

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:

JOHN SWALLOW, RESPONDENT

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No. MUR 6850

OFFICE OF THE
2015 OCT 19 10:11 AM
FBI
U.S. DEPT. OF JUSTICE

Pages: 1 through 33

Place: Washington, D.C.

Date: September 30, 2015

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FEDERAL ELECTION COMMISSION

IN THE MATTER OF:)
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JOHN SWALLOW, RESPONDENT.) No. MUR 6850
)

9th Floor Hearing Room
Federal Election Commission
999 E Street, N.W.
Washington, D.C.

Wednesday,
September 30, 2015

The parties met, pursuant to the notice, at
10:46 a.m.

BEFORE: CHAIRWOMAN ANN M. RAVEL
VICE CHAIRMAN MATTHEW S. PETERSON
COMMISSIONER LEE E. GOODMAN
COMMISSIONER STEVEN T. WALTHER

STAFF DIRECTOR EDWARD HOLDER
ACTING GENERAL COUNSEL DAN PETALAS
ACTING ASSOCIATE GENERAL COUNSEL FOR
ENFORCEMENT KATHLEEN GUITH
ATTORNEY CJ PAVIA

APPEARANCES:

For the Respondent:

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AARON LANCASTER, Esquire
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Washington, D.C. 20006

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P R O C E E D I N G S

(10:46 a.m.)

CHAIRWOMAN RAVEL: The probable cause hearing for Matter Under Review 6850, John Swallow will now come to order, and representing the Respondent today is Scott Thomas and Aaron Lancaster of Dickstein Shapiro, LLP.

On November 18, 2014, the Commission found reason to believe that Respondent John Swallow violated the Act by directing Jeremy Johnson to make contributions in the names of others totaling approximately \$50,000 to Friends of Mike Lee.

On May 28, 2015, the Office of General Counsel sent its brief to Respondent notifying that OGC was prepared to recommend a probable cause finding to the Commission.

On August 20, 2015, Respondent filed the reply brief requesting a probable cause hearing. On August 28th the Commission granted the request for today's hearing.

Respondent will have 20 minutes for the opening statement and counsel can also divide this time between an opening and closing statement, and Respondent is expected to raise only issues that were identified in the Respondent's hearing request.

1 And then following counsel's presentation
2 this hearing is more like a briefing, Commissioners,
3 the General Counsel and Staff Director will have an
4 opportunity to ask questions of the Respondent, and at
5 that time Commissioners may also ask clarifying
6 questions of the Office of General Counsel or the
7 Office of the Staff Director.

8 Today's transcript will become part of the
9 record and may be relied upon for determinations made
10 by the Commission, and the Commission will make a
11 transcript of this proceeding available to the
12 Respondent.

13 Welcome, Mr. Thomas or should I say former
14 Commissioner Thomas. How would you like to divide
15 your time?

16 MR. THOMAS: I think we would just like to
17 reserve a minute of our time for a response.

18 CHAIRWOMAN RAVEL: Okay. Thank you very
19 much. So, proceed.

20 MR. THOMAS: Thank you very much, Madam
21 Chair and members of the Commission, and
22 representatives of the General Counsel's Office and
23 Staff Director's Office. Thank you for this
24 opportunity. I really do want to express my personal
25 thanks to the legal staff who have been very helpful

1 to me in sort of framing our ability to address this
2 matter.

3 As you can appreciate, we have slight
4 complications in that the Respondent John Swallow is
5 currently the subject of a criminal proceeding out in
6 Utah and he has been advised to take the Fifth
7 Amendment to assert his privilege against testifying
8 in any way that could incriminate him. We therefore
9 today are in the posture of trying to give you as much
10 of a presentation as we can without in any way
11 relaying what would in essence be his testimony
12 indirectly.

13 The Fifth Amendment is a difficult matter to
14 work around and so we're having some complications
15 trying to figure out exactly what we can say and how
16 we can say it. But that said I want to thank the
17 legal staff again for their help in sort of working
18 through this process to this point.

19 Time is precious. I know we want to move
20 through this as quickly as possible. I'll just start
21 with what I think is a central legal issue, and that
22 is, in essence, whether or not the regulation on which
23 the Commission is basing its case so far is a valid
24 and enforceable regulation. I have to claim guilt for
25 being involved when that regulation was passed. I

1 voted for it, and the irony is not lost on me, but I
2 do think the Commission should recognize that at this
3 point in time in all likelihood it would be found to
4 be unenforceable if this matter were to go to
5 litigation.

