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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR:	5135
DATE COMPLAINT FILED:	October 30, 2000
DATE OF NOTIFICATION:	November 6, 2000
DATE ACTIVATED:	July 13, 2001
EXPIRATION OF STATUTE OF LIMITATIONS:	March 8, 2004
STAFF MEMBER:	Brant Levine

COMPLAINANT: Concepcion M. Elizondo

RESPONDENTS: George W. Bush
Bush for President, Inc. and David Herndon, as treasurer
Bush-Cheney 2000, Inc. and David Herndon, as treasurer
State of Texas

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 431(8)(A)
2 U.S.C. § 431(11)
2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(f)
11 C.F.R. § 100.7(a)(1)(iii)(A)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

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I. GENERATION OF MATTER

Concepcion M. Elizondo filed a complaint alleging that George W. Bush violated the Federal Election Campaign Act of 1971, as amended, ("the Act") by failing to report the value of security personnel provided by the Texas Department of Public Safety during the 2000 primary and general election for president. For the primary election, Bush's principal campaign

committee was Bush for President, Inc. For the general election, Bush's campaign committee was Bush-Cheney 2000, Inc. David Herndon serves as treasurer of both these committees.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

The complainant contends that the Texas Department of Public Safety ("DPS") made a contribution to the Bush campaign by providing a security detail to then-Governor George W. Bush. Consequently, the complainant asserts that the cost of the security detail should have been reported to the Commission. The complainant had previously submitted a request to DPS for information about the governor's security detail, and he attached correspondence with DPS to the complaint. That correspondence shows that DPS, supported by an opinion of the Texas Office of Attorney General, denied the complainant's request for information. DPS stated that the information was exempt from public disclosure under Texas law because it would interfere with law enforcement.

Bush-Cheney 2000, Inc. and David Herndon, as treasurer, ("Bush-Cheney") counter in their response that the Act does not require committees to report the salaries of law enforcement personnel to the Commission. Additionally, Bush-Cheney asserts that the Texas security officers never performed any campaign functions. Finally, the response states that the Commission should not disturb the decision of Texas authorities to conceal the salary information of Bush's security detail. George W. Bush and Bush for President, Inc. did not respond to the complaint.

The State of Texas, in its response to the complaint, first asserts its sovereign and Eleventh Amendment immunity. Next, the response explains that DPS routinely provides a security detail to Texas governors and that the detail travels with the governor wherever he may

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be, as long as he holds office. Moreover, the response contends that Bush's security detail did not perform any campaign functions. Texas also argues that states are not covered under the Act's definition of "person," and thus it could not have made a contribution to Bush's campaign. Alternatively, the response asserts that even if Texas is a "person," providing a routine security detail to the governor does not constitute a contribution.

According to news accounts, the cost of Bush's Texas security detail in 1999—the year Bush announced his candidacy for president—was approximately $2.6 million, more than ten times the average amount spent by DPS in previous years. *See* Jay Root, "Secret Service Takes Over Bush's Security," *The Fort Worth Star-Telegram*, Mar. 17, 2000, pg. 14. A spokesman for DPS explained the cost by stating that DPS "had to dramatically increase the manpower to accommodate for the governor's travel schedule . . ." *Id.* DPS provided security for Bush until March 15, 2000, when the United States Secret Service took over, leaving DPS to serve in a minimal backup role. *Id.*

B. The Law

The Act defines "contribution" to include either (1) "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office" or (2) "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. § 431(8)(A). The term "anything of value" includes all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A). Examples of in-kind contributions include use of facilities, supplies, and personnel. *Id.* Contributions to political committees must be reported in accordance with the Act. 2 U.S.C. § 434(b).

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The Act provides that no person shall make contributions to any candidate and his or her authorized political committee with respect to any election for federal office which, in the aggregate, exceed $1,000. 2 U.S.C. § 441a(a)(1)(A); 11 C.F.R. § 110.1(b). "Person" is defined as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11). Candidates and political committees are prohibited from knowingly accepting any contributions in excess of the Act's limitations. 2 U.S.C. § 441a(f); 11 C.F.R. § 110.9(a).

C. Analysis

1. Whether Contribution Limits Apply to States

As a threshold matter, this Office must address Texas's contention that the Act's contribution limits do not apply to states. If Texas is not a "person" subject to the Act's limits, it could potentially provide unlimited in-kind contributions to Bush's campaign. The Commission, however, has previously made clear that states are "persons" and are thus subject to contribution limits.

