



COMMISSIONER ELLEN L. WEINTRAUB
 FEDERAL ELECTION COMMISSION
 WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)	
)	
John Ellis Bush,)	MURs 6915 & 6927
Right to Rise USA, <i>et al.</i>)	
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STATEMENT OF REASONS OF COMMISSIONER ELLEN L. WEINTRAUB

Of all the meritorious enforcement complaints Republican commissioners have blocked the Commission from pursuing over the years – and they are legion – my former colleagues’ refusal to enforce the law in this matter ranks as among the most egregious. In blatant violation of the contribution limits and soft money restrictions in the Federal Election Campaign Act, as amended (the “Act”),¹ John Ellis “Jeb” Bush spent the first half of 2015 crisscrossing the country at the expense of a “leadership PAC,” helping to raise over \$100 million for a super PAC that he was integrally involved with and that was dedicated to electing him president. Every member of the Commission knew there was something wrong with that scenario.

Unfortunately, while my Republican colleagues were willing to acknowledge that Bush and his campaign filed a late statement of candidacy, and possibly received excessive in-kind contributions in the form of subsidized travel expenses, they would not lift a finger to investigate the question that *really* mattered here – whether candidate Bush established, financed, maintained, or controlled the Right to Rise USA super PAC (“RTR USA super PAC”). If he did, the millions of dollars in soft money it raised and spent would have been illegal. And I believe it would have been a dereliction of duty to have administered a slap on the wrist for a potential \$100 million violation.

The Commission’s nonpartisan Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that multiple provisions of the Act had been violated. The most minor violation (but one with huge ramifications) was that Bush’s statement of candidacy was filed late. Next, the leadership PAC’s funding of Bush’s travel expenses, whether he was “testing the waters” or actively campaigning, represented an illegal excessive in-kind contribution to his ultimate presidential campaign. But the most outrageous potential violation was that if Bush were already a candidate in the first half of 2015, it followed that virtually the entire \$100+ million raised and spent by the super PAC was a *colossal* soft-money violation.

¹ 52 U.S.C. § 30101, *et seq.*

The only way this was arguably legal was if Bush hadn't yet decided whether to throw his hat into the ring. The problem is this: All members of the Commission voted to find reason to believe that Bush indeed became a presidential candidate before he filed his Statement of Candidacy with the Commission in June 2015.² This is not surprising. That Bush had decided to run for president long before then was the worst-kept secret in the country. *Everyone* knew he was running. Even he couldn't seem to stop himself from acknowledging it.

In January 2015, for example, Bush told the "Morning Joe" audience on MSNBC about a private conversation he had had with 2012 GOP presidential nominee Mitt Romney in which "we talked about the campaign 'cause he was thinking about running. I went out to see him. *I wanted him to know that I was all in and that I had a plan to win this, and I still do.*"³ In May 2015, Bush told a town hall meeting in Reno, Nevada, "*I am running for president in 2016, and the focus is going to be about how we, if I run, how do you create high sustained economic growth.*"⁴

Bush, his aides, and his family helped the leadership PAC (Right to Rise PAC or "RTR PAC") and the RTR USA super PAC raise upwards of \$108 million.⁵ Raising millions of dollars in soft money would have been illegal for someone who was – as Bush said he was – "all in." OGC presented the Commission⁶ with ample evidence that Bush was deeply enmeshed in the super PAC supporting his candidacy:

- The commonalities between the RTR PAC, (which was founded and led by Bush himself), and RTR USA super PAC, were striking. The two groups have virtually the same name. They registered their existence with the Commission on the same day. The same person administratively established both entities and simultaneously served as counsel for RTR

² An individual becomes a candidate for office under the Act if that individual receives contributions or makes expenditures in excess of \$5,000, or has another person do the same on their behalf. 52 U.S.C. § 30101(2). That individual then has fifteen days to file a Statement of Candidacy with the Commission. § 30102(e)(1); 11 C.F.R. § 101.1(a). *See* Certification, MURs 6915 & 6927 (John Ellis Bush), Dec. 6, 2018 (Commissioners Weintraub and Walther voting to find reason to believe that Bush violated 52 U.S.C. § 30102(e)(1) by failing to timely file a Statement of Candidacy); Certification, MURs 6915 & 6927, Dec. 13, 2018 (Commissioners Hunter and Petersen voting to find reason to believe that Bush violated § 30102(e)(1) by failing to timely file a Statement of Candidacy).