6 As you will know, the statute itself when it
7 refers to the contribution in the name of another
8 provisions prohibits the making of a contribution in
9 the name of another, the acceptance of a contribution
10 in the name of another, and knowingly permitting your
11 name to be used by someone to make contributions in
12 others' names.

13 So, the statute doesn't have anything in
14 there about helping or assisting someone in the making
15 of a contribution in the name of another and the
16 statute is very clear on what it does cover but it
17 does not cover this kind of aiding or abetting
18 concept, and, moreover, when you look back at the
19 history of development of that regulation you find
20 that the precise analysis that the counsel's office
21 brief relies on which is that Mr. Swallow by making
22 certain statements was initiating or instigating in
23 some way the making of contributions in the name of
24 another apparently by making some sort of suggestion
25 that maybe someone could be given a gift and that

1 person could then maybe make a contribution.

2 But the point is that that initiate or
3 instigate concept appears only in the explanation and
4 justification of that regulation. It's not even in
5 the text of the regulation. The regulation talks
6 about helping or assisting. But the main point is
7 there is no statutory authority at all for anything
8 along those lines, no aiding or abetting authority.

9 And I know that I'm not supposed to put
10 forward information that wasn't otherwise presented to
11 this point, but I think it's critical that along those
12 lines the Commission, through its staff, look
13 carefully at the Supreme Court's decision in the
14 Central Bank of Denver case. It's a 1994 case, and it
15 involved whether or not the aiding and abetting
16 regulation at the Securities and Exchange Commission
17 could be deemed valid law. And the Supreme Court
18 emphatically said no; that, in essence, Congress knows
19 how to put aiding and abetting enforcement authority
20 in a statute. Congress did not do so. The Supreme
21 Court laid out several examples of statutes where
22 aiding and abetting authority is made available, even
23 for civil enforcement, and noted that in that case the
24 SEC did not have that kind of authority.

25 And so it seems like it's very strong

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1 authority for saying that given that 1994 Supreme
2 Court decision the FEC's regulation is, shall we say,
3 extremely in doubt in terms of enforceability.

4 We are aware, there is another case that --
5 one enforcement case in particular the staff has
6 cited, the O'Hagan case, a '97 case that the staff
7 feels suggests that maybe an agency does have
8 authority, but that case is clearly distinguishable.
9 We note that it was a matter involving a criminal
10 prosecution where there clearly is federal statutory
11 authority for aiding and abetting liability, and also
12 that case was dealing with an underlying regulation
13 that -- so-called prophylactic regulation -- that
14 basically gave the SEC the authority to define and
15 prescribe means reasonably designed to prevent
16 fraudulent and manipulative practices.

17 So, the lawyer in that case who committed
18 the manipulation was subject to a statute and was
19 directly responsible for the actions in question, and
20 it was clearly covered under the regulation, but the
21 underlying law gave the SEC broad authority to define
22 and prescribe means.

23 That's in contrast to the FEC statute and
24 the FEC's authority. The FEC statute authorizes the
25 FEC to promulgate regs, to carry out the provisions of

1 this Act. It doesn't suggest any kind of broad
2 prophylactic authority like existed in the O'Hagan
3 case, so we think it's clearly distinguishable. So,
4 there's that. We think the argument is very strong.

5 Also, to the extent that that regulation is
6 premised on the Rodriguez case, that is a case that
7 involved a fellow who was actively involved in going
8 out and trying to get particular people to agree to
9 contribute in their names, and he was involved and
10 actually he was the bag man. He was taking the money
11 around and getting them reimbursed. He was clearly
12 actively involved in helping Mr. Wolfson move money
13 into the political process in their names.

14 In this case we don't see any evidence that
15 Mr. Swallow did anything at all like that, to
16 facilitate Johnson's reimbursement of any dollars.
17 There is no evidence that he was involved in
18 contacting the donors and handling checks and handling
19 the reimbursements. He just didn't, according to the
20 record, of this case do any of that.

21 So, we just don't see that the Rodriguez
22 case, even if it somehow were seen as providing some
23 sort of authority for federal common law on aiding and
24 abetting type analysis, it certainly wasn't a case
25 that would also extend to this theory that just by

1 uttering some words that arguably someone has
2 initiated or instigated this process of reimbursement
3 scheme. So, the Rodriguez case we think wouldn't give
4 the authority for the regulation anyway.

