



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)
)
Special Operations for America, *et al.*) MUR 6789
Zinke for Congress, *et al.*) MUR 6852
Ryan K. Zinke)
Continental Divide, LLC)
Battlefield Strategies)

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

These matters address whether an individual’s prior involvement with an organization, such as a Super PAC, will unavoidably lead to a potential violation of the Federal Election Campaign Act (the “Act”) if that individual later becomes a federal candidate. Our colleagues seem to think that it will, if the organization runs ads in support of that individual’s campaign.

We disagree. This statement explains why we did not vote to find reason to believe that the Respondents violated the Act and instead voted to dismiss these matters.

*Background*¹

In June 2012, Ryan Zinke founded, chaired, and became the public face and fundraiser for an independent expenditure-only committee, Special Operations for America (the “Super PAC”). In September 2013, Zinke resigned from the Super PAC. Shortly thereafter, the Super

¹ Some of the information in this Background section comes from the First General Counsel’s Report prepared by the Commission’s Office of General Counsel (“OGC”) but does not appear in the Complaints or Responses. See MUR 6396 (Crossroads Grassroots Policy Strategies), Statement of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 26, n.112 (questioning OGC’s “broad investigation into Crossroads GPS’s activities prior to the Commission making a formal reason to believe finding”) (citation and internal punctuation omitted); MUR 6518 (Newt Gingrich, *et al.*), Statement of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 9 (recognizing that “recommending a reason to believe finding based on information outside the Complaint presents legal and practical problems for the Commission and respondents”); Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12, n.79, MUR 6928 (Richard John “Rick” Santorum, *et al.*) (criticizing practice of augmenting record with information not in complaint or response because it “is unfair to respondents, and risks threatening the legitimacy of the Commission’s conclusions”).

PAC began a “draft Zinke” campaign, and Zinke announced the formation of an exploratory committee to evaluate a potential candidacy for the U.S. House of Representatives. The Super PAC included links to the exploratory committee’s website on its social media pages and referred to Zinke’s potential candidacy in its fundraising appeals. In October 2013, Zinke publicly announced his candidacy for the First Congressional District of Montana, filed a Statement of Candidacy, and registered Zinke for Congress as his principal campaign committee (the “Campaign Committee”).

After Zinke became a candidate, the Super PAC reported making independent expenditures in support of Zinke’s campaign and in opposition to another candidate running for the same office. These expenditures included two 15-second television advertisements that the Super PAC ran in January 2014. Each ad depicted footage of an internet search, infantry in combat, and a landscape with mountains and horses, along with two still photographs of Zinke — one of Zinke alone, and one of Zinke with his family — and a voiceover extolling Zinke’s qualifications for federal office. The Super PAC reported spending \$34,576 on the two ads.

MUR 6789

The Complaint in MUR 6789 alleges that the Super PAC’s two 15-second television ads were prohibited and excessive in-kind contributions to the Campaign Committee, which the Campaign Committee failed to disclose. As support, the Complaint states that the photographs in the ads were “nearly identical” to professional portraits of Zinke and his family that appeared on the Campaign Committee’s Facebook page.² From this, the Complaint infers that Zinke or the Campaign Committee arranged and paid for the photo shoot that produced the photos used in the Super PAC’s ads. Further, because the photos in the ads were only similar to, but not the same as, photos on the Campaign Committee’s Facebook page and did not appear on the Campaign Committee’s website, the Complaint posits that Zinke or the Campaign Committee must have provided the photos to the Super PAC. Hence, the Complaint claims, the Super PAC’s ads constituted republication of Zinke’s campaign materials, and Zinke or the Campaign Committee was materially involved in decisions regarding the content of those ads.

Zinke, the Campaign Committee, and the Super PAC deny these allegations. They assert that the Super PAC obtained the photos from Zinke’s publicly available, personal Facebook page. They also assert that the photos do not contain any messages or markings from Zinke or the Campaign Committee, and that the Super PAC used the photos only as background onto which it incorporated text, graphics, audio, and narration to convey its own message. The Responses further assert that neither Zinke nor the Campaign Committee, nor the agents of either, provided the photos to the Super PAC or communicated in any way with the Super PAC about its use of the photos or its ads.

² Compl. at 7, ¶ 18, MUR 6789 (Special Ops. for America, *et al.*).

We find the Responses' assertions to be both credible and consistent with the information in the record. There is no evidence in the record of interaction or communication, much less coordination, between Zinke and the Super PAC after Zinke became a candidate. Nor does the record contain evidence of interaction or communication between the Campaign Committee and the Super PAC. Absent supporting evidence, mere allegations in a complaint cannot serve as the basis for an investigation³ — particularly where, as here, they are directly refuted by the Respondents.

Moreover, as a threshold matter, it is not clear from the record that the photos used in the Super PAC's ads are campaign materials. The Complaint acknowledges that the photos used by the Super PAC differ from those on the Campaign Committee's Facebook page, and that neither these photos, "[n]or any photos like them," appeared on the Campaign Committee's website.⁴ Further, there is no evidence in the record that the photos were ever used, or intended for use, by the Campaign Committee.⁵ Thus, the photos' connection to the campaign is tenuous at best.

But even if the photos were campaign materials, "[t]he downloading of a photograph from a candidate's website that is open to the world, for incidental use in a larger [communication] that is designed, created, and paid for by a political committee as an independent expenditure without any coordination with the candidate, does not constitute the 'dissemination, distribution, or republication of campaign materials.'"⁶ This principle, so ably articulated by our colleagues in a prior matter, applies equally well here.