³ Third Supp. Compl. at 2, MUR 6915 (Feb. 16, 2016) (*emphasis added*) (citing Kyle Cheney, *Watchdog Accuses Bush of Illegally Conveying His Intention to Run*, POLITICO (Jan. 5, 2016); <http://www.msnbc.com/morning-joe/watch/bush--trump-is-a-buddy-of-the-clintons-595966531784>).

⁴ MUR 6915 Supp. Compl. at 1 (citing Michael Barbaro, *Jeb Bush Declares His Candidacy – Prematurely*, NY Times (May 13, 2015) (*emphasis added*), <http://www.nytimes.com/politics/first-draft/2015/05/13/jeb-bush-declares-his-candidacy-prematurely>; T. Schleifer, *It's Getting Harder for Jeb Bush to Pretend He's Not Running for President*, CNN Politics (May 13, 2015), <http://www.cnn.com/2015/05/13/politics/jeb-bush-miscue-2016-campaign-finance/>); MUR 6927 Supp. Compl. at 2-3 (citing P. Blumenthal, *Jeb Bush Messes Up Charade of Not Running for President*, The Huffington Post (May 13, 2015)).

⁵ Bush established Right to Rise PAC, a multicandidate committee for which he served as its Honorary Chairman. Right to Rise USA, an independent expenditure-only political committee or "super PAC," described itself as the "leading independent political action committee strongly supporting Jeb Bush for President." Resp. of Jeb Bush, *et al.*, at 4, MUR 6915 (Nov. 27, 2015).

⁶ First General Counsel's Report ("FGCR"), MURs 6915 & 6927 (John Ellis Bush), throughout, and specifically at 21-22.

PAC and as treasurer and counsel for RTR USA super PAC.⁷ It was undisputed that Bush established RTR PAC. There was reason to believe that Bush or his agents also established RTR USA super PAC.

- RTR USA super PAC was led and staffed by longtime Bush advisers and members of his inner circle.⁸
- Bush directly provided RTR USA super PAC with material to support his candidacy. It's bad enough when candidates post public videos on their websites for super PACs to download. Here, Bush cut out the middleman and *sat down with film crews from RTR USA super PAC for hours of interviews* that could later be sliced and diced during the campaign as raw material for RTR USA super PAC's commercials.
- Bush played a central role in RTR USA super PAC's fundraising. "At a meeting with lobbyists in Washington, D.C. on January 20, 2015, Bush apparently announced his plan to hold 60 fundraisers for both RTR PAC and [RTR USA super PAC]," according to OGC. "The Responses do not refute Bush's involvement in this event. Even if Bush was not directly asking for funds at this event, as Respondents contend, Bush's involvement in this event reflects that Bush was not only a featured speaker at [RTR USA super PAC] fundraisers but also may have had a role in planning them as well."⁹

The law requires super PACs to operate independently from federal candidates or their agents.¹⁰ That law was put in place to ensure that soft money – money not subject to the contribution limitations of the Act – would not make its way into federal campaigns.¹¹ The Act specifically and quite clearly states:

A candidate... or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates... shall not – (A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act[.]”¹²

In plain English, the law bars federal candidates (and entities they establish, finance, maintain, or control) from raising soft money – and RTR USA super PAC scooped up more than \$100 million

⁷ *Id.* at 6.

⁸ FGCR, *supra* note 6, at 8.

⁹ *Id.* at 22.

¹⁰ See 52 U.S.C. § 30125(e)(1)(A); see also 11 C.F.R. § 300.61.

¹¹ See *McConnell v. FEC*, 540 U.S. 93, 133 (2003).

¹² 52 U.S.C. § 30125(e)(1). Super PAC funds are soft money because they are exempt from the contribution and expenditure limitations of the Act.

in soft money. But when the time came to connect the dots and pursue this \$100+ million violation, the Republican commissioners blocked the Commission from doing so.

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My former colleagues' refusal to pursue the \$100+ million soft-money violation is inexplicable and, indeed, it has been left unexplained. In the context of a complainant lawsuit filed pursuant to 52 U.S.C. § 30109(a)(8), the D.C. Circuit currently requires courts to defer to the statement of reasons written by the commissioner or commissioners whose votes at the reason-to-believe stage prevented a complaint from moving forward against the advice of the Commission's attorneys.¹³ I have argued strongly that the Circuit's precedent stems from a fundamental misreading of how the Commission actually handles its enforcement matters, but for the moment, this is the law.¹⁴

Nothing precluded the Republican commissioners who voted not to pursue the RTR USA super PAC violations from writing a statement and leaving it with the files of this matter before they quit the Commission. They simply did not do so. My current Republican colleagues never voted on the merits of this matter and have pointedly disclaimed any opinion on the merits of this matter.¹⁵ The Commission's dismissal of the \$100+ million allegation in this matter is thus utterly unexplained, and under D.C. Circuit precedent, literally no one has *any* authority to explain it.

