

ideas in the public forum.⁵ Santorum served as Co-Chair of Patriot Voices from May 2012 to May 4, 2015.⁶ The PAC — Patriot Voices’ “political arm”⁷ — registered with the Commission in August 2012 as a non-connected committee, and the PAC was engaged in the 2014 and 2016 election cycles.⁸ Santorum participated in the efforts of both the 501(c)(4) and the PAC.⁹

On April 6, 2015, Santorum announced that he was evaluating a presidential candidacy, and established a testing-the-waters account.¹⁰ Prior to that announcement, various media outlets speculated on whether Santorum would again run for president.¹¹

A. Complaint & Responses

Relying heavily on this media speculation, the Complaint alleges that Santorum engaged in unreported testing-the-waters activities in early 2015, primarily paid for by Patriot Voices and the PAC.¹² Specifically, the Complaint alleges that Santorum’s testing-the-waters activities included private meetings and public events that were masked as Patriot Voices and PAC activities. Respondents, however, deny that these were Santorum’s testing-the-waters activities and assert instead that they were either Santorum’s personal activities or *bona fide* Patriot Voices and PAC activities.

1. *Private Events in the District of Columbia, Arizona, and Virginia*

The Complaint alleges that three private meetings that Santorum attended in January 2015 were testing-the-waters activities. Quoting a news article, the Complaint alleges that, on January 13, 2015, Santorum “huddled in Washington with 33 friends and advisors . . . to discuss

⁵ Affidavit of Nadine Maenza, Executive Director of Patriot Voices ¶¶ 2-3 (citing About Patriot Voices, PATRIOT VOICES, www.patriotvoices.com/about (last visited May 15, 2019); *see also* Affidavit of Shelley Ahlesmeyer, National Grassroots Director of Patriot Voices ¶¶ 2-3.

⁶ Santorum Aff. ¶¶ 2-5.

⁷ *Id.* ¶ 5.

⁸ *See* First General Counsel’s Report at 11, MUR 6928 (Santorum).

⁹ Santorum Aff. ¶¶ 3-5, 10.

¹⁰ Joint Response of Rick Santorum, Patriot Voices, and Patriot Voices PAC Resp. (“Resp.”) at 2 (June 1, 2015).

¹¹ *See, e.g.*, Compl. nn. 1-4 (citing Cameron Joseph, *Santorum, top backer gathering support*, THE HILL (Jan. 15, 2015); Shushannah Walshe, *Rick Santorum Preps for 2016, Meets with Aides to Plan Details*, ABC NEWS (Jan. 21, 2015); Robert Costa, *GOP donor Foster Friess launches new effort to boost Rick Santorum*, WASH. POST (Jan. 14, 2015)).

¹² Compl. at 11-12. The Complaint also alleges that Santorum became a candidate by March 2015 and failed to timely register and report his activities with the Commission. OGC, however, concluded that there were not “sufficient facts” to determine that Santorum was a candidate before May 28, 2015, FGCR at 27, MUR 6928 (Santorum), and recommended that the Commission take no action on that allegation. We agreed with OGC that there were insufficient facts to conclude that Santorum was not a candidate before May 28.

his 2016 plans,” and that, according to “Santorum confidant” Matthew Beynon, Santorum described the lessons he learned from 2012 at the event and how he was preparing for a 2016 run.¹³ The Respondents deny the allegation. Under oath, Beynon described the Washington event as a “reunion” of former Santorum staff and family, “which was one of numerous that [Santorum’s staffers] have had over the years.”¹⁴ Beynon recounts that, at the reunion, Santorum spoke about Patriot Voices, his daughter and a book he had written about her, and his experiences from his 2012 candidacy. Beynon asserts that, although Santorum was asked whether he might again run for President and was “encouraged” to do so, Santorum did not state any intention of running.¹⁵

Next, the Complaint alleges that Foster Friess (who had donated money to a pro-Santorum super PAC in 2012) “hosted a ‘private gathering’” for Santorum on the weekend of January 15, 2015, in Scottsdale, Arizona.¹⁶ There, Santorum was reportedly “expected” to obtain financial backing for a campaign.¹⁷ Respondents assert that press reports on the issue are inaccurate, explaining that the quote in the article “was prospective and speculative and was *not* a statement about what actually transpired at the meeting.”¹⁸ Instead, Respondents state that the event was a golf outing to raise funds for Patriot Voices,¹⁹ “something [Friess] ha[d] done regularly over the past several years,”²⁰ and where “there was no discussion at that event about a Santorum presidential candidacy in 2016.”²¹

Last, the Complaint claims that, on January 21, 2015, Santorum held a four-hour-long meeting with “advisors” to create a strategy for Santorum’s “possible new presidential bid.”²² Respondents deny this claim, too. Under oath, the Executive Director of Patriot Voices, Nadine Maenza, asserts that the meeting “was the annual planning meeting for Patriot Voices, which reviewed the past year’s activities, issues, and fundraising and developed the strategic plans for Patriot Voices for the coming year.”²³ She acknowledges that attendees discussed “press

¹³ Compl. at 2, n.3 (quoting Costa, *supra* n. 11) (internal quotes omitted).