The Commission's treatment of states as "persons" began after the Act was amended in 1979 to exclude the federal government from the definition of "person."[1] Because Congress took specific action to preclude the federal government but not states from making a contribution, the

[1] Prior to the 1979 amendments, the Commission did not treat states as "persons." In MUR 246 (Jimmy Carter), for example, this Office wrote in a report to the Commission that "there appears to be no legislative history to support a finding that a sovereign state is a person within the meaning of the Act." Accordingly, the Commission found no reason to believe that the State of Georgia violated the Act by printing a book that featured then-Governor Carter.

Commission had implicit authority to hold states liable under the Act's contribution limits.[2] In MUR 1686, for example, the Commission found reason to believe that North Carolina made an excessive, in-kind contribution to Jim Hunt, who used state-owned helicopters for his Senate campaign travel.[3]

In MUR 3986 (Wilder), which also involved a governor using state aircraft for federal campaign travel, the Commission found reason to believe that Virginia violated the Act's contribution limits.

Advisory opinions also have applied the Act's contribution limits to states. For example, in Advisory Opinion 1999-7, the Commission told Minnesota that a proposed Internet site was permissible under the nonpartisan voter-drive exemption. The Commission made this

[2] This interpretation is consistent with the traditional canon of statutory interpretation known as *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others). *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (accepting the maxim that when a statute limits something to be done in a particular mode, it includes a negative of any other mode); *see also* Norman Singer, *Statutes and Statutory Construction* § 41:23 (6th ed.) (available in the FEC library). According to the legislative history of the 1979 amendments, Congress excluded the federal government from the definition of "person" because misuse of federal funds is a violation of federal law subject to enforcement by other agencies. *See* H.R. Rep. No. 422, 96th Cong., 1st Sess. (1979), contained in *Legislative History of the Federal Election Campaign Act Amendments of 1979*, Federal Election Commission, (1983) at 190-191.

[3] The Commission took no further action against North Carolina after the Hunt Committee fully reimbursed the state for use of the aircraft. However, in MUR 2074 (Charles Schumer), decided the same year as MUR 1686, the Commission failed to find reason to believe that the State of New York violated the Act with respect to possible in-kind contributions provided by Schumer's state Assembly staff. Because this MUR was decided before the Commission began issuing statements of reasons, there is no record of why the Commission did not proceed in this matter.

determination, though, after noting that states are not excluded from the Act's definition of "person."[5] Similarly, Advisory Opinion 2000-5, which dealt with the applicability of the Act to Indian tribes, stated that "the Commission has made clear that State governments and municipal corporations are persons under the Act and are subject to its contribution provisions." Therefore, Texas is a "person" and subject to the Act's contribution limits.[6]

2. Whether a Security Detail Constitutes a Contribution

Because Texas is subject to the Act's contribution limits, the next issue is whether Texas made a contribution to Bush by providing him with a security detail. The Act provides two methods by which a person can make a contribution: (1) by providing something of value to influence a federal election or (2) by paying compensation for the personal services of another that are rendered to a committee without charge for any purpose. *See* 2 U.S.C. § 431(8)(A). There does not appear to be a dispute that Texas provided something of value or that Texas paid for the personal services of others. Thus, the narrow question is whether the security detail was

[5] Because only "persons" can make contributions or expenditures, the Commission would not have even needed to discuss whether the nonpartisan voter-drive exemption applied if states were not "persons."

[6] Texas's assertion of Eleventh Amendment immunity does not affect Commission consideration of this matter. The Eleventh Amendment protects states only from suits by individuals, not the federal government. *See Alden v. Maine*, 527 U.S. 706, 754 (1999) (stating that "the constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law"). The Supreme Court is currently reviewing a Fourth Circuit case which held that the Eleventh Amendment barred a federal agency from proceeding on matter in which an individual filed a complaint against a state. *See South Carolina State Ports Authority v. Federal Maritime Comm'n*, 243 F.3d 165 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 392 (2001). That case, however, involves the Federal Maritime Commission, whose proceedings are significantly different from those of the Commission. The Eleventh Amendment bars suit in such circumstances only if the federal agency proceeding is adjudicative or quasi-adjudicative, where a petitioner seeks reparations from a respondent and the agency is not empowered to exercise "political responsibility" in deciding whether to commence the action. *Id.* at 176. Unlike the Federal Maritime Commission, which *must* act on all complaints, the Federal Election Commission has discretion over whether to open a formal investigation after a complaint is filed. Moreover, under the Supremacy Clause of the United States Constitution (Art. VI), the Act takes precedence over Texas law. *Cf. Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (holding that the Act preempts Minnesota's campaign finance act).

used to influence the presidential election or whether the security detail constituted a service that was rendered to Bush's campaign committees.