The Commission has thus turned a blind eye to an alleged nine-figure violation of a core provision of the Act with nary a word of explanation. If that's not arbitrary and capricious, I don't know what is.

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My vote, as it happens, was the one that kept the Commission from pursuing the leadership PAC allegation. On Dec. 13, 2018, I voted against the last RTB motion the Commission considered, which included pursuing that allegation but not the super PAC allegation.¹⁶ When the Commission

¹³ See, e.g., *Democratic Cong. Campaign Comm. ("DCCC") v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) ("If three or more Commissioners vote against moving forward, this controlling group must provide a statement of reasons for that decision").

¹⁴ The Circuit is currently considering whether to review the panel decision in *Citizens for Responsibility & Ethics in Wash. v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models panel decision*"). See Ellen L. Weintraub, *Statement On the Opportunities Before the D.C. Circuit in the New Models Case To Re-Examine En Banc Its Precedents Regarding 'Deadlock Deference'* (March 2, 2022) ("*Weintraub New Models Statement*"), found at https://www.fec.gov/documents/3674/2022-03-02-ELW-New-Models-En_Banc.pdf. Petition for Rehearing *En Banc, CREW v. FEC* ("*New Models en banc petition*"), No. 19-5161 (D.C. Cir.), found at https://www.fec.gov/resources/cms-content/documents/crew_195161_pet_rhrg.pdf.

¹⁵ Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MURs 6915 & 6927 (John Ellis Bush), May 13, 2022, at 1, 6.

¹⁶ Certification, MURs 6915 & 6927 (John Ellis Bush), Dec. 13, 2018.

voted 4-1-1 to dismiss the matter almost four years later on August 29, 2022,¹⁷ the D.C. Circuit’s legal errors and my dear colleague Steven T. Walther’s retirement from the Commission left me as the only commissioner with any authority to explain the Commission’s actions here.

Ordinarily, those explaining a dismissal’s rationale agree with the outcome and explain all the ways the dismissal was not contrary to law. Not today.¹⁸

I’ll start with a reason that the dismissal of the leadership PAC allegation is arbitrary and capricious but one that, oddly, apparently does *not* count toward making this dismissal contrary to law under D.C. Circuit precedent. When the Commission voted 4-1-1 on August 29, 2022 to dismiss this matter, it took the action over which a complainant may sue the Commission under the Act, should it choose to do so.¹⁹ But none of the commissioners who successfully voted to dismiss the matter ever voted on the *merits* of the matter.²⁰

One might think that in evaluating why the Commission voted to dismiss this matter, the D.C. Circuit might want to hear from the commissioners who voted Yes on the successful motion for the Commission to dismiss the matter. But no – instead, the Circuit’s errant precedent requires courts to defer only to the single commissioner who voted *against* dismissing this matter – me.

¹⁷ Certification, MURs 6915 & 6927 (John Ellis Bush), Aug. 29, 2022 (Commissioners Cooksey, Dickerson, Lindenbaum, and Trainor voting to close the file and send the appropriate letters; Commissioner Weintraub dissenting; Commissioner Broussard abstaining).

¹⁸ A lurking question here is: what constitutes the FEC’s administrative record in this or any other enforcement matter? This statement, for instance, was not before this agency when it decided to dismiss this matter. Can it be considered by a court to be part of the administrative record of this matter? The question has not been put directly before the D.C. Circuit in the context of FEC decisions.

The D.C. Circuit defines an agency’s administrative record as all materials compiled by the agency that were before the agency at the time a decision was made, and it confines a court’s review to the administrative record. *See, e.g., James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C.Cir.1996) (“The APA requires courts to “review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. “Ordinarily, courts confine their review to the “administrative record.” *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 617–18 (D.C.Cir.1988). The administrative record includes all materials “compiled” by the agency, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971), that were “before the agency at the time the decision was made,” *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C.Cir.1981).”).

The decision the agency made in this matter – the decision upon which the complainant may file an (a)(8) dismissal suit – took place on Aug. 29, 2022, when a majority of commissioners voted in favor of a motion to dismiss this matter and close the administrative record (literally referred to as a “close the file” motion in FEC parlance). On that day, this Statement of Reasons was neither released nor written. This statement was not, needless to say, before the agency at the time its decision was made on Aug. 29, 2022, as the D.C. Circuit requires all items in the administrative record to be for a court to consider them.

