

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR 7917

DATE COMPLAINT FILED: July 27, 2021

DATE OF NOTIFICATION: July 30, 2021

DATE OF LAST RESPONSE: Oct. 5, 2021

DATE ACTIVATED: Jan. 27, 2022

EXPIRATION OF SOL: Jan. 6, 2026

ELECTION CYCLE: 2022

COMPLAINANT:

Devin Remiker

RESPONDENTS:

Derrick Van Orden

Van Orden for Congress and Mary Clancy
in her official capacity as treasurer**RELEVANT STATUTE
AND REGULATION:**

52 U.S.C. § 30114(a), (b)

11 C.F.R. § 113.1(g), (g)(1)(ii)(C)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that Derrick Van Orden, a candidate for Wisconsin’s Third Congressional District, and his principal campaign committee, Van Orden for Congress and Mary Clancy in her official capacity as treasurer (the “Committee”), violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by converting contributions to personal use. Specifically, the Complaint alleges that approximately two months after losing the 2020 general election, Van Orden “appear[ed] to use campaign funds for personal use, including travel to and lodging in Washington, DC at the time of the ‘Save America Rally’ and subsequent storming of the U.S. Capitol on January 6.”¹

¹ Compl. at 1 (July 27, 2021).

1 Van Orden and the Committee (collectively, “Respondents”) state that the purpose of the
2 travel was to attend a series of meetings regarding Van Orden’s “political future” that were
3 scheduled for January 5 and 7, 2021, and reference “the ongoing nature of [Van Orden’s]
4 Campaign.”² Respondents further state that Van Orden was “briefly present near the [Rally]”
5 but “did not actually attend the Rally” and “did not take part in [the] unlawful events” that
6 occurred afterward.³

7 Although we lack definitive information as to the substance of the meetings referenced in
8 the Response, the available information suggests that the majority of the travel expenses paid by
9 the Committee may have been made so that Van Orden could attend meetings regarding his
10 potential future candidacy. While it appears that Van Orden was not conducting campaign-
11 related activity on January 6th, between the days on which the January 5th and 7th meetings
12 were scheduled, we do not believe that this matter warrants the expenditure of the Commission’s
13 limited resources given the likely small amount in violation. Accordingly, we recommend that
14 the Commission exercise its prosecutorial discretion and dismiss the allegations that Van Orden
15 or the Committee violated 52 U.S.C. § 30114(b) by converting contributions to personal use.⁴

16 **II. FACTUAL BACKGROUND**

17 Derrick Van Orden was a candidate for the Third Congressional District of Wisconsin
18 during the 2020 election cycle, but he was defeated in the 2020 general election.⁵ According to

² Resp. at 2 (Oct. 5, 2021).

³ *Id.* at 1-2, 3 n.1.

⁴ *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁵ Derrick Van Orden, Statement of Candidacy (Mar. 12, 2020); see *2020 Wisconsin Election Results*, WIS. ELECTIONS COMM’N (Nov. 18, 2020), <https://elections.wi.gov/sites/elections/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf>.

1 its 2020 Year-End Report, the Committee had \$12,507.44 in cash on hand at the end of 2020.⁶
2 On April 8, 2021, Van Orden filed a statement of candidacy to again run for Wisconsin's Third
3 Congressional District in the 2022 election.⁷

4 According to the Committee's 2021 April Quarterly Report, the Committee made three
5 payments totaling \$4,022.72 between January 5, 2021 and February 28, 2021, reporting that the
6 purpose was "travel," "travel reimbursement," or "travel unitemized."⁸ The report lists
7 reimbursements made to three individuals, including the candidate and two individuals that
8 appear to have been part of his 2020 campaign staff: (1) Van Orden, in the amount of \$2,709.66;
9 (2) Jared Carter, in the amount of \$1,057.05; and (3) Mary Krueger, in the amount of \$256.01.⁹
10 Additionally, the Committee provided itemization for two of the reimbursements, as depicted in
11 the chart below:¹⁰

⁶ Van Orden for Congress, 2020 Year-End Report at 2 (Jan. 31, 2021).

⁷ Derrick Van Orden, Amended Statement of Candidacy (Apr. 8, 2021).

⁸ Van Orden for Congress, 2021 April Quarterly Report at 5-7 (Apr. 15, 2021).

⁹ *Id.* Neither the Complaint nor Response offer any information as to Jared Carter or Mary Krueger's relationship to Van Orden or the Committee, nor why their travel was paid for by the campaign. The Response discusses the payments and their purpose collectively. Based on a review of other reports filed by the Committee with the Commission, Krueger and Carter appear to have been paid staffers of the Committee. See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=krueger&two_year_transaction_period=2020 (last visited June 15, 2022) (reflecting nine payroll disbursements by Van Orden for Congress to Mary Krueger in 2020); *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=carter&two_year_transaction_period=2020 (last visited June 15, 2022) (reflecting six payroll disbursements by Van Orden for Congress to Jared Carter in 2020). Indeed, based on the Committee's most recent filings, it appears that Krueger stills work for Van Orden's 2022 campaign. See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=carter&recipient_name=krueger&two_year_transaction_period=2022 (last visited June 15, 2022) (reflecting 22 payroll disbursements to Krueger during the 2022 election cycle).