5 What you're left with is basically you're
6 trying to pursue Mr. Swallow for alleged statement
7 something to the effect of you might make gifts to
8 people and they could then make contributions. That's
9 just speech. So, you're going to be going into a very
10 dangerous area, we think, in terms of authority if you
11 try to enforce for those kinds of mere speech
12 circumstances.

13 Also, we have gone back and looked at the
14 tortured history of that regulation and it turns out
15 that, and maybe I'm the one to blame, but the
16 Commission did not include this aiding or abetting
17 change in 110.4 in the Notice of Proposed Rulemaking.
18 It's not there. It wasn't in any of the comments
19 submitted by any of the commentators. It somehow
20 appeared mysteriously, and I can't even figure out
21 where, but it appeared subtlety in a document going to
22 the Commissioners at the final rule stage. So, I
23 think that that regulation for that reason as well is
24 very subject to challenge based on it not following
25 the proper notice procedures of the Administrative

1 Procedure Act.

2 So, that reg we implore you to look at
3 closely. We think it simply is an unenforceable
4 regulation. So, that's one of our arguments. If that
5 is a satisfactory argument obviously the whole case
6 against Mr. Swallow collapses.

7 Now, let's move a little bit to the -- more
8 to the substance here. We think that it's critical
9 that you note that Mr. Johnson is -- I have to hold
10 back here. He is obviously not a credible source. He
11 has been accused by authorities of deceit, lying and
12 sneaky behavior by the SEC, the Utah Division of
13 Consumer Protection, the Federal Trade Commission, the
14 United States Attorney in Utah who brought an 86 count
15 criminal indictment for fraud against him, by the
16 judge who's handling that criminal prosecution -- we
17 gave you the quote of the judge who has flat-out
18 called him a liar -- and also now by the Federal
19 Election Commission. You folks are suing this guy for
20 having basically tried to sneak money into the
21 political process in the name of straw donors.

22 He's a serial liar, he's a manipulator, and
23 his plot to get revenge against John Swallow should
24 not be facilitated by the Commissioners, in our view.
25 We've gone through indications of why it appears that

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1 he is out to get John Swallow. The first is pretty
2 obvious from all the news stories and all of his own
3 comments, all of his taped conversations that he
4 himself taped secretly. He was angry at John Swallow
5 because Mr. Swallow hadn't done enough in Mr.
6 Johnson's view to get any of the money back that
7 Johnson had paid to try to help -- to try to get
8 Senator Harry Reid to intervene in a pending FTC
9 inquiry. He has been hounding John Swallow to try to
10 come up with some of that money to get it returned for
11 years.

12 Also, it's pretty obvious that Mr. Johnson
13 has been trying to offer up John Swallow as a prize in
14 order to try to get more favorable treatment by
15 federal prosecutors. That's a very standard tactic of
16 trapped defendants. They want to offer up somebody to
17 the feds in order to maybe work a deal and get better
18 treatment by the feds.

19 Also, we've given you what we consider to be
20 a fairly stunning affidavit that a private
21 investigator was willing to offer up, which points out
22 that there was an active concerted effort amongst a
23 bunch of people, including Mr. Johnson, to bring down
24 John Swallow as attorney general, and this -- since it
25 involved Mr. Johnson I'm sure he thought he should

1 join in this group effort because it would not only
2 possibly get John Swallow, again with whom he was very
3 angry, but it might also bring down Brent Ward who was
4 the assistant U.S. attorney who was handling the
5 prosecution of Johnson.

6 Swallow and Ward have been long-time
7 friends. They know each other, and it seems fairly
8 obvious to us when you look at all the evidence that's
9 in all of the news stories, which is, of course, the
10 best we have to work with at this point, that's what
11 that arrangement was all about.

12 Mr. Johnson apparently conceived the idea of
13 putting Mr. Swallow on a proposed immunity list so
14 that he could taint both Mr. Swallow and Mr. Ward with
15 press-fueled insinuations that Mr. Swallow was somehow
16 implicated in the I-Works criminal matters. This is
17 truly a diabolical plot if you think about it.
18 So, we feel that Mr. Johnson's treachery just knows no
19 bounds, and we hope the Commission will focus very
20 hard on that reality.

21 We also are concerned because to us it looks
22 like the investigation that has been launched against
23 Mr. Swallow -- investigations -- have involved some
24 folks who appear to be biased. This Ms. Lindquist who
25 was an investigator hired by the state legislature, it

1 appears that she was complaining to everyone that no
2 one was agreeing that her information gathering was
3 the best and that some of the lead investigators were
4 really trying to put her down, kind of shut her out of
5 the process because she was, as we describe her, a
6 rogue investigator at that point. It looks to us like
7 she was desperate to show that she could produce some
8 sort of incriminating evidence. She worked very
9 closely with this woman who was an assistant of Mr.
10 Johnson, Ms. Beck-Redd, to get her ready for
11 interviews and to lead her through questions during
12 the interviews. It looks like the two of them were
13 very, very anxious to come up with some incriminating
14 evidence against Mr. Swallow.