¹⁴ Resp. at 3; Affidavit of Matt Beynon ¶¶ 3-4.

¹⁵ Beynon Aff. ¶ 9.

¹⁶ Compl. at 2-3.

¹⁷ *Id.*

¹⁸ Resp. at 3.

¹⁹ Maenza Executive Director Aff. ¶ 12.

²⁰ *Id.*

²¹ *Id.*

²² Compl. at 3.

²³ Resp. at 3; Maenza Executive Director Aff. ¶ 13.

reports” of Santorum’s potential run and “contingency plans in the event our national co-chairman . . . should decide to seek the Republican nomination.”²⁴

2. *Appearances at the Iowa Freedom Summit and Conservative Political Action Conferences (CPAC)*

The Complaint also argues that Santorum was testing-the-waters when he attended the Iowa Freedom Summit and CPAC. Respondents deny this claim. They assert that Santorum spoke at the Iowa Freedom Summit about numerous issues and, while he mentioned the role of Iowans in the primary process and his success there in 2012, he did not refer to a potential 2016 candidacy in his remarks.²⁵

At CPAC, which Santorum has attended as a “featured speaker . . . for more than a dozen years,”²⁶ Santorum discussed his 2012 Presidential campaign, as well as what it would take for any candidate to win the 2016 Republican nomination.²⁷ After concluding his speech, Santorum responded to questions submitted by “conservatives all across the country” that were presented by a moderator. Before the Q&A began, the moderator explained to Santorum that the questions were being asked to all individuals “the media consider[ed] . . . [to be] a Presidential candidate.”²⁸ The topics discussed included national security, his religious background, and education reform.²⁹ There were no questions regarding Santorum’s potential candidacy.³⁰ Patriot Voices and Santorum further assert that Santorum represented Patriot Voices at these events to recruit volunteers for Patriot Voices.³¹

3. *Alleged Support from Patriot Voices and the PAC*

The Complaint also alleges that Friess made a \$250,000 contribution to the PAC; that several individuals were named to the “senior finance team” of Patriot Voices and the PAC in

²⁴ Maenza Executive Director Aff. ¶ 13.

²⁵ Resp. at 4 (linking to a video of Santorum’s remarks at the Iowa Freedom Summit) (“You made a good decision and you’ll have to do that again. I just want to encourage you . . . The last time around, everyone told you no . . . don’t pick this person . . . and you said I think we’ll vote for the best person we believe has the best chance, not who Washington and New York think has the best chance.”); *id.* (“I just would say I agree with Chuck Grassley and all the others who say that it is well worth the mileage and the sleep to go to all 99 counties in Iowa. If any one of these other guys want a travel log, I’ll be happy to share it with them.”).

²⁶ Resp. at 5.

²⁷ *See generally* Santorum Remarks at CPAC (Feb. 27, 2015); *see also* First General Counsel’s Report at 19, MUR 6928 (Santorum).

²⁸ Santorum Remarks at CPAC (Feb. 27, 2015).

²⁹ *Id.*

³⁰ *Id.*

³¹ Santorum Aff. ¶¶ 9-10; *see also* Maenza Executive Director Aff. ¶ 10; Ahlesmeyer Aff. ¶¶ 5-6.

January 2015; and Iowa Representative Walt Rogers was selected to serve as the “Iowa chairman” of Patriot Voices.³² The Complaint does not expressly identify the significance of these alleged facts.

Although Respondents acknowledge their close working relationship with one another during Santorum’s years as co-Chairman, Respondents deny that Patriot Voices or the PAC had any involvement in Santorum’s testing-the-waters efforts. Maenza avers that, as Executive Director of Patriot Voices, she has “done everything possible to make certain that Patriot Voices funds have been spent solely for purposes to benefit Patriot Voices and not for the benefit of Sen. Santorum either personally or politically.”³³ Instead, “Patriot Voices’ efforts in 2015 have been dedicated to fundraising and developing the resources to build our national grassroots capabilities.”³⁴ She denies that Patriot Voices made any contributions to Santorum, stating that Patriot Voices has made no contributions or expenditures to Santorum, including with respect to any testing-the-waters activities.³⁵ As treasurer of the PAC, Maenza denies that the PAC paid any travel expenses for Santorum and asserts that the PAC has not paid any expenses associated with any candidate running for office in 2016.³⁶

B. Other information

OGC augmented the Complaint in this matter, primarily with news articles, and thus raised factual allegations that the Respondents have not been able to address. First, at a PAC fundraiser in Mississippi, Santorum responded to a question from a journalist by stating that he was “open to running in 2016” and acknowledged that he had “met with some supporters . . . who were very encouraging”³⁷

Second, OGC highlights Santorum’s response to questions at the South Carolina Tea Party Convention in January 2015.³⁸ Santorum was asked how he would distinguish himself from other Tea Party Republicans, to which he responded, “. . . the decision making process we’re going through really has nothing to do with who else is in the race. People asked me the other day what role do you want to play in this election? And I look back and I say, the winner.” He explained, “. . . if you’re going to do this and take the time away from your family and ask people to join you and sacrifice like so many other did last time around. You do it to win”

³² Compl. at 4-5.