¹⁰ Commission regulations only require itemization of the ultimate payee for reimbursed travel expenses when the total amount reimbursed exceeds \$500 and payments to any one vendor used for the expenses total over \$200 for the election cycle. 11 C.F.R. § 102.9(b)(2)(i); Notice of Interpretive Rule Regarding Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625, 40,626 (July 6, 2013). Accordingly, it appears that only a portion of the reimbursements made to Van Orden and Carter required itemization.

	RECIPIENT	PURPOSE	DATE OF DISBURSEMENT	AMOUNT
	Derrick Van Orden	Travel	2/28/2021	\$2,709.66
Memo Itemization:	Delta	Travel	1/3/2021	\$844.20
	Hampton Inn	Travel	1/8/2021	\$655.60
	Uber	Travel	1/7/2021	\$409.77
	Jared Carter	Travel Reimbursement	1/5/2021	\$1,057.05
Memo Itemization:	Expedia	Travel	1/2/2021	\$418.20
	Hampton Inn	Travel	1/3/2021	\$469.62
	Uber	Travel	1/2/2021	\$67.85
	Mary Krueger	Travel, Unitemized	1/5/2021	\$256.01

1 The Complaint alleges that these travel expenditures were not for permissible campaign
 2 uses but for “personal activity” in connection with “the ‘Save America Rally’ and subsequent
 3 storming of the U.S. Capitol on January 6,” which was also the date that the votes of the
 4 Electoral College were counted regarding the 2020 presidential election.¹¹ Because Van Orden
 5 was not a candidate for federal office at the time of the trip,¹² the Complaint alleges that
 6 respondents violated the personal use provisions of the Act and Commission regulations. In
 7 support of this claim, the Complaint relies on a January 13, 2021 Op-Ed that Van Orden
 8 authored, where he states, “I recently traveled to Washington, DC for meetings and to stand for
 9 the integrity of our electoral system *as a citizen* and at the behest of my neighbors here in
 10 Western Wisconsin.”¹³ The Op-Ed identifies Van Order as a “former Republican congressional

¹¹ Comp. at 1. *See also* 3 U.S.C. § 15 (providing that the counting of the votes of the Electoral College in Congress be held on the sixth day of January).

¹² Compl. at 5.

¹³ *Id.* at 3. (quoting Derrick Van Orden, *We Need Abraham Lincoln Now More Than Ever*, LA CROSSE TRIB. (Jan. 13, 2021), <https://lacrossetribune.com/news/local/derrick-van-orden-we-need-abraham-lincoln-now->

1 candidate for Wisconsin's third district."¹⁴ The Complaint adds that because the "Save America
2 Rally" (the "Rally") concerned the 2020 presidential general election results, the purpose of Van
3 Orden's travel in January 2021 would have been personal regardless of whether Van Orden had
4 become a federal candidate.¹⁵

5 The Response denies that the purpose of Van Orden's trip was personal and instead states
6 he traveled to Washington, DC on January 3rd "for a series of political meetings" scheduled for
7 January 5th and 7th with members of the House Republican Caucus and party staff regarding his
8 "political future."¹⁶ Respondents explain, however, that the meetings scheduled for January 7th
9 were canceled in the wake of the events following the Rally on January 6th, and Van Orden
10 returned home to Wisconsin on January 7th.¹⁷ Respondents assert that Van Orden did not
11 actually attend the Rally but arrived late and "remained on the periphery of the event."¹⁸

12 Given that the meetings that were scheduled for January 5th and 7th were regarding Van
13 Orden's "political future," Respondents contend that the travel expenses for the trip were
14 permissible. Respondents state that "the ongoing nature of [Van Orden's] [c]ampaign at the time
15 of the meetings is just one more fact to justify the necessity and purpose of the trip."¹⁹ While
16 also acknowledging that Van Orden's travel was "not in connection with any particular election,"
17 Respondents nevertheless assert that the trip constituted "political travel" that would be

[more-than-ever/article_f29c4153-a584-54df-9d07-b6092ab38d57.html](https://www.wisconsin.gov/open-records/article_f29c4153-a584-54df-9d07-b6092ab38d57.html) ("Van Orden Op-Ed")) (emphasis added in Complaint).

¹⁴ *Id.*

¹⁵ *Id.* at 5-6.

¹⁶ Resp. at 1-2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2.

1 permitted under the Act as being for “any other lawful purposes.”²⁰ Respondents argue that
2 regardless of whether Van Orden was a candidate at the time, the Committee was “registered
3 with the Commission, properly functioning, and filing timely reports” and therefore it could
4 “raise and spend funds in accordance with federal law, just as the Campaign did in this
5 instance.”²¹ Respondents further claim that even if attending the Rally had been the only
6 purpose of the trip, such a use of campaign funds would nonetheless be permissible because the
7 Rally was “inherently political, akin to any other [p]arty event or committee fundraiser” and the
8 expense would not have existed irrespective of Van Orden’s candidacy.²²

9 III. LEGAL ANALYSIS

10 Under the Act, a contribution accepted by a candidate may be used for, *inter alia*,
11 “otherwise authorized expenditures in connection with the campaign for Federal office of the
12 candidate.”²³ The Commission has long recognized that “candidates have wide discretion over
13 the use of campaign funds,”²⁴ but a contribution to a candidate shall not be converted by any
14 person to “personal use.”²⁵ “Personal use” means any use of funds in a campaign account of a
15 present or former candidate to fulfill a commitment, obligation, or expense of any person that
16 would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.²⁶ The

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.* Respondents do not assert that Van Orden participated in purportedly campaign-related activities on January 6th aside from the Rally. For clarity, the Response elaborates that its references to the Rally refer only “to the Save America Rally on January 6, 2021, and not to the unlawful events that transpired as the Rally dispersed.” *Id.* at 3 n.1.

