

I. PROCEDURAL BACKGROUND

The Federal Election Campaign Act (“FECA” or the “Act”) provides that any citizen may, upon filing a sworn complaint, notify the Federal Election Commission of a potential violation of the Act.⁴ The Commission must then determine whether such a complaint offers “reason to believe that a person has committed...a violation of the Act.”⁵

This so-called “RTB” vote does not adjudicate a matter or determine a respondent’s guilt. It merely serves a gatekeeping function, blocking further action unless there are four affirmative votes—a bipartisan agreement—to move forward.⁶ Even then, finding or declining to find RTB is generally not a binary question. The Commission must approve a particular legal theory of the case, which may be broader or narrower than the one recommended by our Office of General Counsel (“OGC”). And it may authorize, or decline to authorize, an investigation, which allows the Commission to instruct OGC to investigate the allegations in the complaint, including, if necessary, through the issuance of subpoenas, interrogatories, and requests for formal interviews with the Commission’s agents. And any investigation may be limited, both by the narrowness of the legal theory actually approved by the Commission and by explicit instructions to OGC.

⁴ 52 U.S.C. § 30109(a)(1).

⁵ 52 U.S.C. § 30109(a)(2).

⁶ See Statement of Reasons of Vice Chair Weintraub and Comm’rs Bauerly and Walther at 1 n.2, MUR 6441 (Unknown Respondents), Aug. 15, 2012 (“‘Reason to believe’ is a threshold determination that by itself does not establish that the law has been violated...In fact, ‘reason to believe’ determinations indicate only that the Commission has found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act occurred”).

After an RTB finding, and prior to a finding of probable cause, a respondent may conciliate the Matter by signing a conciliation agreement and, typically, agreeing to pay a civil fine.⁷ This is often, by direction of the Commission, attempted before an investigation. A respondent may choose to contest our RTB finding, however, wait for any investigation to conclude and see if OGC will make a recommendation “to proceed to a vote on probable cause,” in which case OGC must lay out its case for probable cause (“PC”) in a brief to the Commission.⁸ At this stage, the respondent is accorded a right to file papers “replying to the brief of [the] general counsel.”⁹

This baroque procedure is doubtless familiar to those who have practiced before this agency. But it is important in these Matters because, as one might expect, the quantum of evidence needed to find probable cause is greater than is required for RTB.¹⁰ And RTB itself is no rubber stamp: “[a]t the reason-to-believe stage, we cannot proceed to authorize an investigation based upon ‘unwarranted legal conclusions from asserted facts or mere speculation,’” nor may we “find reason reason-to-believe when a complaint ‘consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response.’”¹¹

⁷ 52 U.S.C. § 30109(a)(5); *see also* Fed. Election Comm’n, “Procedural Rules for Probable Cause Hearings,” 72 Fed. Reg. 64919, 64920, Nov. 19, 2007 (“Proceeding to probable cause briefing requires a substantial investment of the Commission’s limited resources. Consistent with the goal of expeditious resolution of enforcement matters, the Commission encourages pre-probable cause conciliation”).

⁸ 52 U.S.C. § 30109(a)(3).

⁹ *Id.*

¹⁰ Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 4, MUR 4960 (Clinton), Dec. 21, 2000 (noting that the purpose of a post-RTB investigation is to “prove or disprove the charge”); *see also* Statement of Reasons of Vice Chair Hunter at 3, MUR 6054 (1099 L.C., *et al.*), Dec. 19, 2011 (noting that “[n]either the Act nor Commission regulations define this [PC] standard...at a minimum, [the Commission] must meet the ‘preponderance’ standard in a civil case”).

¹¹ Supp. Statement of Reasons of Vice Chair Dickerson and Comm’r Trainor at 4, MURs 7821/7827/7868 (Twitter, Inc., *et al.*), Sept. 13, 2021 (quoting Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 2, MUR 4960 (Clinton), Dec. 21, 2000) (cleaned up).

Accordingly, a decision by the Commission to find RTB is no small matter. Any time the federal government opens an investigation into alleged wrongdoing it imposes certain costs on the targets of those investigations. Some costs are financial and measurable, such as the expense of hiring counsel.¹² Others are more difficult to pin down: the loss of privacy, the risk of an overbearing investigation, the chilling of political activity,¹³ and the reputational harm imposed when one is identified as the subject of a federal investigation.

