENERAL COUNSEL'S BRIEF

This constitutes the joint response brief of Chellie Pingree, Pingree for Congress, Anne Rand in her official capacity as Treasurer of Pingree for Congress, and Donald S. Sussman (collectively, "Respondents") to the General Counsel's Brief submitted on January 26, 2015.

At issue in this matter is whether the Office of General Counsel ("OGC") will succeed in stretching the definition of "expenditure" and "contribution" beyond the proper limits established by the precedents of this Commission. The OGC argues that the longstanding construction of the terms "expenditure" and "contribution" – which require that a payment be for the purpose of influencing an election before it can be subject to the Federal Election Campaign Act (the "Act") – were somehow superseded when Congress passed the Honest Leadership and Open Government Act ("HLOGA") in 2007. According to the OGC, "both HLOGA and the Commission's implementing regulations expressly override any prior inconsistent provision of the Act or Commission regulations."[1] The discarded precedents apparently include the Commission's longstanding view of what the words "expenditure" and "contribution" mean in the context of air travel.

The Commission should reject the OGC's effort to use HLOGA to rewrite the definitions of "expenditure" and "contribution." The trips at issue in this matter were primarily personal and official in nature, respectively, and the flights would have taken place irrespective of candidacy. The Commission has long held that such flights are not "expenditures" or "contributions." The OGC brief suggests that the so-called "irrespective test" now applies only to commercial flights, because HLOGA superseded it with respect to noncommercial flights. But at the time that it enacted implementing regulations in 2010, the Commission made clear that, though HLOGA prohibited certain types of "expenditures" and "contributions," it did not redefine what those words mean. Yet that is precisely what the OGC is asking the Commission to do here, in contravention of the statute, the regulations, and the Commission's precedents. The Commission should reject the General Counsel's recommendation and dismiss the complaint.

[1] *See* General Counsel's Brief, Matter Under Review 6394, at 8.

FACTUAL BACKGROUND

This matter concerns two trips that Congresswoman Pingree took on the privately-owned jet of Mr. Sussman, her husband of nearly four years and her fiancé at the time of the trips. The first trip took place on September 13, 2010. That day, Congresswoman Pingree flew from her home district in Portland, Maine to White Plains, New York with Mr. Sussman. The jet took off from Portland and landed at the Westchester County Airport in White Plains, New York at 1:20 p.m. That night, Ms. Pingree took a 9:22 p.m. flight from Westchester County Airport to Dulles International Airport.

The purpose of the trip was personal. Due to their busy schedules, Mr. Sussman (who often has meetings in New York) and Ms. Pingree often fly to New York together for an afternoon or evening, so that they can spend extra time together before Ms. Pingree returns to Washington, D.C. These trips also offer Ms. Pingree the chance to visit with her son and grandson, who both live in New York. On September 13, 2010, Mr. Sussman had a personal meeting in New York that he wanted Ms. Pingree to attend. After attending this meeting, Ms. Pingree visited with her son and grandson. At the end of the day, Ms. Pingree went to a campaign fundraiser on the East Side of Manhattan. After the fundraiser ended, Mr. Sussman and Ms. Pingree drove back to the Westchester County Airport to fly to Washington, D.C.

The second trip took place between September 30, 2010 and October 4, 2010. The 5-day trip served primarily personal or official purposes, with a few campaign events sprinkled in. On September 30, Ms. Pingree flew on the jet just before 7:00 p.m. from Washington, D.C. to Portland. On October 1 and 2, she attended a total of three official events (a 30-minute meeting to discuss wind power projects, a one-hour interview with the *Portland Phoenix*, and a 15-minute stop honoring a local library), as well as three campaign events (a 90-minute campaign fundraiser, a one-hour Democratic candidates' event, and a two-hour campaign party). On October 3, she spent the day on entirely personal activities, including spending time with Mr. Sussman and dinner with friends. The following day, October 4, Ms. Pingree flew from Portland, Maine on Mr. Sussman's aircraft to Westchester, New York for a nonprofit fundraiser.

LEGAL DISCUSSION

Neither trip violated the Act. The Act, including the provisions added by HLOGA, regulates only those expenses and payments that qualify as "expenditures" or "contributions." It does not regulate payments for flights, including the flights at issue here, which would exist irrespective of candidacy. The Commission confirmed this in a 2002 advisory opinion and has reaffirmed it several times – including in one enforcement action that has been resolved since this complaint was filed. By now, this rule is ingrained in the Commission's precedents. It has never been superseded, or even questioned, either in the HLOGA rulemaking or anywhere else. The Commission should not abandon it here, without due notice to the regulated community.

A. The OGC Failed to Make Threshold Finding Required by the Constitution and the Act

The OGC's brief contends that two provisions of the Act were violated.

The first statutory provision violated, according to the OGC, was 52 U.S.C. § 30114(c)(2):

> Notwithstanding any other provision of this Act, in the case of a candidate for election for the office of Representative in ... the Congress, an authorized committee and a leadership PAC of the candidate *may not make any expenditure* for a flight on an aircraft unless [one of two exceptions applies].

The second statutory provision violated was 52 U.S.C. § 30116(a)(1)(A):

> Except as provided in subsection (i) and section 30117 of this title, *no person shall make contributions* ... to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000.

As the italicized language makes clear, the Commission must first determine that the payment at issue is an "expenditure" or "contribution" before it can find a violation of sections 30114(c)(2) or 30116(a)(1)(A). Otherwise, the payment does not violate section 30114(c)(2) – which bars certain types of *expenditures* but does not regulate payments other than expenditures – nor does it violate section 30116(a)(1)(A) – which bars *contributions* in excess of certain amounts but does not limit payments other than contributions.

1. The HLOGA ban applies only to "expenditures" and "contributions."

A payment is an "expenditure" or "contribution" only where it is "for the purpose of influencing a Federal election."[2] A payment that does not satisfy this standard is not an "expenditure" or "contribution."[3] Consequently, to find probable cause that these two provisions were violated, there must be a threshold finding that payments for the flights were for the purpose of influencing a federal election and, therefore, constituted an "expenditure" or "contribution."

---

[2] *See* Advisory Opinion 2006-10 (Echo Star) ("The Act and Commission regulations define the terms 'contribution' and 'expenditure' to include any gift of money or 'anything of value' for the purpose of influencing a Federal election.").

[3] *See, e.g.* Advisory Opinion 1981-16 (Carter-Mondale) ("Specifically, in Advisory Opinions 1981-13, 1980-4, and 1979-37, the Commission concluded that donations and disbursements made for the purpose of defending oneself in a lawsuit were not 'contributions' or 'expenditures.' Thus activity to pay the cost of legal defense in those situations was outside the purview of the Act."); Statement of Reasons of Commissioners David M. Mason, Bradley A. Smith, Karl J. Sandstrom, and Scott E. Thomas, Matter Under Review 4960 (Dec. 21, 2000), at 3 (finding that failure to show that purchase of house met the statutory definition of "contribution" was a "threshold deficiency" in complaint); Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matter Under Review 5842 (June 10, 2009), at 7 ("... if there is no evidence of expenditures made or contributions received, the inquiry ends there without any major probe of the group's major purpose.").