The Commission examined the issue of whether a security detail would constitute a contribution in Advisory Opinion 1998-16. That opinion involved Amway, which required executives to be accompanied by a security officer during all travel away from the office. The president of Amway was the chair of an unaffiliated political committee. The committee inquired as to whether the Act permitted Amway's security officers to accompany the president when he was engaging in political activity. The Commission concluded that no violation of the Act would occur, relying on two primary factors. First, the security officers always traveled with Amway's president, regardless of whether the travel involved Amway business. Second, the detail did not enhance the committee's political activity or administration.

Although the Commission noted that the president of Amway was not a candidate for federal office, the same analysis can be applied to the current matter. The Texas security detail, like the Amway security officers, travel with the governor of Texas no matter where he goes. Additionally, there is no evidence that the Texas officers engaged in any campaign activity, just as there was no evidence that the Amway security officers performed political activities. Thus, Texas does not appear to have made a contribution to Bush simply by providing him with a security detail.

Although the use of a security detail by a candidate is not directly addressed in the contribution regulations, there are other provisions that relate to security personnel. For example, when a candidate is authorized by law or required by national security to be accompanied by staff, the costs associated with the staff may be deducted from otherwise

allocable travel expenditures. *See* 11 C.F.R. § 106.3(e).[7] This regulation was cited in Advisory Opinion 1984-48, in which the Commission stated that North Carolina governor and Senate candidate Jim Hunt would not need to reimburse the state for travel expenses of state security personnel who accompanied him on campaign trips.[8]

Overall, this Office believes that the regulations, advisory opinions, and past enforcement matters evidence an interpretation of law that security personnel provided by a state government should not be treated as a contribution to a candidate's committee. In this matter, as in others, the Texas security detail traveled with the governor no matter where he went and would have protected him regardless of whether he was a candidate for federal office. Although the security detail may have interacted with Bush's campaign staff, there is no evidence that the detail performed any campaign activities. Accordingly, the security detail does not appear to be a contribution because (1) it was not used to influence the federal election, and (2) it was a service rendered solely to the governor of Texas, not to Bush's campaign committees.

Therefore, based on all the reasons stated, this Office recommends that the Commission find no reason to believe that the State of Texas violated 2 U.S.C. § 441a(a)(1)(A). This Office further recommends that the Commission find no reason to believe that George W. Bush, Bush for President, Inc., Bush-Cheney 2000, Inc. and David Herndon, as treasurer, violated 2 U.S.C. § 441a(f).

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[7] Although section 106.3(e) requires candidates to allocate travel expenses on government conveyances between campaign-related and non-campaign-related events, there is no similar regulation that government security expenses be allocated. One reason for this distinction may be that a candidate would have to make other travel arrangements if government aircraft were not available, but a candidate could still attend a campaign event without a security detail.

[8] The Commission's public financing regulations also give special treatment to security personnel expenses. For example, travel expenses for Secret Service personnel are not subject to the otherwise strict ceiling on expenditures by publicly financed candidates. 11 C.F.R. § 9004.6(a)(1).

Consistent with the Commission's treatment of materials to release to the public in MUR 5119 pending the resolution of the appeal in *American Fed'n of Labor and Congress of Indus. Orgs. v. Federal Election Comm'n*, 177 F. Supp.2d 48 (D.D.C. 2001), *appeal docketed*, No. 02-5069 (D.C. Cir. Feb. 28, 2002), this Office intends to provide the complainant, the respondents, and the public with copies of only the certification of the Commission's vote and this General Counsel's Report.

III. RECOMMENDATIONS

1. Find no reason to believe that the State of Texas violated 2 U.S.C. § 441a(a)(1)(A) in connection with the allegations in MUR 5135;
2. Find no reason to believe that George W. Bush violated 2 U.S.C. § 441a(f) in connection with the allegations in MUR 5135;
3. Find no reason to believe that Bush for President, Inc. and David Herndon, as treasurer violated 2 U.S.C. § 441a(f) in connection with the allegations in MUR 5135;
4. Find no reason to believe that Bush-Cheney 2000, Inc. and David Herndon, as treasurer, violated 2 U.S.C. § 441a(f) in connection with the allegations in MUR 5135;
5. Approve the appropriate letters; and
6. Close the file.

Lawrence H. Norton
General Counsel

3/28/02
Date

BY: Rhonda J. Vosdingh
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Associate General Counsel