And while the Commission has an obligation to mitigate these downsides wherever possible, such as by finding RTB on a narrow theory and carefully tailoring its investigation, it can never eliminate them. Every RTB vote is ultimately an act of administrative judgment, to be determined on the basis of the particular facts before the Commission in any given matter.¹⁴

The evidence required to move from an RTB finding to a PC finding, however, may be analogized to the difference between the evidence a peace officer needs to stop a vehicle versus what she needs to arrest someone.¹⁵ A marginal case at the RTB stage, unless buttressed by OGC's investigation, will seldom be suitable for a probable cause finding. This was such a case.

¹² See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 323 (2010) (noting First Amendment harm inherent in a regime that requires Americans to hire an attorney before engaging in political speech or association).

¹³ The FEC is “[u]nique among federal administrative agencies” because our “sole purpose [is] the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes.” *Am. Fed’n of Labor and Cong. of Indus. Organizations v. Fed. Election Comm’n*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *Fed. Election Comm’n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)) (brackets supplied).

¹⁴ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

¹⁵ Statement of Reasons of Vice Chair Hunter at 3, MUR 6054 (1099 L.C., *et al.*), Dec. 19, 2011 (noting that “it is debatable whether the Commission may properly apply interpretations of the [probable cause] standard from the criminal sphere”).

II. FACTUAL AND LEGAL BACKGROUND

a. *Proceedings at the RTB stage.*

These Matters came to the Commission’s attention via two complaints which both described and appended reporting from the *Telegraph*, a British newspaper. That reporting consisted of an article bearing a vague byline to the paper’s “Investigative Team” as well as a short video.¹⁶ OGC suggested that the *Telegraph*’s reporting provided sufficient evidentiary basis for us to find RTB that 52 U.S.C. § 30121(a)(2) had been violated. That portion of the Act provides that it is “unlawful for...a person to solicit...a contribution or donation...from a foreign national.”¹⁷

The unsigned reporting and, more importantly, the video described a simple trap: the *Telegraph*’s Investigative Team “lied about who they were, and falsely claimed to represent a non-existent Chinese national who wanted to contribute \$2 million to curry favor with” then-candidate Donald Trump shortly before the 2016 presidential election.¹⁸ The Complaint alleged that Great America PAC took the bait.

The Commission declined to rely upon the *Telegraph*’s anonymous reporting in making its RTB finding. But the accompanying video, while heavily edited, was direct evidence recording brief exchanges between the *Telegraph*’s reporters and Mr. Benton and Eric Beach, a representative of Great America PAC.¹⁹ Specifically, it appears to portray Mr. Benton describing a mechanism by which a foreign national could pass a \$2 million contribution to the PAC through intermediary companies.²⁰

¹⁶ Factual and Legal Analysis (“F&LA”) at 2, n.2, MURs 7165/7196 (Jesse Benton).

¹⁷ 52 U.S.C. § 30121(a)(2).

¹⁸ Jesse Benton’s Probable Cause Br. (“Benton Br.”) at 1. Mr. Benton’s brief incorrectly states that these activities took place “[i]n the weeks before the 2020 election.” *Id.* They did not.

¹⁹ *See, e.g.* F&LA at 12-13.

²⁰ F&LA at 10-16.

Mr. Benton elected not to file a response.²¹

The video clearly did not contain all the raw footage taken by the *Telegraph*. Instead, it was edited to create a three minute and twenty-four second clip.²² While this raised significant doubts as to the full context, it was just sufficient, in my judgment, to meet the RTB standard. While incomplete, the video “provided some evidence upon which one could reasonably conclude” that Mr. Benton and Great America PAC solicited a foreign national contribution in violation of FECA.²³ Far from serving as “mere speculation”²⁴ concerning what Mr. Benton said, the video provided direct evidence that Mr. Benton said things that, at a minimum, presented “a sufficiently specific allegation...so as to warrant a focused investigation that c[ould] prove or disprove the charge.”²⁵

Accordingly, I voted to find reason to believe that Mr. Benton had committed a § 30121(a)(2) violation.²⁶ The Commission took no action against Eric Beach, whose statements in the video did not provide sufficient evidence of his role to make a RTB determination.²⁷