In its Brief, the OGC failed to make this mandatory threshold finding. At no point in its analysis did the OGC ask – let alone answer – whether the payments for the flights were "for the purpose of influencing a Federal election." The HLOGA travel ban applies only to "expenditures" and in-kind "contributions" of non-commercial travel, and does not purport to restrict, in any way, payments for non-commercial travel that do not qualify as "expenditures" or "contributions," as those terms have been traditionally constructed. As noted above, the statute says, "in the case of a candidate for election for the office of Representative in . . . the Congress, an authorized committee and a leadership PAC of the candidate *may not make any expenditure* for a flight on a [non-commercial] aircraft" unless the flight falls within one of two exceptions.[4] The Commission's implementing regulation mirrors the statute nearly word-for-word, providing that "a candidate for the office of Representative in . . . the Congress, and any authorized committee or leadership PAC of such candidate, shall not make *any expenditures*, or receive *any in-kind contribution*, for travel on an aircraft" unless the travel falls within one of two exceptions.[5]

As one Commissioner has said, by "its express terms, HLOGA's requirements apply only to travel *expenditures* of federal candidates, their authorized committees, House leadership PACs, and other political committees making in-kind contributions to federal candidates in the form of travel payments."[6] The Commission's guidance confirms this as well, noting that the ban on non-commercial travel applies only to "expenditures" and in-kind "contributions."[7] In its Notice of Proposed Rulemaking, for example, the Commission stated that "[t]he new law expressly applies to expenditures by authorized committees and leadership PACs of House candidates, including expenditures made by the candidates themselves on behalf of their authorized committees . . . . *This prohibition does not apply when the travel would not be considered an expenditure* by the candidate, the candidate's authorized committee, or candidate's leadership PAC."[8]

While HLOGA barred the making of "expenditures" and the receipt of in-kind "contributions" for non-commercial travel, it did not change the definitions of "expenditure" or "contribution." In the Explanation and Justification, the Commission included a footnote clarifying that, for HLOGA purposes, the term "expenditure" was limited to the activity described in 11 C.F.R. § 100.111(a), *e.g.* "any payment made by any person for the purpose of influencing any election

---

[4] 52 U.S.C. § 30114(c)(2) (emphasis added).

[5] *See* 11 C.F.R. § 113.5(b) (emphasis added). Because the receipt of an in-kind "contribution" necessarily results in an "expenditure" by the receiving committee, HLOGA also bars a House candidate from receiving an in-kind "contribution" of a non-commercial flight. *See* Explanation and Justification for Final Rule, Campaign Travel, 74 F.R. 63951, 63963 (Dec. 7, 2009).

[6] *See* Commissioner Matthew Petersen, FEC Implemented Congress' Vision on Travel Rules, Roll Call (Dec. 1, 2009), *available at* http://www.rollcall.com/issues/55_62/-40988-1.html (last visited on Mar. 1, 2015) (emphasis added).

[7] 74 F.R. at 63952 (Dec. 7, 2009) (emphasis added) ("HLOGA amended the Act to prohibit House candidates, their authorized committees, and their leadership PACs from making any *expenditure* for non-commercial travel on aircraft.").

[8] Notice of Proposed Rulemaking, Campaign Travel, 72 F.R. 59953, 59957 (Oct. 23, 2007) (emphasis added).

for Federal office."[9] The Commission has also confirmed that "[n]othing in HLOGA or its legislative history suggests that 'contributions' is intended to have a different meaning from that already established in FECA and Commission regulations."[10]

2. The OGC's proposed "bright line" test has no basis in the Act or regulations.

The OGC concedes that Respondents' arguments "might be relevant to determining whether Sussman could pay for Pingree's commercial airfare on a trip with him that would have occurred irrespective of her candidacy" but contends that they are "irrelevant to determining whether Pingree could use prohibited non-commercial flights in connection with her re-election campaign."[11] That is the OGC's argument in a nutshell: while Mr. Sussman's payment for the same flight under the same circumstances would not have been an "expenditure" or "contribution" if they had flown commercial or charter, the fact that they flew on a noncommercial jet brought the flights within the Commission's jurisdiction. According to the OGC, HLOGA created a "bright line test" which allows the Commission to regulate conduct that would otherwise be outside the Commission's jurisdiction merely because that conduct was undertaken on a noncommercial aircraft.[12]

The OGC does not cite any legal authority for this proposition, nor does it attempt to explain the passages in HLOGA, the regulations, and the Commission's guidance (summarized above) expressly limiting the travel ban to activity within the Commission's traditional jurisdiction – *e.g.* activity that meets the statutory definition of "expenditure" and "contribution." Instead, the OGC surmises congressional intent from language in a regulatory exception to the definition of "contribution" found at 11 C.F.R. § 100.93. A brief history of section 100.93 shows this to be incorrect. The Commission promulgated section 100.93 in 2003 to describe the circumstances under which payment for non-commercial travel, which otherwise satisfied the definition of "contribution," would nonetheless be exempt from the Act's contribution limits and prohibitions.[13] Under the regulation, if a political committee made an "expenditure" for non-commercial travel, it could avoid the receipt of an excessive or impermissible in-kind "contribution" by paying the service provider for each "campaign traveler" (*e.g.* someone who was "traveling in connection with an election for Federal office on behalf of a candidate or political committee") who traveled on its behalf.

When a candidate other than a House candidate or a political party or PAC (other than a leadership PAC of a Member or House candidate) incurs an obligation for noncommercial air travel that meets the statutory definition of "expenditure" or "contribution," it may rely on the

---

[9] 74 F.R. at 63952, n. 3.
[10] Explanation and Justification for Final Rule, Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants, 74 F.R. 7285, 7301 (Feb. 17, 2009).
[11] *See* General Counsel's Brief, Matter Under Review 6394, at 7, n. 36.
[12] *See* General Counsel's Brief, Matter Under Review 6394, at 7.
[13] *See* Explanation and Justification for Final Rule, Travel on Behalf of Candidates and Political Committees, 68 F.R. 69583, 69583 (Dec. 15, 2003) (emphasis in original).

provisions of section 100.93 to negate the contribution. In other words, section 100.93 operates like any other exception to the definition of "expenditure" or "contribution" in the regulation – a candidate, political party, or PAC need only rely on it once it has incurred an obligation that meets the statutory definition of "expenditure" or "contribution" in the first instance.