²³ 52 U.S.C. § 30114(a).

²⁴ Explanation and Justification for Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7,862, 7,867 (Feb. 9, 1995) (“Personal Use E&J”).

²⁵ 52 U.S.C. § 30114(b)(1).

²⁶ *Id.* § 30114(b)(2); 11 C.F.R. § 113.1(g); Personal Use E&J at 7,863.

1 Commission evaluates certain expenses, such as travel, meal, and legal expenses, on a case-by-
2 case basis by applying the “irrespective test” to determine whether a personal use violation has
3 occurred.²⁷ If a candidate “can reasonably show that the expenses at issue resulted from
4 campaign or officeholder activities, the Commission will not consider the use to be personal
5 use.”²⁸

6 Here, Van Orden asserts that the purpose of the \$4,022.72 in travel expenses was to
7 facilitate his attendance at meetings with Members of Congress and party staff about his
8 “political future” and notes the “ongoing nature of his [c]ampaign.”²⁹ Although we are unable to
9 independently verify the substance or purpose of the meetings, Respondents’ assertions about the
10 existence of these meetings appear to be corroborated in part by Van Orden’s reference to
11 “meetings” in his Op-Ed, which was published just days after the trip and more than six months
12 before the date of the Complaint.³⁰

13 In the context of an Advisory Opinion, the Commission has determined that “the use of
14 excess campaign funds for future Federal and local or state races would not violate the personal
15 use prohibition.”³¹ The Respondents’ use of the vague phrase “political future” to describe the
16 subject of the meetings and statement that the meetings were “not in connection with any

²⁷ See 11 C.F.R. § 113.1(g)(1)(ii).

²⁸ *Id.*

²⁹ Resp. at 1-2. Neither the Complaint nor Response separately address the contemporaneous travel expenses reimbursed by the Committee to Mary Kreuger or Jared Carter. *Supra* note 9. Because both the Complaint and Response address these travel expenses and their purpose collectively with Van Orden’s travel expenses, and there is no conflicting information in the record, we also address them collectively for purposes of this Report.

³⁰ Van Orden Op-Ed.

³¹ Advisory Opinion 1993-10 at 2-3 (Colorado) (advising that the requestor’s proposal to use excess campaign funds for future non-Federal campaigns, including a Gubernatorial campaign and a campaign to seek office in a political party organization, would not be personal use) (citing Advisory Opinion 1986-5 (Barnes for Congress) and Advisory Opinion 1980-113 (Zell Miller for U.S. Senate)); *see* Advisory Opinion 1993-06 at 4 (Panetta) (“Latitude has been given to use campaign funds for what could be termed operating expenditures such as: . . . establishing a fund for a possible future campaign for Federal or non-Federal office”).

1 particular election”³² does raise some question as to how these expenses relate to any particular
2 campaign for election. But considering: (1) Respondents’ references to Van Orden’s “ongoing
3 campaign”; (2) that the travel expenses relating to these meetings included travel for two aids
4 from Van Orden’s 2020 campaign; (3) and that Van Orden filed his statement of candidacy to
5 run for Congress in 2022 prior to the end of the reporting period covering these expenses, an
6 inference can be drawn that at least one purpose of these meetings was to discuss Van Orden
7 running for Congress in 2022.³³ Given these facts, there is an insufficient basis to conclude that
8 the travel expenses here would have existed irrespective of Van Orden’s future candidacy.³⁴

9 However, the same purpose reasoning does not appear to apply to Van Orden’s alleged
10 attendance at the Rally on January 6th.³⁵ Attendance at the Rally, and travel expenses to support
11 such attendance, are also subject to the irrespective test.³⁶ Contrary to Respondents’ assertion,
12 Van Orden’s mere “presence at a political event” does not mean that such attendance is
13 connected to Van Orden’s candidacy and would not have occurred irrespective of such
14 candidacy.³⁷

³² See 52 U.S.C. § 30114.

³³ *Supra* pages 3, 5-6.

³⁴ Cancellation of the January 7th meeting(s) after the travel had commenced does not change the purpose of the payment of those travel expenses.

³⁵ See *Resp.* at 1-2 (asserting that Van Orden did not actually attend the Rally but arrived late and “remained on the periphery of the event”). *But see* Van Orden Op-Ed (“I recently traveled to Washington, DC for meetings and to stand for the integrity of our electoral system”).

³⁶ Respondents argue that paying for “such travel, although not in connection with any particular election, was permitted as ‘any other lawful purpose.’” *Resp.* at 3. But Respondents omit the second half of the provision that, taken together, provide that a contribution may be used by the candidate for “any other lawful purpose unless prohibited by subsection (b),” which in turn sets forth the prohibited use of campaign funds. See 52 U.S.C. § 30114(a)(6), (b).

³⁷ *Resp.* at 3.