³³ Maenza Executive Director Aff. ¶ 19; *see also id.* ¶ 7 (“I have worked hard to . . . make certain that Patriot Voices funds are not spent for political or candidate-related purposes.”).

³⁴ *Id.* ¶ 10.

³⁵ *Id.* ¶ 9.

³⁶ Maenza Treasurer Aff. ¶¶ 2-3.

³⁷ First General Counsel’s Report at 16-17 (citing Geoff Pender, *Santorum Tests 2016 Waters, Backs Away from McDaniel*, THE CLARION-LEDGER, Oct. 8, 2014).

³⁸ *Id.* at 17-18.

In the same interview, Santorum was asked, “You’re about to have a chance to lay out that vision in the Crocker Ballroom. Let’s look into your crystal ball. Let’s say Rick Santorum is the nominee in 2016. Do we flip the key stone state from blue to red?” Santorum responds, “In order to win Pennsylvania . . . just go across the states. You have to have a message that says decent hard working Americans, we’re on your side.” To conclude, the interviewer states, “Can he be President? He’s going to lay out his vision here in just a second.”³⁹

C. OGC’s Recommendations

OGC recommended that the Commission find reason to believe that (1) Santorum violated 11 C.F.R. §§ 100.72 and 100.131 by using non-federal funds to test the waters; (2) Patriot Voices and the PAC made, and Santorum and Santorum for President 2016 accepted, excessive and/or prohibited contributions in violation of 52 U.S.C. §§ 30116(a), (f), and 30118(a); and (3) Santorum for President violated 52 U.S.C. § 30104(a) and 11 C.F.R. §§ 100.72 and 100.131 by failing to file reports of receipts and disbursements covering the testing the waters period.⁴⁰

We voted against these recommendations.

II. LEGAL ANALYSIS

The Complaint fails to establish reason to believe that Santorum paid for testing-the-waters expenses with unreported, soft money payments by Patriot Voices or its PAC.

A. An Overview of Testing the Waters

A “candidate” is “an individual who seeks nomination for election, or election, to Federal office.”⁴¹ Under the Act, an individual “shall be deemed to seek nomination for election, or election . . . if such individual has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000” or “has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of \$5,000 or has made such expenditures aggregating in excess of \$5,000.”⁴² Within 15 days after becoming a candidate, the individual must designate a principal campaign committee by filing a Statement of Candidacy with the Commission.⁴³ The principal campaign committee must file a Statement of

³⁹ *Id.* at 18.

⁴⁰ OGC further recommends taking no action at this time with respect to whether Santorum timely registered his presidential committee with the Commission and disclosed its activities, as well as whether Santorum violated the soft money prohibitions at section 30125. Our colleagues, the Chair and Commissioner Walther, voted to find reason to believe on these latter violations.

⁴¹ 52 U.S.C. § 30101(2).

⁴² *Id.*

⁴³ 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

Organization within ten days after its designation,⁴⁴ and file periodic disclosure reports with the Commission thereafter.⁴⁵

Commission regulations exempt from the definitions of “contribution” and “expenditure” funds received and payments made by an individual solely to determine whether the individual should become a candidate.⁴⁶ This exemption enables an individual to raise and spend money to “test the waters” of a potential campaign without becoming a candidate under the Act.⁴⁷ Testing-the-waters activities include polling, telephone calls, and travel.⁴⁸ An individual who is testing the waters need not register or file disclosure reports with the Commission unless and until the individual becomes a candidate.⁴⁹ Funds raised and spent for testing-the-waters activities are subject to the Act’s amount limitations and source prohibitions.⁵⁰ Once an individual becomes a candidate, all reportable amounts from the beginning of the testing-the-waters period must be disclosed on the first financial disclosure report filed by the candidate’s committee, even if the funds were received or spent before the current reporting period.⁵¹

Not everything that an individual does while contemplating a potential candidacy is necessarily “testing the waters,” however. Before becoming a candidate, an individual may already be a public figure with a history of public activism and discourse who engages in activities, such as travel and public speaking, for reasons other than a potential campaign.⁵² Indeed, it should be assumed that individuals considering federal candidacy are actively

⁴⁴ 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

⁴⁵ 52 U.S.C. § 30104(a)-(b); 11 C.F.R. part 104; *see, e.g.*, Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

⁴⁶ *See* 11 C.F.R. §§ 100.72(a), 100.131(a).

⁴⁷ *See, e.g.*, Advisory Opinion 1981-32 (Askew) at 4.

⁴⁸ *See* 11 C.F.R. §§ 100.72(a), 100.131(a).

⁴⁹ 11 C.F.R. §§ 100.72(a), 100.131(a).