15 That led to this claim that they had seen
16 emails wherein Mr. Swallow supposedly was saying to
17 Mr. Johnson something like if you give people gifts
18 they could then make contributions. But the emails
19 just don't seem to exist. I'm assuming everyone on
20 the legal staff has tried to get them. As near as we
21 can tell they don't exist. Presumably it would be in
22 Mr. Johnson's interest to produce those because I
23 guess they might help him with a defense in the case
24 you folks have against him. Maybe it deflects his
25 knowing and willful behavior if he can somehow imply

1 that John Swallow suggested the possibility of giving
2 gifts to people so they could then make contributions
3 in their names.

4 But anyway, those emails, the phantom emails
5 we don't think they do exist. We haven't seen them,
6 and we think that because Ms. Lindquist and Ms. Beck-
7 Redd both had reasons to try to come up with
8 incriminating evidence that perhaps they overdid it.
9 We think that they are perhaps suggesting these emails
10 exist and that they've seen them when in fact maybe
11 they didn't.

12 Next, I will point out that we think that
13 the best read of the evidence indicates that when Mr.
14 Johnson is talking about whether or not Mr. Swallow
15 made some suggestion that perhaps gifts could be given
16 to people so that they could then make contributions,
17 that that occurred with regard to raising funds for
18 the Shurtleff campaign in 2009, a timeframe that is
19 outside the Commission's statute of limitations
20 authority.

21 So, we have tried to point out in our
22 response that the places where in the testimony it
23 looks like when Mr. Johnson is first asked about this,
24 you know, well, what did Shallow say or do, he sort of
25 references that possible suggestion of gifting people

1 in the context of Shurtleff fundraising. Footnote 10
2 of the General Counsel's brief makes it very clear
3 that that description by Johnson comes up in the
4 context of the Shurtleff campaign.

5 Now, it's true when led by an investigator,
6 well, wasn't this more -- didn't this more -- happen
7 even more with regard to raising money for the Lee
8 campaign, at that point Johnson responds both. So,
9 it's apparent that if led to that point by an
10 investigator's question he would then bring in some
11 comment about the same problem perhaps in the Lee
12 campaign,

13 But we think that evidence points to the
14 real occurrence or the real claim of Mr. Johnson
15 relates only to the Shurtleff fundraising effort, not
16 the Lee effort, and likewise, those phantom emails,
17 it's clear even when you go through the General
18 Counsel's brief that those are perhaps they saw some
19 emails that related to Shurtleff campaign fundraising,
20 not Lee campaign fundraising, so again outside the
21 statute of limitations to the extent that those kinds
22 of suggestions of gifting people occurred in emails.

23 So, on balance we think your evidence is
24 very, very weak; that any of this suggesting possibly
25 gifting people so they can give contributions occurred

1 with regard to the Lee campaign fundraising and during
2 the period that can be covered by the statute of
3 limitations, within the statute of limitations.

4 So, last, we just want you to realize that
5 Mr. Swallow's credibility is certainly, certainly much
6 greater than Mr. Johnson's. Mr. Swallow was deputy
7 attorney general of the State of Utah. He was a chief
8 law enforcement officer. He's a respected member of
9 the Utah legal community. He was an official in his
10 church. He's a father of four with a wonderful wife
11 and a very bright future. He was aware of the
12 contribution in the name of another rules having gone
13 through, as we all know, the enforcement matter of the
14 FEC stemming from his own campaign earlier for
15 congressional office. He knew what the contribution
16 in the name of another rule. He had everything going
17 for him in terms of his personal and his professional
18 life, and in this context, in June of 2010, he was
19 just helping Mike Lee campaign -- Mike Lee's campaign
20 raise money for his senate race, and he had no reason
21 to get involved in some scheme to have Johnson
22 reimburse donors. It would just be a tragically
23 stupid thing to do. We will concede that. If it
24 happened it was a tragically stupid thing to do.