1 To that end, Respondents' citations to Advisory Opinions 1996-20 (Lucas) and 1995-47
2 (Underwood) do not support their broad proposition that the Rally being "inherently political"
3 necessarily makes expenses relating to it not personal use.³⁸ Unlike the present circumstance,
4 both Advisory Opinions involved a sitting official, who was also a candidate, who paid for travel
5 for themselves and either their chief of staff (Advisory Opinion 1996-20) or spouse (Advisory
6 Opinion 1995-47) to presidential conventions using campaign funds.³⁹ In each instance, the
7 Commission recognized not only the political nature of the events attended but that, considering
8 the specific circumstances, the events were directly related to campaign or officeholder duties
9 conducted by the individuals whose travel was paid for with campaign funds.⁴⁰ Here, Van
10 Orden was not an officeholder and attendance at a political rally organized by like-minded
11 individuals was not directly related to his candidacy. Further, as he indicated in his Op-Ed, Van
12 Orden was visiting Washington, DC as a "citizen" and was only identified as a former
13 candidate.⁴¹

14 Instead, the Commission has stated that the use of campaign funds to pay for travel
15 expenses merely to attend a political event may be personal use. In Advisory Opinion 1993-06
16 (Panetta), the Commission distinguished attendance at a political party event honoring the former
17 Congressman or where he was a featured speaker, where travel expenses would be considered a
18 permissible in-kind transfer to the party committee, from instances where the individual merely

³⁸ Resp. at 3 (citing Advisory Opinion 1996-20 (Lucas) ("AO 1996-20"); Advisory Opinion 1995-47 (Underwood) ("AO 1995-47")).

³⁹ AO 1996-20 at 1-2; AO 1995-47 at 1-2.

⁴⁰ AO 1996-20 at 2-3 (stating that the congressman's chief of staff would be "performing important functions [at the convention] related to [his] campaign for reelection"); AO 1995-47 at 3 (stating that the candidate and his wife would be "engag[ing] in activities that are in furtherance of [his] campaign for re-election").

⁴¹ Van Orden Op-Ed.

1 attended an event; in the latter circumstance, the Commission determined it could be
2 characterized as personal activity and thus the use of campaign funds could be impermissible to
3 facilitate his attendance.⁴² Consistent with that guidance, the available information suggests that
4 any expenses relating to Van Orden's mere attendance at the Rally as a citizen were not related
5 to Van Orden's campaign activities and could be considered personal use.

6 Therefore, the travel at issue here may have had both campaign and personal
7 components. Under Commission regulations, if a committee uses campaign funds to pay for
8 travel with a mixed purpose, that is, travel that involves both personal and campaign activities,
9 "the incremental expenses that result from the personal activities are personal use" unless the
10 persons benefiting from the personal use reimburse the committee within 30 days.⁴³ The
11 Commission provided an example to illustrate how this is applied in the Explanation &
12 Justification that accompanied the regulation.⁴⁴ In that example, a candidate traveled to Florida
13 to make a speech in their official capacity and then stayed a week longer for vacation. The
14 Commission explained that it was not considered personal use to pay for the part of the trip that
15 was related to the speech with campaign funds but that "the increase in the total cost of the trip
16 that is attributable to the extra week of vacation," including meals and hotels, may not be paid
17 for by the campaign absent reimbursement.⁴⁵ But, the Commission also explained that "if the
18 vacation and the speech take place in the same location, the Member is not required to reimburse

⁴² Advisory Opinion 1993-06 at 4-5 (Panetta).

⁴³ 11 C.F.R. § 113.1(g)(1)(ii)(C); *see also id.* § 113.1(g)(1)(ii)(D) (requiring candidate to reimburse campaign account within 30 days where vehicle is used for both personal and campaign-related activities, unless personal activities are a *de minimis* amount); Personal Use E&J at 7,869 (stating if committee uses campaign funds to pay for mixed travel expenses, the candidate or officeholder is required to reimburse committee for incremental expenses that resulted from personal activities).

⁴⁴ Personal Use E&J at 7,869.

⁴⁵ *Id.*; 11 C.F.R. § 113.1(g)(1)(ii)(C).

1 the committee for any portion of the airfare, since that expense would have been incurred even if
2 the trip had not been extended.”⁴⁶ In subsequent precedent, the Commission has characterized
3 airfare as a “defined expense.”⁴⁷

4 Considering Van Orden’s alleged attendance at the Rally to be personal activity implies
5 that the travel expenses could require the allocation of the incremental expenses resulting from
6 this personal activity.⁴⁸ Although the travel expenses itemized in Van Orden’s reports do not
7 indicate any particular expenses associated with the Rally, the itemized payments by the
8 campaign include flights and a hotel stay, which appears to include the night of the 6th, when
9 Van Orden did not appear to conduct any campaign-related activities.⁴⁹

10 Under Commission precedent, even if January 6th was an extra day of the trip involving
11 only personal activity, because the cost of the airfare is a defined expense that would have been
12 incurred regardless of the extra day, the use of campaign funds to pay for the flight does not
13 constitute personal use.⁵⁰ However, there is a question as to whether the hotel costs for the
14 evening of the 6th could be considered an incremental expense because this personal day was in

⁴⁶ Personal Use E&J at 7,869.