²¹ First Gen'l Counsel's Report (“FGCR”), MURs 7165/7195 (Great America PAC, *et al.*) at 6 (“Benton did not file a Response”). Beach and Great America PAC did file a brief response, which argued that since the entire affair was a set-up, and no actual Chinese national existed, there was no violation of the Act. This “mistake of fact” defense was unpersuasive. F&LA at 4-5; Statement of Reasons of Comm’r Cooksey at 5, MURs 7165/7196, Oct. 5, 2021 (“Solicitation is a kind of inchoate offense, meaning it is the request itself that is prohibited; it is not necessary for the solicited act to actually occur or to be factually possible in order to constitute a violation”); Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 5, MURs 7165/7195 (Benton), Oct. 8, 2021 (“[S]ection 30121 prohibits all ‘knowing’ solicitations of foreign nationals...even if that conclusion [that the solicited person is a foreign national] is ultimately incorrect”).

²² FGCR at 4, n.16 (“The reporters filmed some of their interactions with Beach and Benton and published clips of the footage beside the article”). The video has been removed from the *Telegraph*'s website, but remains available in our public file and on YouTube.

²³ Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 4, MUR 4960 (Clinton), Dec. 21, 2000.

²⁴ *Id.* at 2.

²⁵ *Id.* at 4.

²⁶ Certification at 1, MURs 7165/7196 (Great America PAC, *et al.*), Feb. 25, 2021.

²⁷ *Id.*

b. The post-RTB investigation fails to expand the factual record.

The Commission’s vote to find RTB authorized an investigation into the respondents, as well as the use of compulsory process, if necessary.²⁸

On March 22, 2021, Great America PAC agreed to “toll the statute of limitations” for sixty days and pursue pre-probable cause conciliation with the Commission.²⁹ The PAC ultimately chose to conciliate with the Commission, “[s]olely for the purpose of settling the matter expeditiously and avoiding the expense of litigation, without admission with respect to any other proceeding.”³⁰ That process formally concluded on June 23, 2021.³¹

Mr. Benton, however, acquired counsel and sent a designation-of-counsel form to the Commission on March 24, 2021.³² On April 13th, the Commission approved a subpoena directed to Mr. Benton.³³ The subpoena, which was narrowly focused on Benton’s background with Great America PAC and his interactions with the *Telegraph’s* Investigative Team,³⁴ was sent one week later, on April 21st. Meanwhile, OGC proceeded to contact the *Telegraph* by mail, assuming the paper would stand by its reporting and seeking the full context for its video.

A comedy of errors ensued.

²⁸ *Id.*

²⁹ Consent to Extend the Time to Commence a Civil Enforcement Action, Suit, or Proceeding at 1, MURs 7195/7196 (Great America PAC, *et al.*), March 22, 2021.

³⁰ Conciliation Agreement at 5, MURs 7165/7196 (Great America PAC, *et al.*).

³¹ Certification at 1, MURs 7165/7196 (Great America PAC, *et al.*), June 23, 2021 (voting to “[a]ccept the signed conciliation agreement with Great America PAC”).

³² Benton Br., Attachment 1 at 1-3.

³³ Amended Certification at 1, MURs 7165/7196 (Great America PAC, *et al.*), April 13, 2021.

³⁴ Subpoena as Sent, “Questions and Document Requests.”

First, in a remarkable snafu, Mr. Benton’s designation-of-counsel form was faxed to the FEC building but was never received by the OGC attorneys handling these Matters.³⁵ As a result, OGC did not realize that Mr. Benton had secured counsel until late July and sent the Commission’s subpoena to an address that OGC believed to be associated with him.³⁶ Upon being apprised of the subpoena requests, Mr. Benton’s counsel swiftly filed a motion to quash, which was not presented to the Commission until August 2nd—just eight days before OGC circulated its general counsel brief to both the Commission and Mr. Benton. As a result, the subpoena approved by the Commission never yielded a response.³⁷

Nor did any other investigatory avenue yield fruit. The *Telegraph* did not respond to repeated inquiries by the Commission—all of which were made by letter. The *Telegraph* was within its rights not to answer such queries. But in the absence of a response from the *Telegraph* supplementing its reporting, the Commission was left with an edited, chopped-up video and an unsigned article—precisely the sort of RTB-stage evidence that must be supplemented to survive the more rigorous scrutiny required to find probable cause.³⁸ And, as discussed *supra*, while Great America PAC chose to conciliate, it did not admit any facts nor concede any wrongdoing when it did so—in fact, Great America PAC disclaimed actual knowledge of Benton’s actions, stating that he “was an independent political consultant who was not acting as [the PAC’s] agent or for [the PAC’s] benefit when he performed the acts at issue.”³⁹ That conciliation agreement, accordingly, added nothing substantive to the evidentiary record before the Commission.