⁵⁰ 11 C.F.R. §§ 100.72(a), 100.131(a); *see* Factual & Legal Analysis at 3, MUR 6533 (Haney, *et al.*) (testing-the-waters funds apply to the Act’s \$5,000 candidacy threshold once an individual decides to become a candidate); Factual & Legal Analysis at 5, MUR 6449 (Bruning, *et al.*) (same); *see also* Advisory Opinion 2015-09 at 5 (Senate Maj. PAC, *et al.*) (concluding that “[i]f an individual becomes a candidate, payments that were made for testing-the-waters must have been made with ‘funds permissible under the Act’”).

⁵¹ 11 C.F.R. §§ 101.3, 104.3(a)-(b).

⁵² *See* First General Counsel’s Report at 26-29, MUR 5260 (Talent) (Jan. 6, 2003) (recommending that the Commission find no reason to believe an individual used an organization to test the waters even though the organization functioned as a platform for the individual to “keep up his public profile” while supporting “candidates and causes until he determined his political future.”); Statement of Reasons of Chairman Matthew S. Petersen, Caroline C. Hunter, and Lee E. Goodman at 4, MURs 6470, 6482, 6484 (Romney, *et al.*) (Mar. 30, 2016) (“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.”).

interested in public affairs, and it should not be a surprise that these individuals speak about their views prior to becoming candidates.

Thus, an 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.”⁵³ The Commission’s regulatory jurisdiction does not extend to an individual’s pre-candidacy activities unless there is a “nexus” between the activities and an eventual campaign.⁵⁴ For example, in MUR 6750 (Carl DeMaio for Congress), a unanimous Commission found no reason to believe that a ballot measure committee founded and controlled by DeMaio made in-kind contributions to DeMaio’s campaign when it paid for DeMaio to travel to a speaking engagement and for campaign consulting services, polling, office expenses, internet, and email services in the months before DeMaio declared candidacy, where the travel, speaking engagement, and other expenses related solely to the committee’s own activities and not to DeMaio’s potential candidacy.⁵⁵ Similarly, in MUR 6970 (Peter DiCianni, *et al.*), a unanimous Commission found no reason to believe that DiCianni should have reported as “testing-the-waters expenditures” payments made by DiCianni’s local political committee for robocalls shortly before DiCianni declared candidacy, where the robocalls concerned a local charity event and did not mention DiCianni’s potential candidacy.⁵⁶

And most recently, in MUR 6932 (Clinton), the Commission found no reason to believe that payments Clinton received for speeches prior to her candidacy were contributions, where Clinton claimed that the payments were made as “part of her ‘regular, ongoing business’ that she continued while she was deciding whether to run for president.”⁵⁷ OGC concluded that the record in that matter gave “no indication that the entities paid Clinton to influence her potential campaign or that Clinton engaged in any campaign-related or testing the waters activity during the course of her speeches.”⁵⁸

Accordingly, a political committee or other organization may provide an individual who is testing the waters (and later becomes a candidate) with a “platform”⁵⁹ to speak about issues,

⁵³ First General Counsel’s Report at 9, MUR 6907 (Huckabee); *see also* First General Counsel’s Report at 29, MUR 5260 (Talent).

⁵⁴ *See* First General Counsel’s Report at 9, MUR 6907 (Huckabee); First General Counsel’s Report at 29, MUR 5260 (Talent); *see also* Leadership PACs E&J, 69 Fed. Reg. at 67,017 (“To the extent that leadership PACs are used to pay for costs that could and should otherwise be paid for by a candidate’s authorized committee, such payments are in-kind contributions, subject to the Act’s contribution limits and reporting requirements.”).

⁵⁵ Factual & Legal Analysis at 8-10, MUR 6750 (Carl DeMaio for Congress); *id.*, Vote Cert. (July 24, 2014).

⁵⁶ Vote Cert. (June 16, 2016), MUR 6970 (Peter DiCianni, *et al.*); *see also* Factual & Legal Analysis at 5-6, 8-9, MUR 6970 (Peter DiCianni, *et al.*).

⁵⁷ First General Counsel’s Report at 20, MUR 6932 (Clinton).

⁵⁸ *Id.*

⁵⁹ First General Counsel’s Report at 9, MUR 6907 (Huckabee).

support other candidates, and maintain a public profile without the payments for such activities being considered contributions to the future candidate’s campaign. Indeed, unlike “candidacy,” which is a generalized status under the Act, the Commission’s testing-the-waters regulations speak in terms of particularized payments for specific activities. Even if the individual refers to a possible candidacy in “incidental remarks” or “response[s] to questions” while engaging in these activities, those references, by themselves, will not convert the activities to testing-the-waters activities.⁶⁰

Thus, when conducting a testing-the-waters analysis, the Commission’s proper focus is on whether a particular payment is made solely for the purpose of determining whether an individual should become a candidate. The Commission will look for objective evidence to show a subjective intent by the individual that an activity occurred for the purpose of determining the viability of a candidacy. Like its determinations as to whether an individual has become a candidate under the Act, an analysis of whether particular expenses are rightly considered testing-the-waters expenses will usually be a highly fact-intensive inquiry. And, consistent with Commission practice, where payments for such activities are attributable in part to an individual’s exploration of a potential candidacy, the payments must be appropriately allocated between the sponsoring entity and the individual’s campaign before being disclosed to the Commission.⁶¹

B. The Complaint Fails to Provide Reason to Believe

The record fails to establish a nexus between Santorum’s activities on behalf of Patriot Voices and the PAC and his eventual campaign. The Complaint throws much at the wall, but nothing sticks.