⁴⁷ See Factual & Legal Analysis at 4-5, MUR 6127 (Obama for America, *et al.*) (“While the Commission has required candidates or office holders to reimburse incremental travel expenses that are personal, (*i.e.*, additional expenses attributable to personal use in a mixed travel context), the Commission historically has considered airfare as a defined expense that is not apportioned as both a personal and campaign expense and thus applied the irrespective test to determine whether personal or campaign funds should be used to pay for the airfare.”); Advisory Opinion 2002-05 at 5 (Hutchinson) (“AO 2002-05”) (“[T]he airfare represents a defined expense that would have existed irrespective of any personal or campaign related activities, the entire cost of the ticket may be paid for by the City, with no obligation by Ms. Hutchinson or her campaign committee to reimburse the City.”).

⁴⁸ See 11 C.F.R. 113.1(g)(1)(ii)(C); AO 2002-05 at 4-5 (“Campaign funds may not be used to pay for the portions of the trip that consisted of days spent either on personal activity or City business.”).

⁴⁹ See *supra* page 4 (chart of the Committee’s itemized travel expenses).

⁵⁰ See Personal Use E&J at 7,869. *But see* Factual & Legal Analysis at 8, MUR 6127 (Obama for America, *et al.*) (stating that it appears the candidate should have used personal funds to pay for a flight where “the undisputed purpose of [the travel] was meeting a personal obligation” and there was no information suggesting that the campaign activity, phone calls and meetings, required the candidate to travel to that destination).

1 the middle of two travel days that were campaign related, unlike the circumstances the
 2 Commission has previously considered where the personal travel expenses were added to the end
 3 of a campaign-related trip.⁵¹ But even if the expenses relating to January 6 were personal in
 4 nature, the amount of that payment appears to be at most only a few hundred dollars, a small
 5 amount that does not merit the expenditure of further Commission resources to pursue.⁵²

6 Accordingly, we recommend that the Commission dismiss as a matter of prosecutorial
 7 discretion the allegations that Van Orden and the Committee violated the Act by converting
 8 contributions to personal use and close the file.⁵³

9 **IV. RECOMMENDATIONS**

10 1. Dismiss as a matter of prosecutorial discretion the allegation that Derrick Van
 11 Orden and Van Orden for Congress and Mary Clancy in her official capacity as

⁵¹ See Personal Use E&J at 7,869. See also AO 2002-05 at 3-5 (treating expenses including “subsistence and lodging” as incremental expenses when two consecutive days in the middle of an eight-day trip were campaign related and the other six days were personal or related to the candidate’s duties of a non-federal office). Unlike this example, we do not have sufficient information to determine whether Van Orden scheduled the meetings on the 5th and 7th for the purpose of attending the Rally, or whether the timing of the trip was based on the availability of the individuals with whom he would be meeting, and the intervening day off from the meetings may have been an unavoidable byproduct of Members of Congress and staff participating in the counting of the votes of the Electoral College in Congress on the 6th. In the former scenario the expenses would be incremental and thus personal use if paid with campaign funds; in the latter scenario the expenses may not have been incremental.

⁵² For instance, we do not have specific information regarding which nights Van Orden or his staff spent in the hotel, but based on his account, he was in Washington, DC for four nights (January 3-6). Dividing his reported hotel expense (\$655.60) by four results in a total of \$163.90. Dividing the reported expense of Carter, his aide (\$469.62) by four results in \$117.41, making the combined total for both of them \$281.31. Without additional information on other potential incremental expenses attributable to the 6th, the total sum of potential personal use expenses at issue here remains a small amount that does not merit the expenditure of further Commission resources to pursue. See Factual & Legal Analysis at 10, MUR 7850 (Freedom First PAC) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$2,655)); Factual & Legal Analysis at 3-5, MUR 7127 (Sean Baddy for US Senate, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$111.56)); Factual & Legal Analysis at 14-16, MUR 7293 (Zinke for Congress, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$1,250)); Factual & Legal Analysis at 7, MUR 6127 (Obama for America, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$1,248-\$1,338) and the “novel facts and issues” presented in the matter); *cf.*, First Gen. Counsel’s Rpt. at 8-9 & Cert. ¶ 2 (Feb. 7, 2005), MUR 5424 (Virginia Foxx for Congress, *et al.*) (finding reason to believe a violation occurred, taking no further action, and sending an admonishment letter regarding personal use of \$100 of campaign funds to pay for Chamber of Commerce membership).

⁵³ *Heckler*, 470 U.S. 821.

- 1 treasurer violated 52 U.S.C. § 30114(b) by converting contributions to personal
 2 use;
- 3 2. Approve the attached Factual and Legal Analysis;
- 4 3. Approve the appropriate letters; and
- 5 4. Close the File.