As noted above, HLOGA prohibits a House candidate from making an "expenditure" for a noncommercial flight. To implement that prohibition, the Commission made clear in its implementing regulations that the section 100.93 exception is not available to House candidates or House leadership PACs. The Commission explained that "[a]lthough the general rule in 11 CFR 100.93(b)(2) states that no contribution results where a campaign traveler pays the services provider the required rate in accordance with 11 CFR 100.93(c), there is no rate applicable to House candidates in 11 CFR 100.93(c)."[14] Therefore, once a House candidate or leadership PAC incurs an obligation for noncommercial air travel that meets the statutory definition of "expenditure" or "contribution," there is no mechanism under section 100.93 to negate the contribution. Which means that the House candidate or leadership PAC would find itself in violation of section 30114(c)(2) of the statute and section 113.5(b).

That is how the regulatory scheme is *supposed* to operate. But the OGC reads into section 100.93 something far broader. The OGC contends that the language in section 100.93(c)(2) supplants the traditional definitions of "contribution" and "expenditure," and creates a new "bright-line" test to determine when a flight is subject to the Commission's jurisdiction in the first instance.[15] This is simply wrong. Section 100.93 is an *exception* to the definition of "contribution"; it is "not the first prong of a two-prong test" to determine whether a payment is a "contribution."[16] In determining whether a "contribution" has been made, the threshold question is whether the payment is "for the purpose of influencing a Federal election." If the answer is no, the inquiry ends. Only if the answer is yes should the Commission even inquire whether the payment qualifies for the exception at section 100.93.[17]

---

[14] 74 F.R. at 63956, n. 8.

[15] *See* General Counsel's Brief, Matter Under Review 6394, at 7.

[16] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, Matters Under Review 5694 and 5910 (April 27, 2009), at 16 (finding that "major purpose" test is not the first prong of a two-prong test to determine "political committee" status; rather, it provides an *exception* to the definition of "political committee" that may be utilized by an entity that meets the statutory definition of "political committee").

[17] In Matter Under Review 5937 (Romney for President), the Commission considered whether a volunteer's payment for a flight to transport other volunteers to a fundraising event violated the Act's contribution limits. Because the payment exceeded $1,000, it did not qualify for the exception to "contribution" found at 11 C.F.R. § 100.79(a)(1). But even though there was disagreement with respect to the ultimate disposition of the MUR, all six Commissioners agreed that the failure to qualify for the exception did not, by itself, render the payment a "contribution" under the Act. *See* Supplemental Statement of Reasons of Vice-Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGhan II, Matter Under Review 5937 (June 16, 2009), at 3 ("[W]e agree that the Act only reaches travel expenses incurred 'on behalf of' a campaign."); Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub (March 16, 2009), at 5 ("We do not dispute that any travel undertaken in the three examples cited by RFP would fall outside of the definition of contribution and thus would not be subject to the

The structure of the regulations reflects this. Subpart B of Part 100 of the regulations limits the term "contribution" to "the payments, services, or other things of value described in this subpart" and defines "contribution" to mean a "gift, subscription, loan, . . . advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office* . . . ."[18] If a payment does not qualify as a "contribution" under Subpart B, it is outside the scope of the Act and not subject to its limits or restrictions. Subpart C of Part 100 then describes certain payments that, though satisfying the definition of "contribution" under Subpart B, are nonetheless exempt from the Act's prohibitions and limits. But the exceptions in Subpart C do not expand, in any way, the definition of "contribution" found in Subpart B.

Moreover, there is no evidence that the Commission intended the "in connection with" standard in section 100.93 to be any broader than the "for the purpose of" standard in section 100.52(a). In similar contexts, the Commission has held that the "in connection with" standard and the "for the purpose of" standard are coextensive.[19] That is how they should be read here, as well.

For nearly four years, Respondents have been imploring the OGC that they cannot proceed in this case until they make a threshold determination whether the flights in question meet the statutory definition of "expenditure" and "contribution." Yet the OGC's brief still fails to make that threshold determination. The Commission simply cannot proceed under these circumstances.

B. The Flights Did Not Result in an "Expenditure" or "Contribution"

Once the Commission asks the correct question – whether the payment of the flights qualified as "expenditures" or "contributions" – it does not have to look far to find the right answer. As the Commission has held on several occasions, the payment for a flight that would exist irrespective of candidacy is not an "expenditure" or "contribution." The Commission reached this conclusion in a 2002 advisory opinion and has reaffirmed it several times in subsequent advisory opinions and enforcement actions.

Because the expenses for the flights at issue were defined expenses that would exist irrespective of candidacy, and because Mr. Sussman's payment for the flights would have been made irrespective of candidacy, there was no "expenditure" or in-kind "contribution," and no violation of HLOGA or the contribution limits. Alternatively, the Commission could reach the same conclusion by relying upon 11 C.F.R. § 106.3(d), which exempts from the definition of

---

travel exception cap of $1,000."). Additionally, the Commission has consistently held that the cost of defraying litigation unrelated to compliance with the Act is not an "expenditure" or "contribution," even though such legal services do not qualify for the exception at 11 C.F.R. § 100.86. *See* Advisory Opinion 1981-13 (Moss) ("In Advisory Opinions 1980-4 and 1979-37 . . . the Commission concluded that because donations and disbursements for the purpose of defending oneself in a lawsuit were not 'contributions' or 'expenditures,' nothing in the Act or Commission regulations would prohibit or limit the receipt of those donations.").

[18] 11 C.F.R. §§ 100.51(a), 100.52(a).

[19] *See* Advisory Opinions 2003-15 (Majette), 2010-3 (National Democratic Redistricting Trust), 2011-1 (Carnahan).

"expenditure" flight expenses between a candidate's district and Washington D.C. paid for by a third party.

1. The payment for a flight made irrespective of candidacy is not an "expenditure" or contribution."

The Act defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[20] The Act requires that candidates use "contributions" to pay for "expenditures."[21] On the other hand, the Act makes it a federal crime to convert "contributions" to personal use.[22] To distinguish between "expenditures" (which *must* be paid with "contributions") and personal use expenses (which may *not* be paid with "contributions"), the Act draws a clear line: expenses that would "exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office" are not covered by the Act, while expenses that would *not* exist irrespective of candidacy are "expenditures."[23]

In a 2002 advisory opinion, the Commission confirmed that a payment for a flight made irrespective of candidacy is not a "contribution" and is not subject to the Act's prohibitions or limits.[24] In that request, the City of Bettendorf, Iowa – a prohibited corporate source under the Act[25] – asked the Commission whether it could pay for its Mayor, who was also a candidate for the U.S. House of Representatives, to fly between Bettendorf, Iowa and Washington D.C. While in Washington D.C., Mayor Hutchinson planned to engage in official activities (25 percent of her time), Federal campaign activities (25 percent), and personal activities (50 percent).