1. *Private Events*

As for the private events in the District of Columbia, Scottsdale, and Leesburg, the Complaint relies on news articles that tend to recount what unsworn authors were told by other, unsworn third-parties.⁶² Weighed against these news articles, Respondents provide specific

⁶⁰ Advisory Opinion 1986-06 (Fund for America’s Future) at 4-5 (concluding that leadership PAC need not allocate expenditures for federal officeholder to appear on behalf of federal candidates or for party building, when sole references to officeholder’s possible intent to campaign occur in incidental contacts or remarks).

⁶¹ See Statement of Reasons of Chairman Matthew S. Petersen and Comm’rs Caroline C. Hunter, Donald F. McGahn II, Steven T. Walther, and Ellen L. Weintraub at 3, MUR 5908 (Duncan Hunter) (stating that travel disbursements benefitting presidential campaign and leadership PAC “would have been allocable between the two committees”); Advisory Opinion 1985-40 (Republican Maj. Fund) at 9 (concluding that leadership PAC must allocate travel costs where individual holds private meetings for testing-the-waters activities in conjunction with appearances on behalf of federal candidates).

⁶² The probative value of these statements is inherently limited. See Statement of Reasons of Matthew S. Petersen and Caroline C. Hunter, MURs 6470, 6482, 6484 (Romney, *et al.*); Statement of Reasons of Matthew S. Petersen, Caroline C. Hunter, Lee Goodman, MUR 6518 (Gingrich, *et al.*) at 6-7 (“As a threshold matter, we observe that unsworn news reports by authors who are not first-hand complainants or witnesses before the Commission present legal and practical problems for the Commission and respondents, and, in any event, may be of limited probative value.”); First General Counsel’s Report, MUR 6907 (Huckabee, *et al.*), at 8 (expressing

denials, backed by affidavits from persons, including Santorum, who attended the events, which undermines “the credibility of the alleged facts”⁶³ that are presented to support a reason to believe finding.

In Washington, Santorum is alleged to have “huddled . . . with 33” advisors and friends “to discuss his 2016 plans.”⁶⁴ Regarding that event, the Complaint provides a single attributed quote that Santorum discussed “how he has laid the groundwork for a potential 2016 run,” but no further context is provided. The cited article does not identify, for example, whether Santorum made comments in response to a particular question, or whether the comments were made as a stray aside to one or few individuals. Further, the record does not establish that Santorum “made any payments in connection with” the reunion.⁶⁵ In contrast, Respondents, in sworn affidavits, describe the event as a “periodic reunion[]” of Santorum friends and former colleagues, not an uncommon event amongst public figures and officeholders, where guests chatted about their families and careers.⁶⁶ Significantly, according to Beynon, who attended the event, Santorum responded to questions about whether he would run (and was encouraged to do so), but did not state that he would run for president.⁶⁷ Most importantly, the Commission has declined to investigate on similar facts.⁶⁸

As to the Scottsdale event, the Complaint provides a “prospective and speculative”⁶⁹ quote to back its allegations, whereas the record includes an affidavit stating that the event was a Patriot Voices fundraiser at which “there was no discussion . . . about a Santorum presidential candidacy in 2016.”⁷⁰ And the Leesburg event was an “annual planning meeting” for Patriot

skepticism for the Complainant’s use of an unsubstantiated news article to prove a violation of the Act); First General Counsel’s Report, MUR 4960 (Hillary Clinton) (“purely speculative charges do not form an adequate basis to find reason to believe that a violation of the Act has occurred.”). The record here underscores the weakness of complaints based on news articles, particularly with respect to private and future events. Additionally, the Commission has limited or no means to identify and contact anonymous sources in news articles.

⁶³ First General Counsel Report at 8, MUR 6932 (Clinton).

⁶⁴ Compl. at 2.

⁶⁵ First General Counsel Report at 9, MUR 6932 (Clinton); *id.* (discussing “meeting with ‘past supporters’ to ‘discuss the current political environment and a potential run for office’”).

⁶⁶ Beynon Aff. ¶ 9.

⁶⁷ *See Resp.* at 3; Beynon Aff. ¶ 9.

⁶⁸ First General Counsel’s Report, MUR 6932 (Hillary Clinton, *et al.*) (citing *Resp.*, MUR 6932 (Clinton)) at 9-10 (declining to investigate Clinton’s meeting with past supporters at her house to discuss a potential run for office); *see also* Response of Hillary Clinton, MUR 6932 (Clinton) at 5 n. 2 (“The Complaint also references a meeting from summer of 2013 in which past supporters of Secretary Clinton met with her to discuss the current political environment and a potential run for office. Such a meeting, by itself, does not amount to “testing the waters” activity.”).

⁶⁹ *Resp.* at 3.