The effect of disregarding this statement of reasons would be to render the *entire* dismissal of the complaint necessarily arbitrarily and capriciously contrary to law, as, then, none of the Commission’s actions would bear any explanation at all.

¹⁹ 52 U.S.C. § 30109(a)(8).

²⁰ *See* Certification, MURs 6915 & 6927 (John Ellis Bush), Aug. 29, 2022, *supra* note 17. Commissioners Cooksey, Dickerson, Lindenbaum, and Trainor were not serving on the Commission when the RTB votes in this matter were taken in 2018 and 2019.

Next, I will rule out two reasons for the dismissal of the leadership PAC allegation:

First, the Commission did *not* dismiss the leadership PAC allegation pursuant to its prosecutorial discretion.²¹ To be clear: this matter’s Controlling Statement of Reasons unequivocally disclaims prosecutorial discretion as a motive for the Commission’s dismissal of the \$5 million leadership PAC allegation.²² It should be noted that the Commission voted on two separate motions to dismiss this entire matter pursuant to its prosecutorial discretion, on May 23, 2019 and June 23, 2020; no commissioner voted for either motion and both failed 0-2-2.²³ When the Commission votes on a specific motion on whether to exercise its prosecutorial discretion, and that motion fails, courts should not entertain the harmful legal fiction that the Commission did indeed exercise that authority just because several commissioners – less than a majority – later write that they, individually, *wanted* to have done so.²⁴

Second, the Commission did *not* dismiss this matter because the statute of limitations had elapsed.²⁵ Three of my colleagues who never voted on the merits of this matter opine in a statement that they believe the statute of limitations had lapsed. This is incorrect.²⁶ The Commission has considerable equitable remedies available to it that are not subject to 28 U.S.C. § 2462. The general statute limits itself quite specifically to any action, suit, or proceeding for the enforcement of “*any civil fine, penalty, or forfeiture, pecuniary or otherwise.*” This describes some of the tools Congress has given the Commission to enforce the law, but not all of them.

²¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

²² And prosecutorial discretion cannot properly be inferred as explaining the rest of the matter that lies entirely unexplained.

²³ Certification, MURs 6915 & 6927 (John Ellis Bush), May 23, 2019 (Commissioners Weintraub and Walther voting No on motion to dismiss case on the grounds of prosecutorial discretion; Commissioners Hunter and Petersen abstaining); Certification, MURs 6915 & 6927 (John Ellis Bush), June 23, 2020 (Commissioners Weintraub and Walther voting No on motion to exercise the Commission’s prosecutorial discretion and dismiss the matter subject to *Heckler v. Chaney* [*supra* note 21]; Commissioners Hunter and Trainor abstaining).

²⁴ At the moment, however, the D.C. Circuit *does* entertain this harmful legal fiction. See *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (“*CHGO*”), *pet. for reh’g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 993 F.3d 880 (D.C. Cir. 2021), *pet. for reh’g en banc pending*.

²⁵ It is worth noting that whether the statute of limitations has elapsed is a legal judgment not properly subject to prosecutorial discretion. If the statute has indeed run on a matter, the Commission lacks the discretion to choose to pursue financial penalties in that matter. Every assertion that the statute of limitations has elapsed draws on an evaluation of the facts of the matter and an evaluation of a statutory provision outside the Act (28 U.S.C. § 2462) and the judicial glosses on that statute – all of which are matters subject to judicial review under the Act. See 52 U.S.C. § 30109(a)(8).

²⁶ Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III, MURs 6915 & 6927 (John Ellis Bush), May 13, 2022, at 1, 6. This statement has no bearing on the Commission’s position in this matter, but it is worth noting that their analysis fails to take into account the Commission’s equitable remedies, plus they cite 52 U.S.C. § 30145(a) as applying to the Commission’s authority in this matter, where that statute applies only to criminal prosecutions. Regardless of their error, under D.C. Circuit precedent, my colleagues’ statement carries zero legal weight in this matter.