At the time the request was made, the Commission had been interpreting section 106.3(b) to require the use of campaign funds to pay for air travel to a "stop" where any non-incidental campaign activity took place.[26] But this interpretation posed a direct conflict with the personal use prohibition, because in many instances it required the use of campaign funds to pay for an expense that would exist irrespective of candidacy. It also presented candidates like Mayor

---

[20] 52 U.S.C. § 30101(9)(A)(i).
[21] *Id.* § 30114(a)(1).
[22] *Id.* §§ 30114(b)(1), (2).
[23] *Id.* § 30114(b)(2). Under Commission regulations, the payment by a third party of an expense that would otherwise be "personal use" is treated as a "contribution" unless the payment would have been made irrespective of candidacy. *See* 11 C.F.R. § 113.1(g)(6). Because Mr. Sussman would have made the payment irrespective of Congresswoman Pingree's candidacy, this provision is inapposite. *See* Advisory Opinion 2008-17 (Bond) ("The third-party payment provision asks whether the payment would have been made by the third party irrespective of the Federal candidate's candidacy for office. In other words, would the third party pay the expense if the candidate was not running for Federal office? If the answer is yes, then the payment does not constitute a contribution.").
[24] *See* Advisory Opinion 2002-5 (Hutchinson).
[25] *See id.* at n. 8 ("Therefore, if it were concluded that, pursuant to section 106.3(b)(3), the entire trip was campaign related, then Ms Hutchinson could not accept City funds even for those portions of her travel that related exclusively to her official activities on behalf of the City.").
[26] *See, e.g.* Advisory Opinions 1992-34 (Castle), 1994-37 (Schumer).

Hutchinson with an unenviable — and likely unconstitutional – Catch-22. If the City paid for the flights, Mayor Hutchinson could be subject to an enforcement action for accepting corporate contributions. Yet if Mayor Hutchinson used campaign funds to pay for flight expenses that, because of the official and personal components, would exist irrespective of candidacy, she could be subject to an enforcement action for converting campaign funds to personal use.

In a 4-2 vote, the Commission clarified that a payment for a flight made irrespective of candidacy did *not* qualify as a "contribution" under the Act and could be paid by otherwise prohibited sources (such as a municipal corporation).[27] The decision, as the vote attests, was not unanimous. One Commissioner advocated for the position that the OGC argues for in this matter: that engaging in any campaign activities at a "stop" requires that the travel to the stop be treated as an "expenditure."[28] But four Commissioners rejected this position, establishing a clear rule that a payment for flights made irrespective of candidacy do not constitute "contributions" under the Act.

This opinion is not merely a shield for candidates; the Commission has used it as a sword as well. In MUR 6127, the OGC concluded that President Obama's flight to Hawaii in the closing days of the 2008 presidential campaign to visit his terminally ill grandmother was not an "expenditure" and should have been paid with personal funds.[29] The President engaged in a substantial amount of campaign activity while on the trip.[30] But relying explicitly on Advisory Opinion 2002-5, the OGC concluded that the "air travel itself appears to have been a defined expense that would have existed irrespective of the campaign activity" and, under Advisory Opinion 2002-5, it was not an "expenditure" and could not be paid with campaign funds.[31] The Commission cannot have it both ways. If the Commission can bar candidates from using campaign funds for flight expenses that would exist irrespective of candidacy, it cannot also treat such expenses as "expenditures" and subject them to the Act's restrictions and prohibitions. Where core First Amendment rights are at stake, "[t]his 'heads I win, tails you lose' approach cannot be correct."[32]

---

[27] *See* Advisory Opinion 2002-5 ("Because the airfare represents a defined expense that would have existed irrespective of any personal or campaign related activities, the entire cost of the ticket may be paid for by City with no obligation by Ms. Hutchinson or her campaign committee to reimburse the City.").

[28] Memorandum from Commissioner Scott Thomas to Commission (May 3, 2002) ("[M]y alternative reads 11 CFR 106.3(a) and (b)(2) and (3) to require the full amount of airfare between the district and Washington to be campaign related. The regulation establishes a hard rule, perhaps, but it is designed to prevent use of outside resources to partially subsidize travel to what has to be characterized as a campaign stop. I can't read Part 113 as overriding this approach.").

[29] *See* First General Counsel's Report, Matter Under Review 6127 (June 18, 2009). The OGC concluded—and the Commission concurred—that the amount at issue was not significant enough to pursue the matter. *See* Factual and Legal Analysis (Nov. 25, 2009). Instead, it sent a cautionary letter.

[30] *See* Response from Barack Obama, Obama for America, and Martin Nesbitt, Treasurer, Matter Under Review 6127 (Dec. 22, 2008).

[31] First General Counsel's Report, Matter Under Review 6127, at 6.

[32] *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 471 (2007).

The Commission has repeatedly and without reservation reaffirmed Advisory Opinion 2002-5. In Advisory Opinion 2011-2, the Commission confirmed that flights that are "defined expenses that would have existed irrespective" of candidacy are *not* "expenditures," and the payment for those flights by otherwise prohibited sources are not impermissible "contributions." The request involved a proposed multi-city tour to promote Senator Scott Brown's book, with the book publisher paying for flights between the cities.[33] Senator Brown asked the Commission whether he could attend campaign fundraisers while in these cities. Both draft opinions issued by the OGC concluded that, under Advisory Opinion 2002-5, flights that constitute "defined expenses that would have existed irrespective" of candidacy are not "expenditures" and can be paid by otherwise prohibited sources.[34] The only disagreement between the drafts was a factual one: Draft A (supported by three Commissioners) concluded that the flights were defined expenses that would have existed irrespective of candidacy, while Draft B (supported by three Commissioners) concluded they were not.

A recent enforcement action relied on both Advisory Opinion 2002-5 and MUR 6127 to solidify the rule that flights that would be taken irrespective of candidacy are not subject to the Act. In MUR 6607, Mufi Hannemann, a candidate for the U.S. House of Representatives, took several business trips on which he engaged in some campaign activity.[35] His principal campaign committee, Hannemann for Congress, did not report payments for the flights as expenditures. The OGC nevertheless recommended that the Commission find no reason to believe that the Act's reporting requirements were violated, and the Commissioners agreed by a 5 to 0 vote. The OGC reasoned that the "Commission has *assessed whether the expense would have occurred irrespective of the candidate's campaign* to determine whether airfare should be paid in full from personal or campaign funds."[36] Because the flights would have been taken irrespective of Mr. Hannemann's campaign, the payments for the flights were not "expenditures" subject to the Commission's jurisdiction.[37]

The OGC does not dispute that the payments for the flights at issue in this matter would have been made irrespective of candidacy.[38] The OGC instead contends that Advisory Opinion 2002-5 and its progeny are inapposite here because it "pre-dates HLOGA and the Commission's implementing regulations."[39] Although Advisory Opinion 2002-5 preceded HLOGA, the other precedents cited above – MUR 6127, Advisory Opinion 2011-2, and MUR 6607 – were decided after HLOGA became law. This authority unambiguously stands for the proposition that a payment for a flight made irrespective of candidacy is not an "expenditure" and, as a result, is not subject to the Act's limits and prohibitions. For Mayor Hutchinson, this meant that an