25 Meanwhile, by that time Johnson had already

1 been nailed by the SEC and by the Utah Division of
2 Consumer Protection for fraud and deceit activities,
3 and he was starting to feel the heat from the FTC
4 investigation. He was in need of friends in high
5 places who might help him with this predicament, and
6 with his online poker banking business problems. He
7 had an incentive to bend the rules, to create
8 falsehoods whereas John Swallow clearly did not.

9 We hope you will recognize that Mr.
10 Swallow's denials in public fora are far more reliable
11 than Mr. Johnson's self-serving wild claims of
12 Swallow's culpability for Johnson's run-of-the-mill
13 straw donor crimes.

14 So, those are the main points I wanted to
15 raise. I do also want to raise for you the prospect
16 that if you agree with us, if you agree that this is a
17 case that ought not go any further, we also want you
18 to be aware that Mr. Swallow is -- it's not in his
19 nature to assert the Fifth Amendment. It's not in his
20 nature to not be able to state his position and views
21 on matters to try to help resolve this. We have
22 talked to him and he is comfortable with having us
23 suggest to you that in appropriate circumstances if
24 there is some way to work out immunity arrangements
25 with the federal prosecutors and with those Utah

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1 prosecutors such that he could feel comfortable
2 testifying without fear of prosecution stemming from
3 his testimony he would be willing to help you in your
4 case against Mr. Johnson.

5 Mr. Johnson is the bad guy, and Mr. Swallow
6 is in a position where if there is anything he can do
7 to help you point out that Mr. Johnson doesn't have a
8 defense that someone else was suggesting that he do
9 this. Mr. Johnson was doing this on his own.

10 CHAIRWOMAN RAVEL: You have about two
11 minutes.

12 MR. THOMAS: Two minutes, yes.

13 You know, we've been trying to deal with
14 evidence as best we can given what we have. We have
15 the investigative reports of the lieutenant governor
16 in Utah. We have the investigative report of the Utah
17 legislature, lots and lots of exhibits there, and then
18 also from our perspective in terms of trying to
19 explain this political assassination plot that Friends
20 od Sean Reyes launched we have an affidavit that we
21 have been able to put together, but we often rely on
22 news stories.

23 I was captured by a news story which,
24 unfortunately, I didn't include in our response but
25 it's an ABC news report by one of our friends, Matt

1 Mosk. Most of us know Matt Mosk. He's a very
2 reputable reporter. He's wrote that Johnson claims he
3 was instructed by online poker figures to hide illegal
4 contributions to the campaigns of Reid and Lee in 2010
5 by finding straw donors who were reimbursed from poker
6 accounts in the bank for money they supposedly
7 contributed.

8 I mean, there's something suggesting a
9 completely different line of where he would have
10 gotten this idea that he could reimburse people, so it
11 further undercuts, I think, the suggestion that John
12 Swallow, a very bright fellow, would have thrown his
13 career away with some sort of crazy plot like that.

14 So, I will leave it with that, Madam Chair.
15 Thank you.

16 CHAIRWOMAN RAVEL: Thank you. Thank you
17 very much, Mr. Thomas.

18 Do the Commissioners have any questions for
19 Mr. Thomas?

20 Hearing none, counsel -- I'm sorry, Mr. Vice
21 Chair.

22 VICE CHAIRMAN PETERSON: Just obviously, at
23 least to me, the most interesting and provocative of
24 the arguments is the legal one regarding the
25 regulation 110.4(b). You've sat in our same seats

1 before, and know what our responsibilities and what
2 our obligations are. From your perspective what --
3 when we encounter a regulation that's been duly
4 enacted, hasn't heretofore been challenged in court,
5 and that this would be the first time that's being
6 brought up in an enforcement matter, from -- again I'm
7 speaking to your experience -- how is a Commissioner
8 supposed to, you know, evaluate that fact?

9 I know as Commissioners we do have -- this
10 is a rule as you said, it's an interpretation, it's
11 not -- the language about assisting is not in the
12 statute, I'll grant that, and so the question is
13 whether or not that is a reasonable outgrowth of the
14 statutory language. If a Commissioner feels like the
15 language is problematic or overbroad are we in a
16 position to make that determination and say we're just
17 not -- we're going to not apply it in this particular
18 case, or do we need to wait for a court decision to
19 make, and kind of a more direct challenge before
20 deciding that we're not going to apply it to a
21 particular matter?

22 MR. THOMAS: Well, I had all these thoughts
23 as I was doing this research and how are the
24 Commissioners going to feel comfortable agreeing that
25 a particular regulation is not enforceable, is not

1 valid. And I recall going through that.