³⁵ Motion, Conciliation, and Tolling at 3, MURs 7195/7196 (Benton); Benton Br., Attachment 1.

³⁶ OGC had previously sent the subpoena to the last available personal address for Mr. Benton, but never received a response from him or a notice that the mail had gone undelivered.

³⁷ The statute of limitations in these Matters was rapidly closing in, as well. FGCR at 1, MURs 7165/7196 (Great America, *et al.*), May 24, 2018 (“LATEST SOL: October 19, 2021”).

³⁸ Unfortunately, news reports do not always stand up to scrutiny. *See, e.g.* Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 1, MUR 7271 (Dem. Nat’l Comm., *et al.*), June 10, 2021 (determining, after a thorough investigation, that, despite a *Politico* article alleging the contrary, “[b]ased on that investigation, OGC reported that there was no factual basis for the allegations that the Respondents solicited, accepted, or received opposition research from Ukrainian officials”); Statement of Reasons of Comm’r Weintraub at 1-2, MUR 7271 (Dem. Nat’l Comm., *et al.*), June 15, 2021 (“The complaint in this matter principally relied upon a *Politico* article...After the Commission voted to initiate the investigation in this matter, however, new information came to light that completely undermined the credibility of the complaint”).

And the risk here was non-trivial: as Mr. Benton’s PC brief noted, due to its short length and edited status, “[w]hat Mr. Benton said before or after the brief, cherry-picked clips in the short video is not shown or discussed in the video or the articles written about the video.” Benton Br. at 2

Worse still, during the months of silence from Mr. Benton and the *Telegraph*, OGC failed to come up with any other investigatory leads.

Thus, we were presented with a record at the probable cause stage that had hardly changed since the RTB stage—with one significant exception: Mr. Benton had secured counsel and provided substantive legal briefing.

c. OGC failed to demonstrate that there was PC against Mr. Benton

To secure the Commission’s vote for PC, it was OGC’s obligation to make a more substantial showing than it had at the RTB stage. Yet, as the general counsel’s brief demonstrates, OGC came back to the Commission—after nearly six months—with nothing more than the same three-and-a-half minutes of edited video footage that the complainants had alerted the Commission to nearly five years ago.⁴⁰

³⁹ Chair Broussard and Commissioners Walther and Weintraub argue that statements made in the Great America PAC conciliation agreement regarding Mr. Benton’s activities have relevance because the PAC “agreed” to them. Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 4, MURs 7165/7196 (Benton), Oct. 8, 2021. But these statements are picked from their context. Great America PAC plainly states that it is conciliating solely to avoid the costs of further dealings with the Commission and that Mr. Benton was not acting as its agent. Given these explicit disclaimers, I do not believe the conciliation agreement can reasonably be bootstrapped into a new role as evidence against Mr. Benton. Conciliation Agreement at 5, MURs 7165/7196 (Great America PAC, *et al.*).

⁴⁰ Gen’l Counsel’s Br. at 11-12 (“Benton’s discussion with the reporters, as captured in the *Telegraph* video, leaves no doubt that the reporters told Benton that their purported client was a Chinese national...Benton then provided the reporters with a detailed plan for the foreign national to make a contribution”); *id.* at 17 (“Based on the *Telegraph* video, there is evidence that Benton was aware that his conduct was illegal and that he engaged in an elaborate scheme to conceal it”); *id.* at 19 (“The *Telegraph* and video show that Benton, reasonably believing that he was speaking with the representatives of a foreign national interested in making a \$2 million contribution, presented and recommended a method for that contribution to be made...”); Benton Br. at 4 (“Based on OGC’s Brief, the documents disclosed by OGC, and what OGC did not disclose, it appears that OGC did not use its investigatory powers, or was not successful in using its investigatory powers, to obtain any further information from the makers of the video or the complainants”).