---

[33] *See* Advisory Opinion 2011-2 (Brown).
[34] *See* Agenda Document No. 09-11, Drafts A and B, Advisory Opinion 2011-2 (Brown).
[35] *See* Factual & Legal Analysis, Matter Under Review 6607, at 8.
[36] *Id.* at 7 (emphasis added).
[37] *See id.* at 8.
[38] On at least several occasions, Mr. Sussman has paid for trips where no campaign activity whatsoever took place. Several of these trips preceded Congresswoman Pingree's 2010 candidacy.
[39] General Counsel's Brief, Matter Under Review 6394, at 7.

otherwise prohibited source could pay for her flight expenses; for Mr. Hanneman, this meant that he was not required to report his flight expenses to the Commission or pay for them with regulated funds; for President Obama, it meant that he had to use personal funds to pay for a flight that he would have taken irrespective of candidacy, even though he engaged in some campaign activity while on the trip. In this case, it means that Congresswoman Pingree's flight on a non-commercial aircraft did not violate HLOGA or the contribution limits.

2. The cost of a flight between Washington, D.C. and a candidate's home district is not an "expenditure" or "contribution" when paid by a third party.

The payments for the flights are also exempt from the definition of "expenditure" because they were paid by a third party and were "for travel between" Washington D.C. and Congresswoman Pingree's home district. Section 106.3(d) of the regulations provides that "[c]osts incurred by a candidate for the United States Senate or House of Representatives for travel between Washington D.C. and the State or district in which he or she is a candidate need not be reported herein unless the costs are paid by a candidate's authorized committee(s), or by any other political committee(s)."[40] The Commission's Explanation and Justification confirms that "[e]xpenses incurred by a candidate for the House or Senate for travel to or from his state or district and Washington, D.C. *are not reportable as an expenditure* unless paid from a campaign account."[41]

The flights at issue were for travel between Congresswoman Pingree's home district and Washington D.C., though the first set of flights did include a stopover in New York. The regulation, on its face, is ambiguous as to whether it covers only non-stop, direct flights between the district and Washington D.C., or whether it covers all flights that are part of the travel itinerary between the district and Washington D.C. But in a 1984 enforcement action involving intra-state travel by Congressman Don Young, the Commission clarified that the exception covers all flights that are part of the travel itinerary between the congressional district and Washington D.C.[42] That enforcement action involved Congressman Young's attendance at a campaign fundraiser in the midst of an official fact-finding tour in the State of Alaska. As part of the tour, the Federal government paid for the following flights:[43]

- Washington D.C. to Mindt Air Force Base (April 14, 1984)
- Mindt Air Force Base to Juneau (April 15, 1984)
- Juneau to Sitka (April 15, 1984)
- Sitka to Juneau (April 16, 1984)
- Juneau to Kodiak (April 17, 1984)

---

[40] 11 C.F.R. § 106.3(d).
[41] Explanation and Justification of the Disclosure Regulations (Jan. 12, 1977), at 50 (emphasis added).
[42] *See* Matter Under Review 1729 (Young).
[43] *See id.*, Flight Itinerary, at 92-94.

- Kodiak to Anchorage (April 18, 1984)
- Anchorage to North Slope (April 19, 1984)
- North Slope to Anchorage (April 20, 1984)
- Anchorage to Valdez (April 20, 1984)
- Valdez to Anchorage (April 21, 1984)
- Anchorage to Juneau (April 21, 1984)
- Juneau to Mindt Air Force Base (April 21, 1984)
- Mindt Air Force Base to Washington D.C. (April 22, 1984)

On the evening of April 16, 1984, after flying from Sitka to Juneau on a government aircraft, Congressman Young attended a campaign fundraiser in Juneau. He did not report the cost of the flight from Sitka to Juneau on April 16 as an "expenditure."[44] After initially finding "reason to believe" that the failure to report the travel expense violated the Act, the OGC reversed course and found that the exception at section 106.3(d) applied to the flight from Sitka to Juneau, in addition to the flights between Washington D.C. and Mindt Air Force Base.[45]

MUR 1729 confirms that section 106.3(d) applies to any flight that is part of the trip between the Member's district and Washington D.C. The OGC attempts to distinguish this MUR by the fact that it "involved official government travel," but offers no legal reason for why that matters. If the argument is that MUR 1729 is inapposite because it did not involve a private aircraft subject to HLOGA's travel ban, this contention misses the point – which is that payments for *any* flights that fall under section 106.3(d) are not "expenditures." Because the flights at issue in this matter were part of the trip between Congresswoman Pingree's district and Washington D.C., the cost of the flights was not an "expenditure" and was not subject to the Act's prohibitions and limits.

C. Proceeding in This Matter Would Raise Grave Due Process Concerns

Proceeding with this enforcement action in the face of contrary precedent – upon which Respondents and other similarly situated persons have relied – would be manifestly unfair and raise grave due process concerns. Moreover, in MUR 6421, the complainant alleged that U.S. Representative Dan Benishek took two flights on a non-commercial aircraft while campaigning in Michigan.[46] In response, Congressman Benishek declined to argue that there had been no "expenditure"; he instead contended that the any trip on a flight was entirely personal and thus he could not be considered a "campaign traveler" under the regulations.[47] The Commission disagreed, finding reason to believe that a violation had occurred because he met the definition of

[44] Because the payment was made by the Federal government, it was not subject to the Act's contribution limits. However, had the exception at section 106.3(d) not been available, Congressman Young would have been required to report the expenditure on his FEC reports. *See id.*, First General Counsel's Report (Aug. 10, 1984), at 56.
[45] *See id.*, General Counsel's Report (Jan. 3, 1985), at 28-29.
[46] First General Counsel's Report, Matter Under Review 6241, at 1.
[47] *See id.* at 5–6; Response and Designation of Counsel from Benishek for Congress and Joseph Shubat, Treasurer, Matter Under Review 6421.

a "campaign traveler."[48] During one stop in Michigan, Benishek had "met a lot of people, shook a lot of hands, saw a lot of constituents, and told them 'where [h]e stand[s] on the issues.'"[49]

But the Commission *still* declined to proceed past the probable-cause stage. According to four of the Commissioners, the low cost of the two flights at issue warranted no use of additional Commission resources.[50] Thus, the Commissioners found no reason to proceed with prosecution. Yet, in this case, the OGC urges the Commission to find probable cause in the face of undisputed evidence that Ms. Pingree would have taken her trips irrespective of her candidacy. That is manifestly unfair.