³ See MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1-2 ("The Commission may find reason to believe only if a complaint sets forth sufficient 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.... In addition, ... a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint.").

⁴ Compl. at 6, MUR 6852 (Special Ops. for America, *et al.*).

⁵ The best evidence in support of the argument that the photos are campaign materials was provided by OGC. OGC found that the Campaign Committee reported expenditures to a photography studio in November 2013, and the same photography studio posted an entry on its Facebook page in January 2014 titled, "Zinke Family!" The entry displayed photographs of Zinke and members of his family in different poses, with text stating, "I've been taking some campaign photos for Ryan Zinke, a local Montanan running for congress . . ." See First Gen. Counsel's Rpt at 12, Att. 14. But even these photos appear to differ from the ones used in the Super PAC's ads.

⁶ MUR 5743 (Betty Sutton, *et al.*), Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub at 4-5; see also MUR 6902 (Al Franken for Senate 2014, *et al.*), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 ("[R]epublication requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates"); MUR 6357 (American Crossroads, *et al.*), Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4 (same); MUR 5996 (Tim Bee for Congress, *et al.*), Statement Of

MUR 6852

The allegations in MUR 6852 are even more speculative and amorphous than in MUR 6789, discussed above. The principal claim appears to be that all of the Super PAC's public communications in support of Zinke's campaign are coordinated communications, and the Super PAC's status as an independent expenditure-only committee is called into question, because of Zinke's association with the Super PAC before he declared candidacy. The Complaint urges the Commission to infer coordination from such factors as the Super PAC's fundraising during roughly the same time period that Zinke explored a potential candidacy; the timing of Zinke's resignation from the Super PAC and his declaration of candidacy; and the Super PAC's express advocacy communications in support of Zinke. The Respondents deny the coordination claim.

OGC relies on many of the same factors as the Complaint in recommending that the Commission find reason to believe that Zinke, the Super PAC, and the Campaign Committee violated the Act. OGC concludes that "it strains credulity" that Zinke's association with the Super PAC "until shortly before he created his own campaign committee did not result in [the Super PAC's] use of Zinke's plans, projects and needs in its purportedly independent expenditures."⁷

We disagree. The assumption that an individual's pre-candidacy association with an organization necessarily taints the independence of the organization's later expenditures in support of that individual's election is just that — an assumption. We do not authorize Commission investigations based on mere speculation.⁸ Indeed, an organization's spending to support the candidacy of its founder or any other previously associated individual may reflect nothing more than their shared values and common goals.⁹ Similarly, we should not be surprised

Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn (explaining that third party's advertisement containing candidate's photo obtained from website of candidate's authorized committee is not republication of campaign materials under Commission regulations) .

⁷ First Gen. Counsel's Rpt. at 21, MUR 6852 (Special Ops. for America, *et al.*).

⁸ See *FEC v. Machinists Non-partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (footnote omitted) ("[M]ere 'official curiosity' will not suffice as the basis for FEC investigations").

⁹ See First Gen. Counsel's Rpt at 29, MUR 5260 (Talent for Senate) (recommending no reason to believe candidate used state leadership PAC to "test the waters" of potential candidacy when allegations were based primarily on prior association between candidate and PAC and public conjecture about possible candidacy, and complaint did not provide specific instances of testing-the-waters activity by PAC); First Gen. Counsel's Rpt at 9 n.41, MUR 6907 (Huckabee) ("As a public figure and politician, Huckabee's association with a social welfare organization is not suggestive of a testing-the-waters violation in itself"); Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 4, MURs 6470, 6482, 6484 (Romney, *et al.*) ("Accordingly, a political committee or other organization may provide an individual...with a platform to speak about issues, support other candidates, and maintain a public profile without the payments for such activities necessarily being considered contributions to the future candidate's campaign."); Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 8, MUR 6928 (Santorum) ("Thus, an

when an individual who is sufficiently interested in politics to be involved with an organization later decides to run for public office. These developments are to be expected.

Prior association plus shared values, interests, and goals do not equal coordination. To assume otherwise would impermissibly shift the burden to respondents to disprove coordination.¹⁰ More importantly, it would cast a pall over the rights of politically like-minded individuals to associate with each other before becoming candidates, and contravene more than half a century of Supreme Court jurisprudence recognizing the crucial Constitutional distinction between independent and coordinated electoral speech.¹¹

For these reasons, we did not vote to find reason to believe the Respondents violated the Act.

individual's mere association with an organization prior to becoming a candidate does not give rise to a violation of the Act or Commission regulations, even where the individual 'use[s] [the organization] as a platform to maintain [a] public image and advance certain issues.'"); Leadership PACs, 68 Fed. Reg. 67013, 67017 (Dec. 1, 2003) (concluding that leadership PACs "cannot be assumed to be acting as authorized committees. Rather, these PACs are worthy of the same treatment as other unauthorized committees that operate without presumptions as to their status.").

¹⁰ For example, in its report, OGC speculated that Super PAC "was Zinke's plans, projects, activities, and needs for most of 2013" and faulted Respondents for "not persuasively suggest[ing] otherwise." First Gen. Counsel's Rpt. at 21, MUR 6852 (Special Ops. for America, *et al.*) (emphasis in original).

¹¹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001); *Buckley v. Valeo*, 424 U.S. 1 (1976).


Matthew S. Petersen
Vice Chairman

5/28/19
Date


Caroline C. Hunter
Commissioner

5/28/19
Date