2 We used to have regulations on the public
3 financing allocation among states that were absurd,
4 and we as Commissioners ultimately decided that we
5 were, in essence, going to stop enforcing those, and
6 those were regulations that really just for policy
7 reasons and practicality reasons were not being
8 followed by campaigns out there, and they as a
9 practical matter couldn't. They were causing all
10 sorts of discombobulation in terms of people renting
11 cars in one state and then trying to use them in
12 another state to get around the state-by-state limits.
13 But we as Commissioners on some of those kinds of
14 regulations just said we're not going to enforce those
15 anymore when we're enforcing the public financing
16 provisions.

17 This case, it seems to me, is even stronger
18 in a sense because you now have the Supreme Court
19 case, the Central Bank of Denver case, which to me is
20 very strong authority for saying unless Congress puts
21 it in the statute you do not have aiding and abetting
22 authority, and it cited a whole slew of statutes as I
23 noted where Congress had put in aiding and abetting
24 authority, even in the civil context. So, it's
25 obvious Congress can do that when it wants to.

1 So, I think at this point you can say we
2 evaluated the legal doctrine surrounding this and we
3 think that it can be -- it must not be enforced under
4 those circumstances. So, you've got that plus you've
5 got the notice element that I talked about, and really
6 if you look at the Shays litigation there were several
7 kinds of regulations, several different regulations
8 the Court held invalid because they had not been given
9 proper notice, and interestingly, in this rulemaking
10 involving helping or assisting regarding the 110.4
11 regulation there was also apparently a push to maybe
12 put in some new languages involving foreign national
13 contribution rules, and the legal staff in the
14 document that went to the Commission agenda said,
15 well, because that has not been put out for notice to
16 anyone we don't think we should put that into the
17 regulation at this final rulemaking stage, so that was
18 left out. So, the Commission was aware of the
19 concept.

20 For the life of me, I cannot figure out why
21 it went ahead with this aiding and abetting or helping
22 and assisting regulation when it was aware of that
23 concept, and I'll take the blame for that. If you
24 want someone to blame, you can blame me all the way up
25 and down the aisle.

1 VICE CHAIRMAN PETERSON: And then the other
2 question I have is that your argument also is that
3 even if we were to apply it in this case, and if we
4 did find that it was -- it could be -- the help or
5 assisting language which could be applied I take it
6 your argument is that what Mr. Swallow is alleged to
7 have done here does not fit even within helping or
8 assisting. Just to give you a chance to flush that
9 out, what do you think are the parameters of that
10 language if we were to apply it?

11 I know that you would say contacting donors
12 and so forth. Do you think that -- I take it that
13 suggestions and maybe even not just, you know, like,
14 hey, it would be great if you did -- you know, if you
15 reimburse contributions, but even something more
16 forceful than that wouldn't necessarily fit within the
17 help or assist language if they didn't, you know,
18 actually assist in the contacting doctors, assisting
19 with the actual transmission of funds and so forth.
20 How do you think that that language should be defined?

21 MR. THOMAS: I think that legal doctrine
22 separates out speech type of problems like inciting to
23 riot, for example, those kinds of things are
24 separately referred to. If you look at Title 18,
25 Section 2, which is the aiding and abetting provision,

1 it also has language in there that talks about a
2 separate kind of violation can occur if someone
3 incites someone to commit a felon. And so there is in
4 the federal criminal law something akin to that, but
5 they separate it out. If there's going to be
6 additional liability for something beyond actions,
7 like contacting donors, collecting checks, handing
8 them the money, all those kinds of actions would be,
9 in my view, in the nature of something like helping or
10 assisting.

11 But just suggesting to someone that maybe
12 they give money to folks who have made contributions
13 or who will make contributions, it's just mere speech
14 in my mind. You would have to have separate special
15 language in the statute, I think, like there is in the
16 criminal law to cover that kind of inciting, if you
17 will.

18 And so that's kind of the way I would
19 analyze it, and I just don't see certainly in any of
20 the regulatory history any sort of thinking about
21 that. It just suddenly appears in the explanation and
22 justification when the regulation went final, and it
23 just surprised me I would have to say.

24 VICE CHAIRMAN PETERSON: Thanks.

25 CHAIRWOMAN RAVEL: Commissioner Goodman.

1 COMMISSIONER GOODMAN: Let me draw on that
2 point a bit. I take it that one way the Commission
3 could view your argument is disregard helping and
4 assisting as extra-statutory and therefore actus reus,
5 we can't force them under the SEC case you cite.
6 Another way would be to avoid the issue and give
7 helping and assisting a more narrow interpretation;
8 that it requires some action and not merely a bad
9 suggestion.