This conclusion remains true even though the flights in this matter were more expensive than those in Congressman Benishek's case. The Commission cannot fairly declare a bright-line, blanket prohibition on noncommercial travel, if it has excused such travel in the past because of the dollar amount at issue. "The cost of the flight is not relevant to enforcement of HLOGA."[51]

On numerous occasions, the Commission has resisted the OGC's invitation to proceed with an enforcement action in the face of conflicting precedent. In these circumstances, the Commission has expressed several concerns. First, "[t]he regulated community . . . ha[s] no fair warning of Commission enforcement policy . . . ."[52] Second, proceeding against conduct that an advisory opinion had held to be permissible would violate 52 U.S.C. § 30108(c)(2), unless and until the opinion was formally superseded.[53] Third, proceeding in some enforcement actions, but not others, would be "arbitrary and capricious" under the Administrative Procedure Act.[54]

---

[48] *See* Factual and Legal Analysis, Matter Under Review 6421, at 5.
[49] First General Counsel's Brief, Matter Under Review 6421, at 6.
[50] *See* Second General Counsel's Brief, Matter Under Review 6421, at 8.
[51] Statement of Reasons of Chair Ellen L. Weintraub and Commissioner Steven T. Walther, Matter Under Review 6421 (Mar. 5, 2013), at 2.
[52] Statement of Reasons of Commissioners Bradley A. Smith, David M. Mason, and Michael E. Toner, Matter Under Review 5369 (Aug. 15, 2003), at 5. *See also* Statement of Reasons of Commissioners Lee Ann Elliott and David M. Mason, Matter Under Review 4687 (Jan. 20, 1999), at 3 (the "lack of notice to the regulated community and opportunity for it to be heard ...may offend the due process clause.").
[53] *See* Statement of Reasons of Karl J. Sandstrom, Matters Under Review 4553, 4671, 4407, 4544, and 4713 (June 21.2000), at 2 ("No reading of the law as it existed when these advertisements were aired would have provided the parties with fair notice of the standard that the staff has subsequently suggested should be applied. . . . The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech."); Statement of Reasons of Karl J. Sandstrom, Matter Under Review 4538 (Aug. 12, 2002) ("In light of the Commission's failure to formally supersede Advisory Opinion 1995-25, I voted not to proceed against the respondents in this MUR because of the same concerns about due process I have consistently raised in enforcement matters relating to media advertisements alleged to be coordinated between candidates and party committees.").
[54] Statement of Reasons of Commissioner David M. Mason, Matters Under Review 4568, 4633, 4634, and 4736 (Jan. 22, 2003), at 2-3 ("Fundamental fairness is also implicated here by the principle of treating like cases alike. The Commission would be exposed to attack if it went forward as to these particular respondents because our actions are subject to judicial review by the arbitrary and capricious standard under the Administrative Procedure Act. A Commission decision will be considered arbitrary if we 'treat like cases differently.'"); Statement of Reasons

These concerns are present here. The Benishek MUR signaled to the regulated community that the Commission would not proceed against HLOGA violations of a low cost – let alone in a matter where the candidate undisputedly would have taken trips irrespective of her candidacy. Proceeding in this matter would be arbitrary and capricious given the fact that the flights in both cases totaled roughly three hours.

When the Commission believes that an act of Congress or a Commission regulation supersedes a prior advisory opinion, its standard practice is to expressly state this in an Explanation and Justification, or some other policy statement.[55] Its failure to do so when it passed the HLOGA regulations signaled to the regulated community that it could continue to rely on Advisory Opinion 2002-5. The Commission's re-affirmation of that opinion in MURs 6127 and 6607, and in Advisory Opinion 2011-2, provided an even stronger signal that the opinion remained good law after HLOGA.

The MUR process is *not* "an opportunity to obtain some sort of legal precedent which was apparently unattainable through more traditional and appropriate channels."[56] If the Commission believes – despite all evidence to the contrary – that HLOGA supersedes the guidance it has previously issued in this area of law, it must articulate this new position in a rulemaking or policy statement before proceeding with an enforcement action. It should not penalize candidates and committees that relied on its previous guidance, and had no notice that the Commission was poised to "take a sudden U-turn" in its view of the law.[57]

Indeed, this is what the Commission has done in the past. In MUR 4250, for example, the Commission rejected the OGC's recommendation that the Commission find probable cause that the Republican National Committee and its then-Chairman, Haley Barbour, accepted illegal contributions from foreign nationals. The OGC's theory of wrongdoing depended, in part, on applying a tax law concept, which had not been applied in the context of campaign finance law.

---

of Chairman David M. Mason and Commissioners Darryl R. Wold and Bradley A. Smith, Matter Under Review 4994 (Jan. 11, 2002), at 3 ("Proceeding in this case at this time would be unfair to the respondents because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against them but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances.").

[55] *See, e.g.* Explanation and Justification for Final Rule, Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 F.R. 24375, 24382 (May 5, 2010) ("The Commission has addressed the issue of participation by Federal candidates and officeholders in non- Federal fundraising events in Advisory Opinions 2007–11 (California State Party Committees), 2005–02 (Corzine II), 2004–12 (Democrats for the West), 2003–36 (Republican Governors Association), and 2003–03 (Cantor). As explained below, the Commission is superseding the aspects of these advisory opinions that address this issue."); Explanation and Justification for Final Rule, Leadership PACs, 68 F.R. 67013, 67017-18 (Dec. 1, 2003) ("Thus, the final rules supersede Advisory Opinions 1978–12, 1984–46, 1987–12, 1990–7, 1991–12, and 1993–22, only to the extent these advisory opinions suggest that an authorized committee can be affiliated with an unauthorized committee.").

[56] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, Matter Under Review 5541 (June 1, 2009), at 17.

[57] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matter Under Review 5724 (Dec. 11, 2009), at 7.

In their Statement of Reasons, three Commissioners rejected this approach, citing their "reservation about adopting a doctrine that has not been relied on before by the Commission or the courts in applying the provisions of FECA for the first time in an enforcement action. That procedure raises significant questions about fair notice to the regulated community and, hence, questions of due process."[58] Likewise, in an enforcement action against a candidate who allegedly received an excessive contribution from a parent, two Commissioners concluded that the Commission's guidance had been so "hopelessly muddled" that "respect for due process and fundamental fairness demand[ed]" that the Commission not penalize candidates until it "articulate[d], either by rule or through policy statement, the permissible boundaries relating to family gifts."[59]

In situations, such as this one, where past Commission actions would lead a reasonable person to conclude that conduct at issue is non-sanctionable and where proceeding with the enforcement action necessarily relies on a heretofore unannounced interpretation of the Act, the Commission has traditionally exercised its prosecutorial discretion and opted not to proceed with the matter. It should so here again.

D. The Commission Should Avoid Adopting the OGC's Statutory Construction Because it Raises Serious Constitutional Problems

Additionally, because applying the statute in the way that the OGC recommends raises serious constitutional problems, the Commission should refrain from proceeding in this matter.