One power of the Commission is to levy “a civil penalty.”²⁷ This falls directly under the “civil fine, penalty, or forfeiture” terms of 28 U.S.C. § 2462. The law is clear that past the five-year statute of limitations, the Commission may not impose a civil penalty on a respondent. But the Act separately gives the Commission the power to “institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order[.]”²⁸ These are the Commission’s “equitable remedies.” Equitable remedies are had when the Commission compels a respondent to, say, file missing reports, amend its filings, register as a political committee, halt a current practice, or attend compliance training. Equitable remedies are also had when the Commission signs agreements with respondents where respondents agree to desist from violating the law going forward, not to work for a federal political committee for a specified period of time, or to secure their own independent compliance audits and provide the Commission with the results.²⁹ None of these equitable remedies involve paying a fine or suffering some other monetary penalty. 28 U.S.C. § 2462 cannot reasonably be read to extend to the Commission’s equitable remedies.

In this matter, the Commission has substantial equitable remedies available to it. Had it pursued this matter, the Commission could have sought, for example, to have all relevant entities update their filings with the Commission and disaggregate their expenditures. And if the Commission made a finding that Bush was a candidate on a certain date, it could have required all relevant entities to disclose what had previously been styled as pre-candidacy expenditures.

Finally, I will explain why the Commission dismissed the potentially \$5 million leadership PAC allegation, and explain why this dismissal is contrary to law.

In a nutshell, I voted against pursuing the well-documented leadership PAC allegation because the only path forward on that allegation would have been to ignore the much larger and also very well-documented \$100+ million RTR USA super PAC allegation. This result would have been gravely contrary to law.³⁰

The Commission’s eventual dismissal of the leadership PAC allegation in August 2022 was itself contrary to law because it unreasonably ignored the facts and reasoning outlined in the General Counsel’s Report,³¹ which I incorporate by reference here. Among them, in addition to the

²⁷ 52 U.S.C. §30109(a)(5)(A).

²⁸ 52 U.S.C. §30109(a)(6); *see also Christian Coalition*, 965 F.Supp. at 72 (“Under the FECA, the Commission has the authority to seek injunctive relief wholly separate and apart from its authority to seek a legal remedy”) (*citing* 52 U.S.C. §30109(a)(6)’s antecedent).

²⁹ Courts also have equitable remedies available in FECA-related matters, such as issuing a declaratory judgment that the conduct at issue violated the Act.

³⁰ Note that this matter represents a consequential instance in which a commissioner’s vote on an RTB motion does not track with that commissioner’s desire to dismiss the matter. They are not the same vote, and they do not have the same rationales. *See Weintraub New Models* Statement, *supra* note 14, at 2 (“Though the Court has, in dicta, analytically conflated split enforcement votes and dismissal votes, they are two separate votes, taken at two separate times, with two different voting lineups.”) and at 10-11.

³¹ FGCR, *supra* note 6.

ones detailed above on pages 2-3: Bush solicited no contributions for his actual campaign while testing the waters.³² The leadership PAC spent only 5% of its funds on contributions to other federal committees and candidates; most of its spending supported Bush’s testing-the-waters travel and fundraising.³³ The Commission has no information that Bush talked about any other conservative candidates when the leadership PAC was paying his travel expenses – just his own qualifications and accomplishments. The leadership PAC’s activities significantly declined after Bush declared his candidacy.³⁴ During the time that Bush acknowledged traveling the country to test the waters, his campaign incurred hardly any travel expenses while RTR PAC paid \$800,000.³⁵

Because a dismissal of the potentially \$5 million leadership PAC allegation was unreasonable, given the facts before the Commission and the law governing this activity, I voted against dismissing the allegation and the matter in general.³⁶

The trigger for Commission action in an enforcement matter is a finding, based on information received in a complaint or in the course of its supervisory responsibilities, that the Commission has “reason to believe that a person has committed, or is about to commit, a violation” of the Act (“reason to believe” or “RTB,” in FEC shorthand).³⁷ This finding requires the affirmative vote of four or more commissioners.³⁸ The Commission’s standard for finding RTB in an enforcement matter is when “a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.”³⁹

The available information shows that Bush and his aides, prior to announcing his candidacy, shared information with the super PAC about his strategic plans, projects, activities, needs, campaign messaging, and scheduling plans for his intended campaign.⁴⁰ Mike Murphy, RTR USA super PAC’s CEO, reportedly told donors after Bush declared candidacy that “he ‘can’t coordinate *anymore*’ with the campaign, but said he was ‘well informed as of a week ago.’”⁴¹ RTR USA super PAC had raised most of its funds by June 2015; the amount raised dwarfed what Bush raised for his actual presidential campaign.⁴²

³² *Id.* at 6.

³³ *Id.* at 8, 11-12.

³⁴ *Id.* at 30.

³⁵ *Id.* at 28-30.