6
 7 Lisa J. Stevenson
 8 Acting General Counsel

9
 10 Charles Kitcher
 11 Associate General Counsel
 12 for Enforcement

13
 14
 15 6/16/2022
 16 Date

17 
 18 _____
 19 Jim Lee
 20 Deputy Associate General Counsel
 21 for Enforcement

22 
 23 _____
 24 Ana J. Peña-Wallace
 25 Assistant General Counsel

26 
 27 _____
 28 Nicholas O. Mueller
 29 Attorney
 30

Cooksey Office Edits

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

Respondents: Derrick Van Orden MUR 7917
Van Orden for Congress and Mary Clancy
in her official capacity as treasurer

I. INTRODUCTION

The Complaint in this matter alleges that Derrick Van Orden, a candidate for Wisconsin's Third Congressional District, and his principal campaign committee, Van Orden for Congress and Mary Clancy in her official capacity as treasurer (the "Committee"), violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by converting contributions to personal use. Specifically, the Complaint alleges that approximately two months after losing the 2020 general election, Van Orden "appear[ed] to use campaign funds for personal use, including travel to and lodging in Washington, DC at the time of the 'Save America Rally' and subsequent storming of the U.S. Capitol on January 6."¹

Van Orden and the Committee (collectively, "Respondents") state that the purpose of the travel was to attend a series of meetings regarding Van Orden's "political future" that were scheduled for January 5 and 7, 2021, and reference "the ongoing nature of [Van Orden's] Campaign."² Respondents further state that Van Orden was "briefly present near the [Rally]" but "did not actually attend the Rally" and "did not take part in [the] unlawful events" that occurred afterward.³

Because the available information suggests that the majority of the travel expenses paid by the Committee were made so that Van Orden could attend meetings regarding his potential

¹ Compl. at 1 (July 27, 2021).

² Resp. at 2 (Oct. 5, 2021).

³ *Id.* at 1-2, 3 n.1.

MUR 7917 (Derrick Van Orden, *et al.*)
Factual & Legal Analysis
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1 future candidacy, the Commission does not believe that this matter warrants the expenditure of
2 the Commission's limited resources given the likely small amount in violation. Accordingly, the
3 Commission exercises its prosecutorial discretion and dismisses the allegations that Van Orden
4 and the Committee violated 52 U.S.C. § 30114(b) by converting contributions to personal use.⁴

5 II. FACTUAL BACKGROUND

6 Derrick Van Orden was a candidate for the Third Congressional District of Wisconsin
7 during the 2020 election cycle, but he was defeated in the general election.⁵ According to its
8 2020 Year-End Report, the Committee had \$12,507.44 in cash on hand at the end of 2020.⁶ On
9 April 8, 2021, Van Orden filed a statement of candidacy to again run for Wisconsin's Third
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11 According to the Committee's 2021 April Quarterly Report, the Committee made three
12 payments totaling \$4,022.72 between January 5, 2021 and February 28, 2021, reporting that the
13 purpose was "travel," "travel reimbursement," or "travel unitemized."⁸ The report lists
14 reimbursements made to three individuals, including the candidate and two individuals that
15 appear to have been part of his 2020 campaign staff: (1) Van Orden, in the amount of \$2,709.66;
16 (2) Jared Carter, in the amount of \$1,057.05; and (3) Mary Krueger, in the amount of \$256.01.⁹

⁴ *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁵ Derrick Van Orden, Statement of Candidacy (Mar. 12, 2020); see *2020 Wisconsin Election Results*, WIS. ELECTIONS COMM'N (Nov. 18, 2020), <https://elections.wi.gov/sites/elections/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf>.

⁶ Van Orden for Congress, 2020 Year-End Report at 2 (Jan. 31, 2021).

⁷ Derrick Van Orden, Amended Statement of Candidacy (Apr. 8, 2021).

⁸ Van Orden for Congress, 2021 April Quarterly Report at 5-7 (Apr. 15, 2021).

⁹ *Id.* Neither the Complaint nor Response offer any information as to Jared Carter or Mary Krueger's relationship to Van Orden or the Committee, nor why their travel was paid for by the campaign. The Response discusses the payments and their purpose collectively. Based on a review of other reports filed by the Committee with the Commission, Krueger and Carter appear to have been paid staffers of the Committee. See *FEC*

- 1 Additionally, the Committee provided itemization for two of the reimbursements, as depicted in
2 the chart below:¹⁰

	RECIPIENT	PURPOSE	DATE OF DISBURSEMENT	AMOUNT
	Derrick Van Orden	Travel	2/28/2021	\$2,709.66
Memo Itemization:	Delta	Travel	1/3/2021	\$844.20
	Hampton Inn	Travel	1/8/2021	\$655.60
	Uber	Travel	1/7/2021	\$409.77
	Jared Carter	Travel Reimbursement	1/5/2021	\$1,057.05
Memo Itemization:	Expedia	Travel	1/2/2021	\$418.20
	Hampton Inn	Travel	1/3/2021	\$469.62
	Uber	Travel	1/2/2021	\$67.85
	Mary Krueger	Travel, Unitemized	1/5/2021	\$256.01

- 3
4 The Complaint alleges that these travel expenditures were not for permissible campaign
5 uses but for “personal activity” in connection with “the ‘Save America Rally’ and subsequent
6 storming of the U.S. Capitol on January 6,” which was also the date that the votes of the

Disbursements: Filtered Results, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=krueger&two_year_transaction_period=2020 (last visited June 15, 2022) (reflecting nine payroll disbursements by Van Orden for Congress to Mary Krueger in 2020); *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=carter&two_year_transaction_period=2020 (last visited June 15, 2022) (reflecting six payroll disbursements by Van Orden for Congress to Jared Carter in 2020). Indeed, based on the Committee’s most recent filings, it appears that Krueger stills work for Van Orden’s 2022 campaign. See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=carter&recipient_name=krueger&two_year_transaction_period=2022 (last visited June 15, 2022) (reflecting 22 payroll disbursements to Krueger during the 2022 election cycle).