1. The constitutional avoidance doctrine counsels dismissal.

Under the constitutional avoidance doctrine, "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the [courts] will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress."[60] This is also a "settled" principle of executive branch decision-making, applied by the Office of Legal Counsel[61] and also "the more routine interpretive activities of various administrative agencies."[62]

There are both theoretical and practical reasons for administrative agencies to apply the constitutional avoidance doctrine. Theoretically, the avoidance canon is a means of enforcing the Constitution, and the administrative agencies, like the courts, must interpret statutes to avoid creating constitutional problems.[63] Practically, if an administrative agency knows its statutory

---

[58] Statement of Reasons of Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott and David Mason, Matter Under Review 4250 (Feb. 11, 2000), at 10.
[59] Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter, Matter Under Review 5724, at 2.
[60] *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).
[61] *See, e.g.*, Limitation on the Detention Authority of the Immigration and Naturalization Service, 2003 WL 21269067 (Op. Off. Legal Counsel, Feb. 20, 2003) ("It is settled, of course, that where there are two or more plausible constructions of a statute, a construction that raises serious constitutional concerns should be avoided.").
[62] Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1194 (2006).
[63] *See id.* at 1212.

construction will likely face judicial review, and the reviewing court would likely apply the canon, it follows that the agency has a tactical incentive to apply the cannon itself.[64] "Indeed, if the canon is likely to be outcome determinative, the agency's failure to apply it would invite reversal."[65]

Here, the Commission is faced with two competing interpretations of the statute. The Respondents agree that HLOGA prohibits House candidates from making "expenditures" or receiving in-kind "contributions" for noncommercial air travel, but contend that HLOGA did not redefine what it means for a flight to qualify as an "expenditure" or "contribution," as set forth by Advisory Opinion 2002-5 and its progeny. The OGC, on the other hand, argues that HLOGA obviated these precedents and expanded the scope of conduct that the Commission may lawfully regulate.

If we assume for a moment that these interpretations are equally plausible – and, for the reasons set forth in preceding sections, we do not think they are – the avoidance doctrine compels the Commission to adopt the construction that does not raise serious constitutional difficulties. The Respondents' proposed construction does not raise serious difficulties. On the other hand, the OGC's proposed interpretation would subject HLOGA to a serious constitutional challenge.

2. The conduct at issue does raise the threat of corruption or its appearance.

The Supreme Court "has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption."[66] Moreover, outright expenditure bans (including a total ban on private travel) are "classic examples of censorship" that have been found to not satisfy the state's duty to narrowly tailor its laws to achieve preventing corruption or its appearance.[67]

When Congress passed HLOGA in 2007, the bill sponsors made clear that preventing corruption or its appearance was the purpose of the bill. The "intent of Section 601 of HLOGA was frequently characterized by its sponsors as an effort to end subsidization of air travel provided by corporations and others to candidates, and thereby reduce the potential for corruption or the appearance thereof."[68] As the Senate considered HLOGA, then-Senator Obama said, "these corporate jets . . . provide undue access for the lobbyists and corporations that offer them . . . . Most of the time we have lobbyists riding along with us so they can make their company's case for a particular bill or a particular vote."[69]

The provision of free air travel to a Member from her fiancé (and, now, her husband) does not

[64] *See id.* at 1197.
[65] *Id.*
[66] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014); *see Citizens United v. FEC*, 558 U.S. 310, 356 (2010).
[67] *See Citizens United*, 558 U.S. at 337, 340.
[68] 74 F.R. at 63952, n. 4.
[69] 153 Cong. Rec. S. 263 (daily ed. Jan. 9, 2007) (statement of Sen. Obama).

present any such threat. As the Supreme Court has said, "the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or his immediate family."[70] Although "[t]he Commission has yet to adopt an approach in matters involving family gifts that adequately takes into account the reduced risk of corruption posed by such gifts and the constitutional right of a candidate to spend an unlimited amount of personal funds on his or her election," several Commissioners have shown a proclivity toward dismissing matters involving such intra-familial transfers.[71]

The House proceedings regarding the September 13 flight further support the notion that the government has no compelling interest to apply HLOGA in these circumstances. When the House of Representatives amended Rule 23 of the House Ethics Rules to restrict the use of non-commercial aircraft, the sponsors again made clear that the purpose of the rule was to prevent corruption or the appearance of corruption. Then-chairman of the Rules Committee, Congresswoman Slaughter, announced, "[w]hile the rules package of the 109th Congress effectively embraced corrupt practices, this package stamps them out. Today and tomorrow we are introducing a series of critical new rules, legislation that will help guarantee that the unethical practices of the past will have no place in our future."[72]

To prevent corruption or its appearance, the House of Representatives enacted a comprehensive scheme to restrict the use of non-commercial aircraft, to be enforced by both the House Ethics Committee and the Commission. In January of 2007, the House passed H.R. 5, which amended Rule 23 of the House Ethics Rules to bar the "use of personal funds, official funds, or campaign funds for a flight on a non-governmental airplane that is not licensed by the Federal Aviation Administration to operate for compensation or hire."[73] In May of the same year, the House passed H.R. 363, which further amended Rule 23 to exempt from this ban travel on aircraft owned by the Member or a "family members," and travel on aircraft for "personal use" supplied by an individual on the basis of "personal friendship."[74] Notably, the ban on non-commercial travel was not part of the HLOGA bill that the House initially passed on May 24, 2007. The ban first appeared in Section 601 of the final bill that the House passed on July 31, 2007.[75]

In this enforcement scheme, the House Committee on the Standards of Official Conduct (since renamed as the House Committee on Ethics) plays a crucial role. On September 24, 2010, the Committee determined that the flights at issue—and others like them—did not violate the House

[70] *Buckley v. Valeo*, 424 U.S. 1, 53 (1976) (quoting *Buckley v. Valeo*, 519 F.2d 821, 855 (D.C. Cir. 1975)).
[71] *See* Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter, Matter Under Review 5724 (Dec. 11, 2009), at 3; Statement of Reasons of Chairman Bradley A. Smith and Commissioner Michael E. Toner, Matter Under Review 5321 (July 27, 2004), at 3; Statement of Reasons of Commissioners Bradley A. Smith and Michael E. Toner, Matter Under Review 5138 (June 12, 2003), at 2.
[72] 153 Cong. Rec. H8 (daily ed. Jan. 4, 2007) (statement of Rep. Slaughter).
[73] H.R. Res. 6, 110th Cong. (Jan. 5, 2007).
[74] H.R. Res. 353, 110th Cong. (May 2, 2007).
[75] *See* H.R. 2316, 110th Cong. (May 24, 2007).