⁷⁰ Maenza Executive Director Aff. ¶ 13.

Voices. There, Respondents acknowledge that attendees held “minimal discussion”⁷¹ of press reports on Santorum’s potential candidacy, but attendees also discussed how Patriot Voices would be impacted “in the event its national co-chairman Rick Santorum should decide to seek the Republican nomination”⁷² — a perfectly reasonable and responsible activity for Patriot Voices’ officers to have undertaken.

2. *Santorum’s Public Appearances*

Nor do Santorum’s appearances at the Iowa Freedom Summit or CPAC justify an investigation. With respect to the Iowa Freedom Summit, the Complaint includes a single sentence to insinuate that Santorum’s mere presence at the event indicated that he was testing the waters: “Like many other prospective 2016 presidential candidates, Santorum traveled to Iowa in late January 2015 to speak at the Iowa Freedom Summit.”⁷³ In response, Santorum and staff of Patriot Voices aver that he attended the Iowa Freedom Summit to help enlist volunteers for Patriot Voices, consistent with its goal to “develop[] the resources to build [its] national grassroots capabilities.”⁷⁴ While the Complaint includes a link to a news article that profiles other attendees, we will not infer that Santorum was testing the waters at the Iowa Freedom Summit based on media speculation.

Further, in his prepared remarks at the Iowa Freedom Summit, Santorum did not refer to himself as a potential candidate or discuss entering the 2016 race. Instead, Santorum spent most of the speech discussing education reform, outreach to the working class, and immigration, among other issues. Although Santorum indirectly referred to his 2012 success in Iowa — telling the audience that Iowans made the right choice in 2012 and that they need to also make the right choice in 2016 — that statement does not necessarily suggest that Santorum was or might be a potential candidate. In fact, Santorum’s statement that he would share his 2012 travel log (when he won the Iowa Primary) with any “one of these other guys” tends to show the opposite,⁷⁵ if it is to be taken literally at all. Certainly, a person seriously considering running in the 2016 Presidential election would not offer to aid direct competitors.

Nor do we make much of Santorum’s attendance at CPAC on this record. He was a regular “featured” speaker, having attended “for more than a dozen years . . . both when in office and since.”⁷⁶ That Santorum frequently attended CPAC well before becoming a candidate in 2016 tends to undermine any particular significance of his CPAC attendance in 2015. His

⁷¹ Resp. at 3.

⁷² Maenza Executive Director Aff. ¶ 13.

⁷³ Compl. at 3 (citing Jennifer Jacobs, *Prominent Speakers at the Iowa Freedom Summit*, DES MOINES REGISTER, Jan. 24, 2015, available at <https://www.desmoinesregister.com/story/news/politics/2015/01/18/iowa-freedom-summit-speakers/21934883/>).

⁷⁴ Santorum Aff. ¶¶ 9-10; *see also* Maenza Executive Director Aff. ¶ 10; Ahlesmeyer Aff. ¶ 5.

⁷⁵ First General Counsel’s Report at 18, MUR 6928 (Santorum).

⁷⁶ Resp. at 5.

regular attendance instead lends credibility to the argument that he attended CPAC because he cares about the issues addressed at CPAC, something the Commission has no jurisdiction to regulate. In his speech, he never mentioned his potential 2016 candidacy, or described himself as a potential candidate. He also did not mention or allude to entering the race in response to the questions asked in the post-speech Q&A session. But even if he had, the Commission has determined that responses to questions and “incidental remarks” do not convert all expenses related to an event into testing-the-waters expenses.⁷⁷

In addition to Santorum’s appearances at the Iowa Freedom Summit and CPAC, OGC introduces statements Santorum made at events in Mississippi and South Carolina.⁷⁸ OGC interprets these statements as evidence Santorum failed to report his testing-the-waters activity as early as 2014. These allegations, however, were not raised in the Complaint, and Santorum has not had an opportunity to address them. That is particularly troubling in the context of a highly fact-intensive analysis, such as a testing-the-water analysis, and where the cited sources are press accounts.⁷⁹

⁷⁷ Advisory Opinion 1986-06 (Fund for America’s Future) at 5; Statement of Reasons of Matthew S. Petersen, Caroline C. Hunter, and Lee E. Goodman, MUR 6470, 6482, 6484 (Romney, *et al.*).

⁷⁸ In October 2014, Santorum made comments after a fundraiser for the PAC in Ridgeland, MS, in which he addressed the speculation around his potential candidacy. He acknowledged that he had met some individuals that day who encouraged him to run. First General Counsel’s Report at 16-17, MUR 6928 (Santorum). OGC also identified comments that Santorum made at the South Carolina Tea Party Convention, where Santorum was interviewed about a potential 2016 run. OGC (and our colleague) emphasize one quote by Santorum to show that he was testing the waters: “People asked me the other day what role do you want to play in this election? And I look back and say, the winner.” He further explained “. . . if you’re going to do this and take the time away from your family and ask people to join you and sacrifice like so many others did last time around . . . you do it to win . . .” See First General Counsel’s Report at 23, MUR 6928 (Santorum); Statement of Chair Ellen L. Weintraub at 3-4 (MUR 6928).