¹⁰ Commission regulations only require itemization of the ultimate payee for reimbursed travel expenses when the total amount reimbursed exceeds \$500 and payments to any one vendor used for the expenses total over \$200 for the election cycle. 11 C.F.R. § 102.9(b)(2)(i); Notice of Interpretive Rule Regarding Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625, 40,626 (July 6, 2013). Accordingly, it appears that only a portion of the reimbursements made to Van Orden and Carter required itemization.

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1 Electoral College were counted regarding the 2020 presidential election.¹¹ Because Van Orden
2 was not a candidate for federal office at the time of the trip,¹² the Complaint alleges that
3 respondents violated the personal use provisions of the Act and Commission regulations. In
4 support of this claim, the Complaint relies on a January 13, 2021 Op-Ed that Van Orden
5 authored, where he states, “I recently traveled to Washington, DC for meetings and to stand for
6 the integrity of our electoral system *as a citizen* and at the behest of my neighbors here in
7 Western Wisconsin.”¹³ The Op-Ed identifies Van Orden as a “former Republican congressional
8 candidate for Wisconsin’s third district.”¹⁴ The Complaint adds that because the “Save America
9 Rally” (the “Rally”) concerned the 2020 presidential general election results, the purpose of Van
10 Orden’s travel in January 2021 would have been personal regardless of whether Van Orden had
11 become a federal candidate.¹⁵

12 The Response denies that the purpose of Van Orden’s trip was personal and instead states
13 he traveled to Washington, DC on January 3rd “for a series of political meetings” scheduled for
14 January 5th and 7th with members of the House Republican Caucus and party staff regarding his
15 “political future.”¹⁶ Respondents explain, however, that the meetings scheduled for January 7th
16 were canceled in the wake of the events following the rally on January 6th, and Van Orden

¹¹ Comp. at 1. *See also* 3 U.S.C. § 15 (providing that the counting of the votes of the Electoral College in Congress be held on the sixth day of January).

¹² Compl. at 5.

¹³ *Id.* at 3. (quoting Derrick Van Orden, *We Need Abraham Lincoln Now More Than Ever*, LA CROSSE TRIB. (Jan. 13, 2021), https://lacrossetribune.com/news/local/derrick-van-orden-we-need-abraham-lincoln-now-more-than-ever/article_f29c4153-a584-54df-9d07-b6092ab38d57.html (“Van Orden Op-Ed”)) (emphasis added in Complaint).

¹⁴ *Id.*

¹⁵ *Id.* at 5-6.

¹⁶ Resp. at 1-2.

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1 returned home to Wisconsin on January 7th.¹⁷ Respondents assert that Van Orden did not
2 actually attend the rally but arrived late and “remained on the periphery of the event.”¹⁸
3 Given that the meetings that were scheduled for January 5th and 7th were regarding Van Orden’s
4 “political future,” Respondents contend that the travel expenses for the trip were permissible.
5 Respondents state that “the ongoing nature of [Van Orden’s] [c]ampaign at the time of the
6 meetings is just one more fact to justify the necessity and purpose of the trip.”¹⁹ While also
7 acknowledging that Van Orden’s travel was “not in connection with any particular election,”
8 Respondents nevertheless assert that the trip constituted “political travel” that would be
9 permitted under the Act as being for “any other lawful purposes.”²⁰ Respondents argue that
10 regardless of whether Van Orden was a candidate at the time, the Committee was “registered
11 with the Commission, properly functioning, and filing timely reports” and therefore it could
12 “raise and spend funds in accordance with federal law, just as the Campaign did in this
13 instance.”²¹ Respondents further claim that even if attending the rally had been the only purpose
14 of the trip, such a use of campaign funds would nonetheless be permissible because the rally was

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3.

²¹ *Id.*

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1 “inherently political, akin to any other [p]arty event or committee fundraiser” and the expense
2 would not have existed irrespective of Van Orden’s candidacy.²²

3 **III. LEGAL ANALYSIS**

4 Under the Act, a contribution accepted by a candidate may be used for, *inter alia*,
5 “otherwise authorized expenditures in connection with the campaign for Federal office of the
6 candidate.”²³ The Commission has long recognized that “candidates have wide discretion over
7 the use of campaign funds,”²⁴ but a contribution to a candidate shall not be converted by any
8 person to “personal use.”²⁵ “Personal use” means any use of funds in a campaign account of a
9 present or former candidate to fulfill a commitment, obligation, or expense of any person that
10 would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.²⁶ The
11 Commission evaluates certain expenses, such as travel, meal, and legal expenses, on a case-by-
12 case basis by applying the “irrespective test” to determine whether a personal use violation has
13 occurred.²⁷ If a candidate “can reasonably show that the expenses at issue resulted from
14 campaign or officeholder activities, the Commission will not consider the use to be personal
15 use.”²⁸

16 Here, Van Orden asserts that the purpose of the \$4,022.72 in travel expenses was to
17 facilitate his attendance at meetings with Members of Congress and party staff about his

²² *Id.* Respondents do not assert that Van Orden participated in purportedly campaign-related activities on January 6th aside from the rally.

²³ 52 U.S.C. § 30114(a).