Ethics Rules. The Committee determined that, while the flights are "gifts" under the Rules, they qualify for the exception afforded to gifts from a "relative,"[76] which includes a Member's fiancé.[77] Significantly, the Committee found House Rule 23 to be inapplicable here because it "governs only the permissibility of a Member paying or reimbursing for the cost of a flight on a private plane" and is "inapplicable where a Member is receiving such a flight as a gift that is otherwise acceptable under the gift rule."[78]

As interpreted by the Committee, the regulatory scheme enacted by the House in 2007 does not prohibit a Member's fiancé from making a *gift* of non-commercial travel, made irrespective of candidacy, to the Member. There is no compelling justification for the Commission to extend the regulatory scheme to cover such gifts. Nothing in the legislative history suggests that the House intended Section 601 to be more restrictive than the parallel ban in Rule 23 of the House Ethics Rules. As Respondents explained in their initial response, the HLOGA regulations and the House Ethics Rules prevent Members from accepting a flight on noncommercial aircraft unless (i) the payment for the flight is not an "expenditure" under the Act *and* (ii) the flight falls within one of the narrow exceptions to the House gift rules. The instances in which a flight satisfies both of these criteria – as they do here – are rare.

The Commission has, in the past, declined to exercise its regulatory authority in areas where the threat of corruption is non-existent and the activity is regulated by other bodies of Federal law, including congressional ethics rules. In 2002, for example, the Commission issued an interpretive rule clarifying that its mixed purpose travel allocation regulations did not apply to the extent that the candidate's travel was paid for with funds appropriated by the Federal government.[79] The Commission willingly ceded this regulatory space, in large part, because "the use of Federal funds is governed by general appropriations law and is subject to Congressional oversight."[80] The same approach is warranted here.

Thus, the Commission should recognize the non-existent threat of corruption or its appearance, and dismiss the matter.

E. The Commission Should Dismiss the Matter Regarding Mr. Sussman

1. Mr. Sussman did not give a gift for the purpose of influencing any election for federal office.

The Commission should find no probable cause to find that Mr. Sussman violated the Act. The incredible reach of the OGC's analysis is shown by its finding that Mr. Sussman made an

---

[76] *See* Letter from Reps. Zoe Lofgren and Jo Bonner to Rep. Chellie Pingree (Sept. 24, 2010), citing House Rule 25, cl. 5(a)(3)(C).
[77] Ethics in Government Act § 109(16).
[78] *See* Letter from Reps. Lofgren and Bonner, at n. 7.
[79] *See* Interpretation of Allocation of Candidate Travel Expenses, 67 F.R. 5445, 5445-46 (Feb. 6, 2002).
[80] *Id.*

excessive contribution *without even making a finding that there had been a contribution.* "Contribution" is defined as "gift, subscription, loan, . . . advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office* . . . ."[81] There is no suggestion that Mr. Sussman brought Ms. Pingree on these trips for such a purpose.

It is implausible that Mr. Sussman offered his flight to his fiancé for the purpose of influencing her federal election. For Mr. Sussman, this was a business and personal trip and he allowed Ms. Pingree to accompany him irrespective of her candidacy. Indeed, Mr. Sussman would have made these trips whether or not Ms. Pingree accompanied him. His lack of knowledge that there could even be a campaign issue in allowing his fiancé to accompany him on these trips was entirely reasonable and understandable under these circumstances.

The due process concerns outlined above apply with even greater force to Mr. Sussman. Based on the plain language of the House rules – subsequently confirmed in a letter from the Committee's Chairman and Ranking Member giving unqualified approval to these flights as permissible gifts – and the longstanding position of the Commission regarding travel taken irrespective of candidacy, the campaign did not inform Mr. Sussman that these flights might be treated as "contributions" by the Commission; neither the campaign nor Mr. Sussman were on notice that the Commission would take this position. Private citizens, like Mr. Sussman, rely on campaigns to inform them when their activities might be deemed an in-kind contribution to the campaign. To tag Mr. Sussman with excessive in-kind contributions when he had no intent to influence a federal election and had no notice that the flights could be construed as contributions would be manifestly unfair.

Thus, because Mr. Sussman made no excessive contribution, the Commission should not find probable cause to believe that he violated the Act and should dismiss the matter.

2. The Commission never served Mr. Sussman with the complaint.

In addition, the reason to believe finding against Mr. Sussman should be withdrawn. The complaint by the Maine Republican Party did not list Mr. Sussman as a Respondent.[82] While the Commission added Magic Carpet Enterprises, LLC – a limited liability company owned entirely by Mr. Sussman – as a Respondent, served it with the complaint, and provided it with an opportunity to respond, the Commission did *not* name Mr. Sussman as a Respondent; did *not* serve him with a complaint in his personal capacity; and, therefore, did *not* provide him with an opportunity to respond.[83]

The Act prohibits the Commission from finding reason to believe against any party without providing that party with an opportunity to respond to the complaint. On several occasions, the

[81] 11 C.F.R. §§ 100.51(a), 100.52(a).
[82] *See* Letter from FEC to Magic Carpet Enterprises, LLC (Oct. 15, 2010), attached as Exhibit B.
[83] *See* Letter from FEC to Magic Carpet Enterprises, LLC (Oct. 15, 2010).

Commission has determined that it was inappropriate to find reason to believe against a person where that person was not properly named as a Respondent in the complaint.[84] The Act provides that, "[w]ithin 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation."[85] Furthermore, "[b]efore the Commission conducts *any vote* on the complaint, other than a vote to dismiss, any person so notified *shall have the opportunity to demonstrate, in writing, to the Commission* within 15 days after notification that no action should be taken against such person on the basis of the complaint."[86] This requirement is not optional; the "Commission needs to scrupulously comply with this requirement in all matters."[87]

By finding reason to believe that Mr. Sussman violated the Act, without providing him an opportunity to respond, the Commission plainly violated 52 U.S.C. § 30109(a)(1). To rectify this violation, the Commission should withdraw the reason to believe finding against Mr. Sussman and immediately dismiss the matter with respect to him.

F. Conclusion

Nothing in the Act, the regulations, or the Commission's precedents supports a probable cause finding in this matter. For the reasons set forth above, the Commission should not find probable cause to believe that a violation occurred and should close the file.

Submitted March 9, 2015.

Marc E. Elias
Jonathan S. Berkon
Joseph P. Wenzinger
Counsel for Respondents

---

[84] Statement of Reasons of Chairman Mason and Commissioners Wold and Smith, Matter Under Review 4994 (Jan. 11, 2002), at 3-4 ("we conclude that reason-to-believe findings were inappropriate because these entities were not properly respondents to the complaint."); Statement of Reasons of Vice-Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Matter Under Review 6056 (June 1, 2009), at 12 ("The failure to provide a respondent with an opportunity to respond to factual and legal allegations that the Commission will consider in making its RTB determination undermines the command that '[t]he Commission shall not take any action, or make any finding, against a respondent ...unless it has considered [its] response ....'").
[85] 52 U.S.C. § 30109(a)(1).
[86] *Id.* (emphasis added).
[87] Statement of Reasons of Vice-Chairman Petersen and Commissioners Hunter and McGahn, Matter Under Review 6056, at 12.