⁷⁹ See Statement of Reasons of Chairman Matthew S. Petersen, Caroline C. Hunter, and Lee E. Goodman at 7 n. 29, MURs 6470, 6482, 6484 (Romney, *et al.*) (“As a general evidentiary matter, we decline to open investigations based solely upon hearsay reports or editorial characterizations contained in press articles, particularly where, as here, the speculation is rebutted by record evidence.”); First General Counsel’s Report, MUR 6907 (Huckabee, *et al.*), at 8; First General Counsel’s Report, MUR 4960 (Hillary Clinton).

The Commission must be consistent in its approach to supplementing the record in enforcement matters. We have noticed that the recommendations in some MURs, including the present MUR, have been based, at least in part, on information not in the complaint or response, while the record has not been augmented in other matters. See generally First General Counsel’s Report, MUR 6932 (Clinton); First General Counsel’s Report, MUR 6509 (Friends of Herman Cain). A colleague also issued a statement explaining her vote in this matter, indicating that she relied on the two news articles not in the Complaint or Response to vote in favor of OGC’s recommendations. See Statement of Reasons of Chair Ellen L. Weintraub, MUR 6928 (Rick Santorum, *et al.*). This is not the first time our colleague has done this in enforcement matters. See Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub, MUR 6880 (Carolina Rising, Inc.). On several occasions, we have explained our concern with augmenting the record with outside information not provided in the complaint or response. See, e.g., Statement of Reasons of Matthew S. Petersen, Caroline C. Hunter, Lee E. Goodman, MUR 6518 (Gingrich, *et al.*); Statement of Reasons of Chairman Matthew S. Petersen, Caroline C. Hunter, Lee E. Goodman at 7, MURs 6470, 6482, 6484 (Romney, *et al.*). This practice is unfair to respondents, and risks threatening the legitimacy of the Commission’s conclusions. See, e.g., *Westar Energy Inc. v. Fed. Energy Reg. Comm’n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A

Nonetheless, while the Commission’s role is to examine complaints, not claims,⁸⁰ we conclude that these additional facts do not tip the scales towards a reason-to-believe finding. Significantly, the statements that OGC found were made in response to questions either preceding or following speeches, and as the Commission explained decades ago, mere responses to an inquiry do not transform the entirety of an underlying event into regulated, testing-the-waters activity.⁸¹ Additionally, when listening to the entirety of the interviews, Santorum does not go further than generalizations and hypotheticals.

OGC, as well as our colleague, rely significantly on Santorum’s interview at the South Carolina Tea Party as definitive proof that Santorum was testing the waters.⁸² Specifically, OGC and our colleague emphasize Santorum’s statement at the South Carolina Tea Party Convention that he wanted to be the “winner” *if he were to enter the race* to establish that he was testing the waters. Again: A response to a question at an event does not convert the entire event into a reportable testing-the-waters expense. Further, *thinking* about running for office is not the same as *spending money to evaluate a possible run for office*. The comments do not suggest, as OGC concludes, that the purpose of the event and associated travel costs were for Santorum to test the waters.

3. *Comments by Matt Beynon*

The Complaint alleges that Matt Beynon, a “Santorum aide and agent,” made comments that “made clear that Santorum is a presidential candidate.”⁸³ Beynon had reportedly stated that “You have to understand what is the best use of your candidate’s time, and their appeal, who is going to gravitate towards the candidate.”⁸⁴ Respondents, however, more than met their burden in responding to this allegation. Beynon, in a sworn affidavit, avers that he had been “speaking generically and from [his] experiences working for a number of candidates and campaigns. I was NOT speaking about the 2016 presidential campaign or potential campaign of Sen.

fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.”); *Colo. Interstate Gas Co. v. Fed. Energy Reg. Comm’n*, 850 F.2d 769, 774 (D.C.Cir.1988). (“[T]he Commission’s dissimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice”).

⁸⁰ See *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 363 F. Supp. 3d 33 (D.D.C. 2018) (stating that the Act does not provide for judicial review of a decision to foreclose investigation of potential claims that could have arisen out of a complaint).

⁸¹ Advisory Opinion 1986-06 (Fund for America’s Future).

⁸² First General Counsel’s Report at 17-18, MUR 6928 (Santorum); Statement of Reasons of Chair Ellen L. Weintraub, MUR 6928 (Rick Santorum, *et al.*) at 2.

⁸³ Compl. at 4.

⁸⁴ Compl. at 13 (citing Nicholas Confessore and Jonathan Martin, *G.O.P. Race Starts in Lavish Hunt of Rich Donors*, N.Y. TIMES (Feb. 28, 2015)).

Santorum.”⁸⁵ Particularly given this specific denial and explanation, the quote provides no support for the conclusion that Santorum was spending funds to test-the-waters (or had already become a candidate under the Act).