10 So, can you -- I mean, help me out there.
11 So, CEO of a company decides to run a reimbursement
12 scheme of a whole bunch of employees, and directs the
13 CFO of the company to cut the checks, tells CFO to
14 carry it out. CFO understands what CFO is doing and
15 why CFO is writing the checks. CFO disguises the
16 checks. Instead of square dollar amounts of the
17 amounts of contributions matches them up a little bit,
18 calls them bonuses in the records. At that point you
19 could argue CFO is -- is helping or assisting the CEO
20 accomplish the objective in the form of action and
21 participation in the name of another scheme, right?

22 MR. THOMAS: Yes. I think that where you
23 have someone who is undertaking those kinds of actions
24 to cause the reimbursement you've at least got helping
25 or assisting. It's in the ball park of aiding or

1 abetting and under traditional legal concepts I think.

2 But your hypothetical raises the question,
3 well, what about the top guy who just sort of said,
4 hey, why don't you put this in motion? I mean, I
5 think there's a legal problem perhaps with the person
6 --

7 COMMISSIONER GOODMAN: Well, if the top guy
8 directs it, occur, the top guy is making it happen.
9 The top guy it seems to me is doing. I would think
10 that both of those people are participating, and
11 whether you call it participation or helping and
12 assisting to do it you might capture them both.

13 But that would still distinguish it, it
14 would seem to me, somebody who under your argument
15 merely suggested the idea.

16 MR. THOMAS: I agree. Our set of facts is
17 even further removed from the boss guy causing people
18 to go about making this reimbursement happen, and
19 directing underlings and so on. Our situation is
20 clearly different from that.

21 I mean, Mr. Swallow had no authority over
22 Mr. Johnson, and at most it looks to us like even Mr.
23 Johnson's testimony is that it was at most a
24 suggestion from Mr. Swallow, and also outside the
25 statute of limitations.

1 COMMISSIONER GOODMAN: Under the theory that
2 I have just walked us through interpreting help or
3 assist to mean some actual action and participation
4 would that save the regulation under the case that you
5 cite you believe?

6 MR. THOMAS: I don't think so. That's the
7 problem. That case is extremely broad. It basically
8 says -- I can read you the relevant quotes but it
9 basically says Congress has to put it in the statute,
10 has to put aiding or abetting, or if you choose,
11 helping or assisting, has to put that kind of language
12 in the statute.

13 So, I think that case would preclude you
14 from even going with a helping or assisting theory.

15 COMMISSIONER GOODMAN: What is the actus
16 reus under the statute again? You mentioned it
17 earlier.

18 MR. THOMAS: Well, the statute basically
19 prohibits someone from making a contribution in the
20 name of another --

21 COMMISSIONER GOODMAN: Well, in the scheme I
22 just mentioned or where the CEO and the CFO are
23 actually reimbursing the contributions. Aren't they
24 making contributions in the name of another through
25 reimbursement?

1 MR. THOMAS: I mean, I think you at least
2 have the authority to say that a corporation acts
3 through its people, corporation acts through its
4 agents. You also in those cases normally have the
5 corporate prohibition to work with which clearly talks
6 about corporate officers also being responsible for
7 acts of the corporation.

8 So, there are other legal principles that
9 you probably could rely on in those context, but you
10 wouldn't be trying to rely on aiding or abetting, or
11 helping or assisting legal theory. I think to be
12 honest, I think you still have a fair amount of
13 flexibility for enforcing the law if you work with
14 those kinds of principles for the people who are
15 really involved in the decision chain, especially if
16 you're dealing with a corporate setting. So, most of
17 your 441(f) cases I think you'll still be able to
18 pursue the relevant characters.

19 CHAIRWOMAN RAVEL: Thank you. Are there any
20 other questions by the Commissioners?

21 MR. THOMAS: I guess it's not 441(f)
22 anymore.

23 CHAIRWOMAN RAVEL: No.

24 MR. THOMAS: Sorry.

25 CHAIRWOMAN RAVEL: Does counsel or staff

1 director have questions for Mr. Thomas?

2 MR. PETALAS: Just one clarification if I
3 may. You've mentioned a number of times the
4 invocation of the Fifth Amendment here. You mention
5 it in your brief as well. I'm trying to get a sense
6 though of the basis of the invocation. I think in
7 your brief you indicate that the concern, or a
8 concern, is an eager prosecutor concluding that
9 they're going to prosecute your client for truthful
10 statements under a false statement theory or, I
11 suppose, perhaps obstruction of justice, or, you know,
12 perjury type theory.