Moreover, Benton’s reply brief raised, for the first time, an argument that the Commission had not considered during its deliberations concerning these Matters. Specifically, Benton argued that the *Telegraph’s* incomplete video footage did not, in fact, show a “solicitation” under Commission regulations because “the two agents made the approach, pretending to be agents of a foreign national that wanted to make a \$2 million contribution to the Committee...By offering to make the contribution unsolicited, there was no contribution for Mr. Benton to solicit and merely discussing their unsolicited contribution does not constitute a solicitation.”⁴¹

Our regulations provide that a “solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value.”⁴² The regulations go on to note that this “clear message” “may be made directly or indirectly.”⁴³ And we have stated this “standard is an objective test, which ‘does not turn on the subjective interpretations of the speaker or the recipients,’ yet also ‘hinges on whether the recipient should have reasonably understood that a solicitation was made.’”⁴⁴ Concededly, our solicitation regulations are “hardly a model of clarity.”⁴⁵

⁴¹ Benton Br. at 10. Three of my colleagues issued a Statement of Reasons that does not address this argument, focusing instead on the respondent’s due process objections. Statement of Reasons of Chair Broussard and Comm’rs Walther and Weintraub at 2, MURs 7165/7196 (Benton), Oct. 8, 2021 (“We believe these concerns were sufficiently addressed and did not justify dropping him as a respondent”). While I found OGC’s mistakes in these Matters to be serious, my vote against probable cause was based on the evidentiary record before us (limited as it was by OGC’s carelessness) and the statutory arguments discussed in this Statement. *See infra* at n.51.

⁴² 11 C.F.R. § 300.2(m).

⁴³ *Id.*

⁴⁴ Statement of Reasons of Vice Chair Dickerson and Comm’r Cooksey at 3, MURs 7340/7609 (Great America Comm.), June 25, 2021 (quoting Statement of Reasons of Comm’rs Hunter and Petersen at 8, MUR 6798 (Vitter), Aug. 30, 2019 and Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13926, 13928, Mar. 20, 2006).

⁴⁵ Statement of Reasons of Vice Chair Dickerson and Comm’r Cooksey at 3, MURs 7340/7609 (Great America Comm.), June 25, 2021 (discussing the vagueness of our solicitation rules).

One thing that the rules *are* clear about, however, is that a solicitation must be initiated by the prospective recipient of a contribution.⁴⁶ The general counsel's brief acknowledged this fact, and grounded its argument in a theory that Mr. Benton "presented and recommended a method for [the] contribution to be made,"⁴⁷ suggesting that the term "recommend"...plainly encompasses providing specific instructions or general words of encouragement to those already interested in making a contribution."⁴⁸

But that is not what our regulations state,⁴⁹ and when faced with a gap in our regulatory scheme we are not permitted to fill it using our enforcement process.⁵⁰ Nor, in any event, do OGC's examples and arguments capture what Mr. Benton is recorded as doing: he is describing a scheme, not initiating instructions or encouragement. Perhaps there is more to the story, but it has not been presented to us by either the Complaint or OGC, despite the opportunity to do so.⁵¹

⁴⁶ 11 C.F.R. § 300.2(m) ("[T]o solicit means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value").

⁴⁷ Gen'l Counsel's Br. at 19.

⁴⁸ *Id.* at 10.

⁴⁹ The citations provided by OGC are drawn from 11 C.F.R. § 300.2(m), giving examples of solicitous statements including that "any contribution would mean 'a great deal' to a candidate, or the exhortation that 'giving \$100,000 to the candidate or political committee would be a very smart idea,'" or "where the person making the solicitation tells a potential contributor, 'I am not permitted to ask for contributions, but unsolicited contributions will be accepted at the following address.'" Gen'l Counsel's Br. at 10 (citing various portions of 11 C.F.R. § 300.2(m)) (cleaned up). All these examples require the solicitor to take the initiative in securing a contribution. OGC's effort to read them differently is unpersuasive.

⁵⁰ 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title").

⁵¹ Mr. Benton's briefing advanced a number of other legal arguments. But as this one is foundational and persuasive, I did not need to reach them to determine that the Commission lacked probable cause to proceed.

III. CONCLUSION

The Commission found RTB based on a particular theory and authorized an investigation targeted at the evidence necessary to prove or disprove that theory. Despite this mandate, OGC's investigation failed to develop the factual record, leaving us, at the probable cause stage, with only marginally useful evidence. Faced with a failed investigation and a newly-advanced legal argument to which OGC had no answer, I voted against a probable cause finding in these Matters.



Allen Dickerson
Vice Chair

October 13, 2021

Date