4. *Activities and Operations of Patriot Voices*

Finally, the Complaint appears to allege that various Patriot Voices operations reflected Santorum’s testing-the-waters activities: a \$250,000 contribution made by Friess to the PAC, that three staffers were identified in January as part of a “senior finance team” for Patriot Voices and the PAC, and Patriot Voice’s selection of Iowa Representative Walt Rogers to be the “Iowa chairman” of Patriot Voices.⁸⁶ These are all “conclusory assertions” and “[g]eneral characterizations” of the purpose of Patriot Voices and the PAC and as such, do not support the weight of a reason-to-believe finding.⁸⁷

Patriot Voices and the PAC provided several affidavits generally denying that Patriot Voices or the PAC paid for Santorum’s testing-the-waters activity, averring instead that Patriot Voices and the PAC spent money on their mission. That Patriot Voices and the PAC would have a “senior finance team,” or that the PAC would accept a permissible contribution from a supporter, in no way supports a reason-to-believe finding on these allegations. Patriot Voices engaged in issue and grassroots advocacy since its founding in 2012, and the PAC reported receipts and disbursements totaling about \$2.75 million in 2014.⁸⁸ Clearly, the ability to raise and spend funds were of vital importance to the missions of Patriot Voices and the PAC, and that activity well preceded Santorum’s eventual testing-the-waters activities in late spring 2015 and eventual candidacy. And given that Patriot Voices and the PAC continue operations to this day further undermines any claim that they were mere shells to pay for Santorum’s testing-the-waters expenses. Nor is it significant that Patriot Voices announced an “Iowa Chairman” in March 2015. That individual was “an unpaid, volunteer grassroots leader whose job was and is to find more grassroots activists . . . [for] Patriot Voices.”⁸⁹ Nor is it significant that staff who had worked for Patriot Voices and the PAC — and thus in all likelihood share in his values and worldview — would want to continue working for Santorum on a campaign.

C. “Pre-Pre Candidacy” Did Not Affect Our Vote

⁸⁵ Beynon Aff. ¶ 11.

⁸⁶ Compl. at 5.

⁸⁷ *See* First General Counsel Rpt. at 8-9, MUR 6907 (Huckabee).

⁸⁸ *See* First General Counsel’s Report at 11, MUR 6928 (Santorum).

⁸⁹ Resp. at 7

Respondents argue that Santorum was engaged in “pre-pre candidacy” activities.⁹⁰ They assert that the Commission recognized pre-pre candidacy status in Advisory Opinion 1986-06 (Fund for America’s Future).⁹¹ This opinion recognizes that individuals who may consider running for office at a future point may make public appearances and assist in fundraising efforts on behalf of others without being considered to test the waters. Our colleague, in her statement on the matter, erroneously suggests that our disagreement with OGC’s recommendations implies our recognition of a “pre-pre candidacy” phase.⁹² That is not accurate. As the above analysis demonstrates, we did not bite off on that argument. Rather than refashioning press reports into a press release, we instead scrutinized the record in a manner consistent with prior Commission determinations and interpretations.

III. CONCLUSION

Ultimately, the Complaint’s legal conclusions are based on assumption and speculation. The Complaint begs the question, beginning with the assumption that Patriot Voices was merely a vehicle to pay for Santorum’s testing-the-waters expenses. We, by contrast, begin our analysis with the presumption that Patriot Voices and the PAC had their own missions and their own goals and their own interests, not subsumed in Santorum’s personal goals. Mere media speculation about Santorum’s potential candidacy does not provide the Commission with jurisdiction to regulate Santorum’s activities, particularly given Santorum’s status as a well-known public figure, former presidential candidate, and long-standing participant in public discourse.⁹³ And boring into the details of the record, we do not find a nexus between Santorum’s testing-the-waters expenses and Patriot Voices or the PAC’s spending. Thus, we did not vote to find reason to believe that Respondents violated the Act.

⁹⁰ First General Counsel’s Report at 20-21, MUR 6928 (Santorum); Statement of Chair Ellen L. Weintraub at 1, MUR 6928 (Santorum).

⁹¹ In Advisory Opinion 1986-06 (Fund for America’s Future), then-Vice President George H.W. Bush and the PAC he chaired asked the Commission whether Bush could fundraise and make public appearances on behalf of Republican candidates engaged in the 1986 midterm elections without Bush’s activities being considered testing the waters. The Commission concluded that Bush could engage in those efforts without it being considered testing the waters. The Commission also stated that although these efforts would benefit a future Presidential campaign if Bush should choose to run, it would not be considered testing the waters, because these efforts were not for the purposes of testing a potential candidacy, but rather to assist others in their election efforts.

⁹² Statement of Chair Ellen L. Weintraub, MUR 6928 (Santorum) at 1-2.

⁹³ *See generally* First General Counsel’s Report, MUR 6509 (Friends of Herman Cain) at 8 (“Prominent citizens considered to be possible presidential candidates have traveled . . . during campaign cycles for decades without triggering Commission scrutiny or treatment of their speeches as testing-the-waters activities.”).

5/20/19
Date


MATTHEW S. PETERSEN
Vice Chairman

5/20/19
Date


CAROLINE C. HUNTER
Commissioner