13 Is that then the basis of the invocation
14 given that at this point at least as to DOJ or some
15 federal prosecution they wouldn't within the
16 limitations period be able to bring a case, unlike us,
17 given the tolling, but they wouldn't be able to bring
18 a case against your client related to contributions to
19 Mike Lee at this stage.

20 MR. THOMAS: Yes, the underlying concern is
21 some sort of pursuit for a false statement, and as we
22 have argued, there is a whole army of people who have
23 decided to line up and sort of make statements about
24 what Mr. Swallow said or did, and if all those people
25 are wrong and they were willing to sort of continue

1 with those kinds of statements who knows whether a
2 prosecutor would pick up something that Mr. Swallow
3 said and say I'm going to prosecute you for false
4 statement.

5 MR. PETALAS: That's all I have. Thank you.

6 CHAIRWOMAN RAVEL: Okay. Yes, Commissioner
7 Walter.

8 COMMISSIONER WALTER: We're not supposed to
9 question the counsel, but I would ask you for maybe
10 some comment on the Colorado case in Denver. What was
11 the name of the case, Central?

12 MR. THOMAS: Central Bank of Denver case.

13 COMMISSIONER WALTER: Just to see, since you
14 rely heavily on it, how you view that.

15 MR. PETALAS: Well, I would be happy to
16 opine on it and we certainly will. I sort of view the
17 probable cause hearing as an opportunity to hear from
18 the Respondent and counsel when counsel is involved,
19 and it's not a very good forum for us to -- Office of
20 General Counsel to provide legal advice to our client.
21 So, I appreciate that you raise the point here, and
22 we'll certainly address it at the appropriate time.

23 CHAIRWOMAN RAVEL: Thank you, Mr. Petalas.

24 MR. THOMAS: I apologize for my own part in
25 not finding that earlier and bringing that out in our

1 response, but I have smart associates who are much
2 better than I am, and they helped me get ready for
3 this, and that's why it came up when it did.

4 CHAIRWOMAN RAVEL: Appreciate you raising
5 it.

6 MR. THOMAS: Sorry, Counsel.

7 CHAIRWOMAN RAVEL: So hearing no further
8 questions, Mr. Thomas, you have about a minute to wrap
9 or say whatever you wish.

10 MR. THOMAS: Well, thank you, Madam Chair.
11 Commissioners, I come to you on behalf of a guy who,
12 you know, you have no way of knowing, I suppose, what
13 he's like in person, and I've never met him face to
14 face. I've only dealt with him on the phone. But
15 this is a man who is just absolutely stunned at what
16 has happened to him, and he has faith that he will be
17 able to beat back the charges that are pending against
18 him in Utah by the state level, the special
19 prosecutors that are lined up against him.

20 He admits he's not a perfect person, but he
21 sort of asks you to just think about the credibility
22 of Jeremy Johnson. That's the central issue in this
23 matter. Who should you believe? Who should you
24 believe? And Jeremy Johnson, he is a desperate man
25 and he's trying to get revenge. He's trying to bring

1 John Swallow down, and there's been a concerted effort
2 to do this for some time. He beats some folks in an
3 election and they have, I guess, sworn to make his
4 life miserable hereafter.

5 So, I ask you to keep all that in the proper
6 context. It's the way I think that you should
7 evaluate all the evidence in this matter, and if the
8 question is is there probable cause I hope you will
9 think probably not. Thank you.

10 CHAIRWOMAN RAVEL: Thank you very much, Mr.
11 Thomas and Mr. Lancaster, for your presence here
12 today, and as I indicated previously the Commission
13 will make the transcript available to you as soon as
14 it's available.

15 MR. THOMAS: Great. Thank you.

16 CHAIRWOMAN RAVEL: Thank you. Thank you.
17 So this hearing is adjourned.

18 (Whereupon, at 11:29 a.m. the hearing in the
19 above-entitled matter was concluded.)

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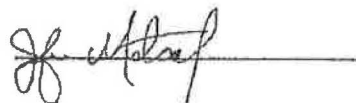
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REPORTER'S CERTIFICATE

DOCKET NO.: MUR 6850
CASE TITLE: In the Matter of John Swallow
HEARING DATE: September 30, 2015
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Election Commission.

Date: September 30, 2015

A handwritten signature in dark ink, appearing to read "Jen Metcalf", is written over a horizontal line.

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