³⁶ Certification, MURs 6915 & 6927 (John Ellis Bush), Aug. 29, 2022 (Commissioner Weintraub voting No).

³⁷ 52 U.S.C. § 30109(a)(2).

³⁸ *Id.*

³⁹ Federal Election Commission, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545 (Mar. 16, 2007).

⁴⁰ FGCR, *supra* note 6, at 17.

⁴¹ *Id.* at 9, note 38 (emphasis added).

⁴² *Id.* at 11.

My former colleagues were willing to find RTB that Bush had committed a violation of the Act regarding the late statement of candidacy. They were willing to find RTB on the in-kind contributions from the leadership PAC (although it was unclear whether they would ultimately be willing to pursue that violation and impose any penalty for it, no matter what any investigation may have turned up).

But when it came to the heart of the complaint – the RTR USA super PAC allegations – my former colleagues refused to move forward, despite a record that easily cleared the Commission’s RTB threshold.⁴³ The votes blocking an RTB finding on the RTR USA super PAC allegations led to a dismissal that was contrary to law because those votes were cast in disregard for the Commission’s legal standard for finding RTB. The complaint in this matter alleged a violation that was not just significant, but massive, and did so not just credibly but compellingly.

Because my colleagues refused to pursue the RTR USA super PAC allegation, I was left with the option of a tepid “take no action at this time” on it, relying on the faint hope that an investigation into the leadership PAC might fortuitously turn up some evidence about RTR USA super PAC that my colleagues might find persuasive. My years of working with them counseled me not to hold my breath on that.

I am willing to compromise – half a loaf is generally better than none. But in this case, I was not being offered portions of loaves, or even thin slices of bread – just bread crumbs. Under ordinary circumstances, a potential \$5 million violation would be well worth pursuing – but not here, not at the cost of sacrificing a potential \$100 million violation. Five cents on the dollar is not a serious offer. Though my colleagues professed to be surprised when I turned it down, they shouldn’t have been.

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Whether the Commission’s dismissal of an enforcement-complaint allegation comports with the law depends on whether it was reasonable. That is what is missing here. Why would Bush spend six months helping to raise \$100 million for a super PAC dedicated solely to electing him had he not already decided to run? No other explanation is reasonable or remotely credible.

The unreasonableness of this dismissal strikes at the heart of the Act and at the core mission of the Commission to “protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws.”⁴⁴ In *Buckley v. Valeo*, the Supreme Court upheld contribution limits as “necessary . . . to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.”⁴⁵

⁴³ I believed that Bush’s extensive participation in the extraordinary fundraising activities of RTR Super PAC merited an RTB finding under this standard, and, accordingly, voted RTB on the corresponding allegation.

⁴⁴ FEC, “Mission and history,” *found at* <https://www.fec.gov/about/mission-and-history/>.

⁴⁵ 424 U.S. 1, 28 (1976).

These words have no meaning if the candidate can participate in raising \$100 million in unlimited donations to a super PAC doing nothing but supporting his presidential campaign by simply pretending not to have made up his mind. How can the activities of that super PAC, given all the connections, be considered “independent”? There was reason to believe that Bush and/or his agents established, financed, maintained or controlled the RTR USA super PAC.

Pre-2010, testing the waters cases had a relatively low impact on the process. If a candidate abused the testing the waters provision, their disclosures might be delayed by a few months. But way before the election, they would have to start openly campaigning and asking people for their votes. At that point, disclosure statements would be filed and the electorate would get the transparency the law requires well in advance of voting. In the era of super PACs, though, candidates like Bush who game the testing the waters rules position themselves to raise vast sums of illegal funding. And if you think this case is a quaint relic of a long-gone election, wait 'til you see the impact this kind of gamesmanship could have on the 2024 election.

In a more functional era for the Commission, commissioners worked hard to find a place where four commissioners could find common ground. Now, however, it has become common practice for half the Commission to simply block enforcement of the law. Such was the case in this matter. Accordingly, it should come as no surprise that many complainants have sought recourse from the courts. Congress anticipated that this bipartisan Commission would sometimes split on enforcement votes and provided a mechanism for the Commission's failure to enforce the law to obtain judicial review. I make no apologies for using the provisions that Congress enacted to try to ensure that those complaints can get a fair hearing in the courts. Those who file complaints before the Commission deserve a meaningful review of their allegations, either by a Commission that will do its job to enforce the law or by a court that will do so.

Sept. 30, 2022



Ellen L. Weintraub
Commissioner