²⁴ Explanation and Justification for Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7,862, 7,867 (Feb. 9, 1995) (“Personal Use E&J”).

²⁵ 52 U.S.C. § 30114(b)(1).

²⁶ *Id.* § 30114(b)(2); 11 C.F.R. § 113.1(g); Personal Use E&J at 7,863.

²⁷ *See* 11 C.F.R. § 113.1(g)(1)(ii).

²⁸ *Id.*

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1 “political future” and notes the “ongoing nature of his [c]ampaign.”²⁹ Respondents’ assertions
2 about the existence of these meetings appear to be corroborated in part by Van Orden’s reference
3 to “meetings” in his Op-Ed, which was published just days after the trip and more than six
4 months before the date of the Complaint.³⁰

5 In the context of an Advisory Opinion, the Commission has determined that “the use of
6 excess campaign funds for future Federal and local or state races would not violate the personal
7 use prohibition.”³¹ Considering: (1) Respondents’ references to Van Orden’s “ongoing
8 campaign”; (2) that the travel expenses relating to these meetings included travel for two aides
9 from Van Orden’s 2020 campaign; (3) and that Van Orden filed his statement of candidacy to
10 run for Congress in 2022 prior to the end of the reporting period covering these expenses, an
11 inference can be drawn that at least one purpose of these meetings was to discuss Van Orden
12 running for Congress in 2022.³² Given these facts, there is an insufficient basis to conclude that
13 the travel expenses here would have existed irrespective of Van Orden’s future candidacy.³³

14

²⁹ Resp. at 1-2. Neither the Complaint nor Response separately address the contemporaneous travel expenses reimbursed by the Committee to Mary Kreuger or Jared Carter. *Supra* note 9. Because both the Complaint and Response address these travel expenses and their purpose collectively with Van Orden’s travel expenses, and there is no conflicting information in the record, we also address them collectively.

³⁰ Van Orden Op-Ed.

³¹ Advisory Opinion 1993-10 at 2-3 (Colorado) (advising that the requestor’s proposal to use excess campaign funds for future non-Federal campaigns, including a Gubernatorial campaign and a campaign to seek office in a political party organization, would not be personal use) (citing Advisory Opinion 1986-5 (Barnes for Congress) and Advisory Opinion 1980-113 (Zell Miller for U.S. Senate)); *see* Advisory Opinion 1993-06 at 4 (Panetta) (“Latitude has been given to use campaign funds for what could be termed operating expenditures such as: . . . establishing a fund for a possible future campaign for Federal or non-Federal office”).

³² *Supra* pages 3, 5-6.

³³ Cancellation of the January 7th meeting(s) after the travel had commenced does not change the purpose of the payment of those travel expenses.

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1 Under Commission precedent, even if January 6th was an extra day of the trip involving
2 only personal activity, because the cost of the airfare is a defined expense that would have been
3 incurred regardless of the extra day, the use of campaign funds to pay for the flight does not
4 constitute personal use.³⁴ There is a question as to whether the hotel costs for the evening of the
5 6th could be considered an incremental expense because this personal day was in the middle of
6 two travel days that were campaign related, unlike the circumstances the Commission has
7 previously considered where the personal travel expenses were added to the end of a campaign-
8 related trip.³⁵ But even if the expenses relating to January 6 were personal in nature, the amount
9 of that payment appears to be at most only a few hundred dollars, a small amount that does not
10 merit the expenditure of further Commission resources to pursue.³⁶ Accordingly, the
11 Commission dismisses as a matter of prosecutorial discretion the allegations that Van Orden and
12 the Committee violated the Act by converting contributions to personal use.³⁷

³⁴ See Personal Use E&J at 7,869. *But see* Factual & Legal Analysis at 8, MUR 6127 (Obama for America, *et al.*) (stating that it appears the candidate should have used personal funds to pay for a flight where “the undisputed purpose of [the travel] was meeting a personal obligation” and there was no information suggesting that the campaign activity, phone calls and meetings, required the candidate to travel to that destination).

³⁵ See Personal Use E&J at 7,869. *See also* AO 2002-05 at 3-5 (treating expenses including “subsistence and lodging” as incremental expenses when two consecutive days in the middle of an eight-day trip were campaign related and the other six days were personal or related to the candidate’s duties of a non-federal office).

³⁶ Without additional information on other potential incremental expenses attributable to the 6th, the total sum of potential personal use expenses at issue here remains a small amount that does not merit the expenditure of further Commission resources to pursue. *See* Factual & Legal Analysis at 10, MUR 7850 (Freedom First PAC) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$2,655)); Factual & Legal Analysis at 3-5, MUR 7127 (Sean Baddy for US Senate, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$111.56)); Factual & Legal Analysis at 14-16, MUR 7293 (Zinke for Congress, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$1,250)); Factual & Legal Analysis at 7, MUR 6127 (Obama for America, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation (\$1,248-\$1,338) and the “novel facts and issues” presented in the matter); *cf.*, First Gen. Counsel’s Rpt. at 8-9 & Cert. ¶ 2 (Feb. 7, 2005), MUR 5424 (Virginia Foxx for Congress, *et al.*) (finding reason to believe a violation occurred, taking no further action, and sending an admonishment letter regarding personal use of \$100 of campaign funds to pay for Chamber of Commerce membership).

³⁷ *Heckler*, 470 U.S. 821.